CASES, PROBLEMS, AND MATERIALS

FOR USE WITH

THE LAW OF HIGHER EDUCATION: ESSENTIALS FOR LEGAL AND ADMINISTRATIVE PRACTICE

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2024

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by

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Professor Kaplin received the American Council on Education's Borden Award, in recognition of the First Edition of *The Law of Higher Education;* and the Association for Student Judicial Affairs' D. Parker Young Award, in recognition of research contributions; and he has been honored twice by the National Association of College and University Attorneys, being named a Fellow of the Association (1990) and being presented the Life Member Award in 2018. He has also been honored through the establishment, by the Center for Excellence in Higher Education Law and Policy at Stetson University, of the *William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship,* a national award presented annually to a leading scholar in the field.

In addition to the various editions and updates of *The Law of Higher Education,* Professor Kaplin's books include *The Law of Higher Education Fourth Edition: Student Version* (with Barbara Lee) (Jossey-Bass, Inc., 2007); *Cases, Problems, and Materials for Use With The Law of Higher Education* (with Barbara Lee) (NACUA, 2006); and *A Legal Guide for Student Affairs Professionals, 2d ed.* (with Barbara Lee) (Jossey-Bass, Inc., 2009). Among his other books are *State, School, and Family: Cases and Materials on Law and Education* (with co-authors) (Matthew Bender, 2nd ed., 1979) and *Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004).

Bill Kaplin received his B.A. degree in political science from the University of Rochester and his J.D. degree *with distinction* from Cornell University, where he was editor-in-chief of the *Cornell Law Review.* He then worked with a Washington, D.C., law firm, served as a judicial clerk at the U.S. Court of Appeals for the District of Columbia Circuit, and was an attorney in the education division of the U.S. Department of Health, Education and Welfare, before joining the Catholic University law faculty.

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In addition to coauthoring the Third, Fourth, Fifth, and Sixth Editions of *The Law of Higher Education* and *The Law of Higher Education, Student Version*, supplements and updates to the main volume, as well as *A Legal Guide for Student Affairs Professionals* (1997), Professor Lee also coauthored *Academics in Court* (1987, with George LaNoue), as well as numerous articles, chapters, and monographs on legal aspects of academic employment. She serves as an expert witness in tenure, discharge, and discrimination cases, and is a frequent lecturer and trainer for academic and corporate audiences.

Barbara Lee received her B.A. degree, *summa cum laude* in English and French from the University of Vermont. She received an M.A. degree in English and a Ph.D. in higher education administration from The Ohio State University. She earned a J.D., *cum laude* from the Georgetown University Law Center. Prior to joining Rutgers University in 1982, she held professional positions with the U.S. Department of Education and the Carnegie Foundation for the Advancement of Teaching.

Neal H. Hutchens is Professor of Educational Policy Studies and Evaluation at the University of Kentucky. Prior to his current appointment, he served as a faculty member at the University of Mississippi and Pennsylvania State University.

Hutchens was the 2015 recipient of the William A. Kaplin Award from the Center for Excellence in Higher Education Law and Policy at Stetson University College of Law. He serves on the Litigation Committee for the American Association of University Professors. He is also a past member of the Board of Directors for the Education Law Association. Hutchens' scholarship has appeared in publications that include the *University of Pennsylvania Journal of Constitutional Law*, *Journal of College and University Law*, *Counselor Education and Supervision*, *Kentucky Law Journal*, *West's Education Law Reporter*, *Journal of Law and Education*, and *Journal of Student Affairs Research and Practice*. He is former member of the editorial board for *The Review of Higher Education* and a current board member for *Education Law & Policy Review* and a current member of the authors' committee for *West's Education Law Reporter*. He is co-author, along with Brandi Hephner LaBanc, Frank J. Fernandez, and Kerry Brian Melear, of *The Contested Campus: Aligning Professional Values, Social Justice and Free Speech*, which was published in 2020 by NASPA: Student Affairs Administrators in Higher Education.

Hutchens earned a Ph.D. in education policy with a specialization in higher education from the University of Maryland. He has a J.D. from the University of Alabama School of Law, where he graduated summa cum laude and was a member of the Order of the Coif and of the *Alabama Law Review*.

Jacob H. Rooksby is Dean and Professor of Law at Gonzaga University School of Law in Spokane, Washington, where he also holds appointment as a Professor of Education. In addition to his administrative role, Dean Rooksby has taught courses in torts, intellectual property (IP) subjects, law and higher education, and social media and the law. He formerly practiced law

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Dean Rooksby's primary scholarship focus concerns the impact of IP law and policy on higher education. His book on IP law and policy issues in higher education, *The Branding of the American Mind*, was published in 2016 by Johns Hopkins University Press.

Dean Rooksby holds J.D., M.Ed. (social foundations of education), and Ph.D. (higher education) degrees from the University of Virginia. He earned his undergraduate degree, summa cum laude, in Hispanic studies and government from the College of William & Mary, where he was inducted into Phi Beta Kappa.

TABLE OF CONTENTS

H. CHAPTER VIII: STUDENT ACADEMIC ISSUES

I. CHAPTER IX: STUDENT DISCIPLINARY ISSUES

J. CHAPTER X: RIGHTS AND RESPONSIBILITIES OF STUDENT ORGANIZATIONS AND THEIR MEMBERS

K. CHAPTER XI: THE COLLEGE AND GOVERNMENT

L. CHAPTER XII: THE COLLEGE AND EXTERNAL PRIVATE ENTITIES

PART II

LARGE-SCALE PROBLEM-SOLVING EXERCISES

APPENDICES

CASES, PROBLEMS, AND MATERIALS

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Preface

A. The Scope and Purpose of these Materials

This volume, *Cases, Problems, and Materials* ("*CPM*"), complements William Kaplin's, Barbara Lee's, Neal Hutchens', and Jacob Rookby's text, *The Law of Higher Education Essentials for Legal and Administrative Practice* (Jossey-Bass, Inc., Publishers, 2024) *("text"*). (Note: throughout this volume of materials, we often use the shorthand reference, text, to refer to *The Law of Higher Education: Essentials for Legal and Administrative Practice*.) Designed for instructional use by both instructors and students, *CPM*'s purpose is to facilitate and enrich the teaching and learning of education law and educational administration in law schools, graduate schools of education, and professional workshops for both attorneys and administrators.

Earlier versions of these materials, published by NACUA in 1995, 2001, 2007, 2013, and 2020 were designed for use with previous editions of the authors' treatise, *The Law of Higher Education* and its *Student Version.* This 2024 edition of *CPM-SV* includes various new cases with notes and questions, various new problems with answer guidelines, and one new problem-solving exercise with review guidelines, as well as updates and revisions of the materials retained from the 2020 edition.

B. Organization of these Materials

This version of *Cases, Problems, and Materials* is divided into two Parts. Part I contains three types of materials: edited judicial opinions[1] illustrating selected facets of the law's development; notes and questions to enhance understanding of the cases and their broader law and policy implications; and narrowly focused practice problems (with answer guidelines) that explore the law's concrete applications to colleges and universities. This Part is divided into 12 sections corresponding to the 12 chapters in the text. The particular section(s) of the test that relates to each case and problem in Part I is indicated on the top of the first page of the case or problem. Particular section or page references to the text frequently are included in the notes

[1] Small deletions of text from these opinions are indicated by ellipses; large deletions are indicated by asterisks. Most internal citations have been deleted. Deletions of footnotes are usually made without indication, but can be detected by noting missing footnote numbers. (The court's original footnote numbering is retained, so when a footnote number is missing, it means that the authors have deleted that footnote.)

after the cases and in the answer guidelines for the problems. More general references for further study are included only occasionally with these cases and problems, since such references already appear in the text in the discussions, the footnotes, and the Bibliography at the end of the book.

Part II of *CPM-SV* is a series of "large-scale" problem-solving exercises whose issues are not confined to a single section or chapter of the text. The various sections that are most directly related to each problem exercise are identified in the answer guidelines in Appendix B (see below). In a formal course, these problem-solving exercises may be used periodically to integrate knowledge or to practice professional roles in problem-solving; or they may be used for end-of-course review and synthesis, for independent study, or as the basis for research and writing assignments or examinations. In a workshop, these problem-solving exercises (along with the smaller problems in Part I) may become the central focus of workshop activity. Preceding the first of the large-scale problem-solving exercises is a proposed set of directions for working through the problems and a proposed set of basic questions for problem review. Guidelines for working through each problem-solving exercise are contained in Appendix B at the end of *CPM-SV*. (Instructors may wish to defer student access to particular sets of these guidelines until students have completed the pertinent problem-solving exercise.)

C. How to Use These Materials

Cases, Problems, and Materials, used in conjunction with the text, combines the best features of a casebook, a problems and exercises manual, and a narrative explication and synthesis of higher education law.

There are two basic ways in which instructors may use *CPM* in conjunction with the text:

(1) The instructor may use the text as the primary resource and *CPM* as a secondary resource. The text would then be the main source of assigned readings and the main support for class (or workshop) presentations and discussions, while selected materials from *CPM* would be used for illustrating particular points of presentations and discussions, for problem solving practice[2] and writing assignments, and for independent study. *CPM* is published in electronic format to

[2] For more information on the pedagogical values of problem-solving exercises, see, *e.g.*, Kurtz, Wylie, and Gold, "Problem-Based Learning: An Alternative Approach To Legal Education," 13 *Dalhousie L.J.* 797 (1990); Nathanson, "The Role of Problem Solving in Legal Education," 39 *J. of Legal Educ.* 167 (1989); and Moskovitz, "Beyond the Case Method: It's Time to Teach with Problems," 42 *J. of Legal Educ.* 241 (1992); Cockrell, Caplow, & Donaldson, "A Context for Learning: Collaborative Groups in the Problem-Based Learning Environment," 23 *Review of Higher Education* 347 (Spring 2000). These articles draw upon the psychology of learning and would be useful guides whether the setting is a law school, a graduate school of education, or a professional workshop.

facilitate this type of selective use and to allow the instructor to integrate other teaching materials with those in *CPM*.[3]

(2) The instructor may use *CPM* as the primary resource and the text as a parallel or secondary resource. *CPM* would then be a regular source of assigned readings and the main support for class discussions, case analysis, simulations, or other problem-solving exercises.[4] The text would be a source for assigned background readings, for independent study of particular topics, for assistance with or review of problems and questions in *CPM*, and for general review and synthesis. In addition, either the text or the *LHE* 6th treatise (2019) (see above) could be a basic resource for students doing research papers, memos, or other projects.

Instructors could, of course, also devise variants of these two basic approaches to suit their particular pedagogical styles and goals, or – having adopted the text for a course (or workshop) – may simply use *CPM* as a personal resource for planning purposes or a resource for exam questions.

In any course or workshop using the 2024 text as a required text, the instructor may reproduce and distribute this version of *CPM*, or selected portions of it, to participants in the course or workshop. No other reproduction or distribution is permitted.

Whenever administrators, educators, policy makers, attorneys, or other active practitioners use *CPM*, an important precaution is in order. These materials are not a substitute for the advice of legal counsel, nor a substitute for further research into the particular legal authorities and factual circumstances that pertain to any legal problem that such practitioners may face in their professional roles. Nor is *CPM* necessarily the latest word on the law, since the law moves especially fast in its applications to postsecondary education. Instructors therefore may wish to find ways to keep abreast of ongoing developments concerning the legal sources and issues in *CPM*. Various aids that are available for such a purpose are described on pp. xxv-xxvi of the text.

D. Use of these Materials by Persons without Legal Training

Cases, Problems, and Materials is designed for use not only by law students and lawyers, but also by education students, educators, and others who may not have prior training or background in law. The General Introduction to the text is directed to both groups. (Nonlawyers should pay particular attention to the suggestions and cited resources in section F of this General

[3] The electronic version of *Cases, Problems, and Materials for Use with The Law of Higher Education: Essentials for Legal and Administrative Practice,* is available free-of-charge from the National Association of College and University Attorneys (https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education); for information on how to download these materials, please see the website.

[4] See note 2 above.

Introduction.)[5] The cases in Part I of *CPM* are edited, and the notes and questions are crafted, to accommodate the needs and perspectives of both groups. The problems also are designed so that they may be addressed from the perspective of either group – or from the perspectives of both, allowing for comparison and accommodation of viewpoints as well as collaborative problem-solving experiences.

In courses or workshops for education students and educators, and in courses or workshops that mix education students or educators together with law students or lawyers, instructors and workshop leaders will want to differentiate the educator's and administrator's roles from the lawyer's role. In this respect, educators and administrators need not learn to know the law like lawyers know the law, or to analyze problems like lawyers do, or to perform the functions that lawyers perform. In real-world settings, there are (or should be) lawyers available to perform these functions. Educators and administrators (and public policy-makers as well) have different roles to play – roles in which it is more critical to know about law than to know the law; more critical to know how to analyze problems from their own discipline's perspective, against the backdrop of law, than to analyze problems from the lawyer's perspective; and more critical to know how to work with lawyers in performing their own functions, than to perform the lawyers' functions for them.

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[5] Earlier versions of this General Introduction appeared in earlier versions of *CPM*, including the 2006 *CPM* for the two-volume treatise. The General Introduction does not appear in this volume of *CPM*, however, since the authors have revised it for inclusion in the text (pp. xxxiii-xxxl.

Acknowledgments

This *Cases, Problems, and Materials* ("*CPM-SV*") would not have been possible without the encouragement and assistance of the National Association of College and University Attorneys (NACUA). In particular, we are grateful to Kathleen Curry Santora, Former CEO; Karl Brevitz, former director of legal resources; and Melinda Grier, past president of NACUA, for their agreement to publish earlier versions of *CPM*, as well as the periodic supplement to the fourth edition of *The Law of Higher Education (LHE* 4th), and for their sponsorship of a website for *CPM* and the updates and supplement to *LHE* 4th; and to Linda Henderson, NACUA's former Manager of Publications, for skillfully editing this and previous editions of *CPM*, as well as *The Law of Higher Education* supplements.

Jossey-Bass, Inc., publisher of the text, and of *LHE* 6th and its previous editions, as well as the *Student Versions*, provided partial financial support for the publication of the first edition of *CPM* in 1995. Similarly, the Variable Annuity Life Insurance Company (VALIC) contributed significant support toward the costs of producing the first edition of *CPM*, and NACUA put forth considerable effort in printing and disseminating the first edition of *CPM* and a 2001 revision.

Jim Brooks; Allen Kropp; Kathryn Bender, former General Counsel at the College of Charleston; Ann Franke, President of WiseResults; Kathy Hollingsworth of Duke University; and Steve Olswang, former Provost at the City University of Seattle, each provided a draft of one or two of the problems in *CPM*; and College Administration Publications, Inc., and Gary Pavela, author of *The Pavela Report*, gave their permission to include two case statements from a volume authored by Gary Pavela. Acknowledgments are included on the pages where these contributions appear.

At Catholic University Law School, Jean Connelly skillfully word-processed materials for the 2007 edition of *CPM*. At Stetson University College of Law, Sally Waters provided bibliographic services, and the Faculty Support Services staff prepared additions to the 2007 version of *CPM*. Barbara Kaplin provided back-up word-processing services for the 2007 edition.

The authors also acknowledge their families, who have remained patient and supportive, even though the various editions of *The Law of Higher Education*, its supplements, and the *CPM* seemed to run together and continue on endlessly; and the many colleagues and users who have encouraged our work on the various versions of *The Law of Higher Education* and of *Cases, Problems, and Materials*.

PART I

CASES, NOTES, QUESTIONS, PROBLEMS

A. CHAPTER I: OVERVIEW OF POSTSECONDARY EDUCATION LAW

SEC. 1.4.3. Internal Sources of Law

Howard University v. Best
547 A.2d 144 (D.C. Cir. 1988)

OPINION BY: ROGERS

This is the second appeal arising out of the employment contract of appellee Dr. Marie L. Best with appellant Howard University. In our prior opinion, we remanded the case to the Superior Court for retrial of Dr. Best's claims of indefinite tenure, sex discrimination, and intentional infliction of emotional distress. We affirmed the trial court's directed verdict in favor of Dr. Best, holding that the University had breached its contract with her by failing to provide timely notice of non-renewal, but we remanded for findings on the proper remedy for late notice. We also remanded the case for trial on Dr. Best's claim of indefinite tenure based on the Faculty Handbook provision for indefinite tenure upon reappointment after a "previous appointment," the trial court having dismissed this tenure claim without prejudice. *Howard University v. Best*, 484 A.2d 958, 990 (D.C. 1984) (*Best I*). Following a retrial, the jury found in favor of Dr. Best on her claim of indefinite tenure based on a "previous appointment," and, alternatively, found that she was entitled to reappointment for three years without indefinite tenure as a result of the University's failure to give her the required one-year notice of non-renewal of her previous three-year appointment. The jury awarded her damages of one million dollars on the indefinite tenure claim and $155,000 on its alternative finding of a three-year reappointment without indefinite tenure. A judgment was entered for Dr. Best awarding her one million dollars plus interest and costs.

On appeal the University contends principally that, as a matter of law, Dr. Best failed to present sufficient evidence of the University's custom and practice regarding the granting of indefinite tenure by reappointment after a "previous appointment." The University also contends that there was no evidence to support the jury's finding that Dr. Best was entitled to a three year appointment as a result of its late notice breach of her contract; at most, the University maintains, she was entitled to a statement of reasons for her non-renewal and to damages measured by the lateness of the notice, i.e., six months pay.[1]

[1] The University also appeals the judgment on the grounds that (1) Dr. Best's evidence of custom and practice was incompetent and inadmissible, (2) the verdicts were based on improper hearsay, and (3) the University was denied a fair trial because of highly prejudicial evidence presented to the jury. The jury

We hold that Dr. Best failed to present sufficient evidence of the University's custom and practice regarding a "previous appointment" and, therefore, reverse the judgment based on a finding that she was entitled to indefinite tenure as of July 1, 1976. We further hold that there was sufficient evidence from which the jury could find that Dr. Best had a reasonable expectation of a reappointment for three years without indefinite tenure upon receiving late notice of the non-renewal of her three year probationary appointment, and, accordingly, affirm the judgment based on the alternative finding.

I.

A complete recitation of Dr. Best's negotiations and employment with the University, as well as the events giving rise to this lawsuit, appears in *Best I*, supra, 484 A.2d at 965-66. Before considering the University's contentions, we address the threshold issue raised by Dr. Best of whether the University preserved its right to appeal the verdict in her favor based on her "previous appointment" theory of entitlement to indefinite tenure. We also review the holding in *Best I* on what Dr. Best was required to prove with regard to the University's custom and practice. Thereafter, in Parts II and III, we address the University's contentions on appeal.

* * * *

B.

In the trial court, Dr. Best presented two alternative theories in support of her claim that she was entitled to indefinite tenure with the University. Under her first theory, Dr. Best asserted that by the terms of the Howard University Faculty Handbook Section III (C) (3) (c),[2] she received indefinite tenure on July 1, 1976 because she had held a "previous appointment" at the University, and, therefore, upon commencement of her reappointment on July 1, 1976, she

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also found in favor of Dr. Best on her sex discrimination claim and awarded her ten dollars in damages. The University has abandoned its appeal of the judgment based on the verdict for Dr. Best on this ground. Dr. Best voluntarily dismissed her claim of intentional infliction of emotion distress after the trial judge entered a directed verdict for the University.

[2] Section III (C) (3) (c) of the Faculty Handbook provides:

> Associate Professors and Professors shall be appointed with indefinite tenure, except that an Associate Professor without *previous appointment* at the University shall be appointed for a period of three years. If reappointed, he will be given indefinite tenure. In exceptional cases, a new appointee to the rank of Associate Professor or Professor may be appointed with indefinite tenure.

automatically acquired indefinite tenure. She maintained that her ninety-day, part-time, non-teaching appointment from April 1 to June 30, 1976, was a "previous appointment" within the meaning of the Faculty Handbook Section III (C) (3) (c). . . . Dr. Best's second theory was that she achieved indefinite tenure on July 1, 1979 because, contrary to Section III (C) (2)[3] of the Handbook, the University failed to serve notice of her non-renewal one year prior to the expiration of her three-year contract.

Dr. Best argues that *Best I* did not require her to present evidence of custom and practice in support of her first, or "previous appointment," theory. On the contrary, Dr. Best argues that *Best I* resolved the issue of evidentiary sufficiency on this theory in her favor. She reads our opinion as having held that her evidence was sufficient to create an issue of fact for the jury and that therefore the University's claim that the evidence is insufficient is frivolous. We cannot agree.

In *Best I*, we held that the critical issue with respect to Dr. Best's "previous appointment" theory was "the meaning of the words 'previous appointment.'" At the outset of our opinion, we stated that the objective view of contract interpretation adopted in this jurisdiction requires, in the context of University employment contracts, that the custom and practice of the University be taken into account in determining what were the reasonable expectations of persons in the position of the contracting parties. . . . After reviewing the provisions of the Faculty Handbook and summarizing the testimony presented at trial, we held that the trial court had properly ruled that there was a disputed issue of fact concerning the meaning of the two appointments. Thus we stated:

> The disputed issue is the meaning of the words "previous appointment." The employment papers for Dr. Best's July 1, 1976 appointment refer to a "reappointment," and another way to frame the issue is, what was the nature of her first (April 1 to June 30, 1976) appointment? . . .But since there are two reasonable interpretations of the phrase "previous appointment" and resort must be had to extrinsic evidence, the issue should have been presented to the jury.

We observed earlier in the opinion, moreover, that

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[3] Section III (C) (2) of the Faculty Handbook provides in pertinent part:

> Subject to the provisions below, a regular full-time member of the faculty shall be notified in writing on or before June 30, preceding his final (i.e. maximum), probationary year that he will be granted indefinite tenure or that his regular full-time service will be terminated at the completion of that year.

> it is clear, however, that the disputed issue between [Dr. Best and the University] cannot be resolved *without reference to the University's custom and practice for making reappointments and granting indefinite tenure generally* as well as its custom and practice specifically, if any, when a faculty member whose reappointment would result in indefinite tenure receives late notice of non-renewal.

Since the only pertinent issue before us in *Best I* was whether the trial court had erred in dismissing without prejudice the "previous appointment" claim, we did not need to address, nor did we purport to resolve, the issue of the sufficiency of Dr. Best's evidence. The trial court had dismissed her claim based on this theory, after directing a verdict in her favor on her late notice theory, and consequently the trial court did not rule on the University's objections to the relevance, competency, or admissibility of Dr. Best's evidence, and there were no rulings for this court to review. In view of the dismissal of this duplicative theory of indefinite tenure before the case had been submitted to the jury, there was no occasion in *Best I* for either the trial court or this court to consider whether Dr. Best's evidence was legally sufficient to establish the University's custom and practice in construing the Faculty Handbook term "previous appointment." Rather, as the italicized language quoted above makes clear, we held only that the phrase "previous appointment" was susceptible of two reasonable interpretations and that therefore extrinsic evidence was necessary to a proper interpretation of this provision of the Faculty Handbook. Dr. Best was therefore required to present evidence of the University's custom and practice in construing the phrase "previous appointment" in order to prevail on this theory.

Notwithstanding Dr. Best's interpretation of *Best I* in this appeal, the record of the trial following our remand indicates that the parties and the trial court clearly understood that custom and practice evidence was necessary under either of Dr. Best's theories of indefinite tenure. The parties proposed instructions on the relevance of evidence of the University's custom and practice to both of Dr. Best's tenure theories, and the trial court so instructed the jury at several points during the final instructions. Dr. Best did not voice an objection to the court's proposed instructions on custom and practice during the discussion of the trial court's proposed instructions, and she did not express any objection after the court had instructed the jury. Also included in Dr. Best's proposed instructions was an instruction that, with respect to her "previous appointment" theory, where a necessary contract term does not appear in the written employment agreement, it can be supplied by determining the reasonable expectations of the parties based on the surrounding circumstances. The thrust of this instruction was given to the jury. *Best I*, as well as *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) leaves no doubt that "the surrounding circumstances" required proof of "the hiring policies and practices of the University

as embodied in its employment regulations and customs." *Greene v. Howard University* at 1135. Dr. Best's contract documents do not explicitly state the disputed proposition, namely, that Dr. Best had acquired indefinite tenure on July 1, 1976, because her ninety-day prior appointment was a "previous appointment" under the Faculty Handbook. Finally, in closing arguments to the jury the parties specifically disputed whether Dr. Best had shown that the University's custom and practice entitled her to indefinite tenure upon reappointment because of a "previous appointment."

II.

The University contends on appeal that the trial court erred in failing to grant its motion for judgment notwithstanding the verdict because the evidence offered by Dr. Best in support of her "previous appointment" theory was legally insufficient to support the verdict. Specifically, the University maintains that Dr. Best failed to establish that it was the University's custom and practice to grant indefinite tenure upon reappointment to professors whose only previous appointment was a part-time non-teaching appointment lasting less than the standard three-year probationary period. We agree.

The standard for establishing a custom and practice, or custom and usage as it is also called, is well established in this jurisdiction. In order for a custom and practice to be binding on the parties to a transaction, it must be proved that the custom is definite, uniform, and well known, and it must be established by "clear and satisfactory evidence." . . . *United States Shipping Bd. Emergency Fleet Corp. v. Levensaler*, 290 F. 297, 301 (D.C. Cir. 1923) (citations omitted). In *Levensaler* the court relied on *Chicago, M. & St. P. Ry. v. Lindeman*, 143 F. 946, 949 (1906), where the Eighth Circuit Court of Appeals stated that "a binding custom must be certain, definite, uniform, and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care." The reason for such a high standard arises from the fact that:

> [a] custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurements by this standard will be unequal and unjust.

Lindeman, supra, 143 F. at 949. As one court has noted in a case involving a non-tenured professor seeking tenure based on the university's custom, "custom is an area of contract law through which the courts must travel prudently. Only upon a clear showing of custom, nigh universally understood, should a court impose obligations based on custom." *Marwil v. Baker*, 499 F. Supp. 560, 575 (E.D. Mich. 1980).

The jury found that Dr. Best was entitled to indefinite tenure on her "previous appointment" theory. Although the jury was not explicitly instructed on the meaning of the term "custom and practice," but only told that Dr. Best had the burden to prove it by a preponderance of the evidence, the jury apparently believed Dr. Best's assertion that, in view of the evidence that the University did not always require a faculty member to serve a three-year probationary period prior to obtaining indefinite tenure, it was reasonable for her to rely upon Dean Robinson's representations that she would receive indefinite tenure upon her reappointment on July 1, 1976. A review of the evidence before the jury clearly demonstrates, however, that Dr. Best failed to present evidence sufficient to establish the University's custom and practice with regard to granting indefinite tenure to a faculty member who had served only a part-time, non-teaching, non-resident appointment for less than the usual three-year probationary period (and who had not previously had indefinite tenure elsewhere before joining the Howard University faculty). Without such evidence the jury had no basis on which to find that Dr. Best had a reasonable expectation at the time of her negotiations with Dean Robinson that she would receive indefinite tenure on July 1, 1976.

As evidence of the University's custom and practice regarding previous appointments resulting in indefinite tenure upon reappointment, Dr. Best relies heavily on the testimony of Dr. Benjamin Cooke, a former tenured professor at the University and former member of the faculty executive committee. However, Dr. Cooke testified only that he had received tenure upon his reappointment as associate professor after serving as lecturer for a single semester. He testified that the dean had told him he had tenure and that it was the University's policy to grant tenure in this manner. Dr. Cooke also gave testimony concerning other members of the faculty who had received tenure in a manner inconsistent with the Faculty Handbook, but in each instance, according to Dr. Cooke's own testimony, the individual received tenure as a result of late notice of non-renewal or by promotion to full professor. Dr. Cooke further conceded that all tenure decisions had to have the ultimate approval of the president and board of trustees of the University. The individuals whose cases he cited had, in fact, received such approval.

Dr. Best also seeks support for her theory in the testimony of Dr. Arlondo Taylor, acting dean of the University's School of Communications, who testified concerning Professor Lawrence Still. Dr. Taylor stated that Still had received indefinite tenure after serving in a part-time capacity as an adjunct professor at the University. However, Dr. Taylor testified unequivocally that Still's tenure, unlike that of Dr. Best, had been approved by the president and board of trustees of the University.

The testimony of Ralph Arline, an instructor of pharmacy at the University and former member of the appointment, promotion, and tenure committee, and Captain Edward Basdekian, then an assistant professor and assistant to Dean Ira Robinson, is similarly unhelpful to Dr. Best

in proving the existence at the University of a generally accepted custom and practice relative to faculty members in Dr. Best's position. Arline and Basdekian testified that they understood that Dr. Best's second appointment on July 1, 1976 was to be with indefinite tenure, but both stated that the basis for their belief was statements made by Dean Robinson to this effect. Their testimony did not address the University's custom and practice. Dr. Best's reliance on the testimony of Dr. Kenneth Scott, a member of the faculty of the College of Pharmacy for twenty-six years, is puzzling since he testified that it would have been unreasonable for Dr. Best to rely on the dean's oral representations of indefinite tenure and that the approval of both the president and the board of trustees was necessary before indefinite tenure could be awarded. Furthermore, Dr. Scott testified that he knew of no instance in which an initial probationary appointment was shorter than three years.

Thus, in only one instance, involving Dr. Cooke, does it appear that the University granted indefinite tenure to a faculty member upon reappointment whose previous appointment had been for less than a three-year probationary period. A single isolated instance such as this does not rise to the level of proof necessary to constitute a custom and practice. . . . In addition, Dr. Cooke did not claim that his indefinite tenure was the result of a "previous appointment," but rather that it resulted from his promotion to a position with indefinite tenure, after serving in a full-time teaching position, from lecturer to associate professor, the latter rank being one with indefinite tenure. Dr. Best makes no claim she was promoted, nor that her "previous appointment" was either full-time or a teaching position

The custom and practice that Dr. Best had to demonstrate in order to succeed on her previous appointment theory was the University's treatment in 1975-76 of part-time, non-teaching faculty appointments: did such appointments constitute a "previous appointment" under the Faculty Handbook. What Dr. Best showed was that there were a number of ways to obtain indefinite tenure at the University. But since she was relying on the "previous appointment" language in the Faculty Handbook, she had to show that the type of appointment she received from April 1 to June 30, 1976 was, according to the custom and practice of the University, a "previous appointment" that would entitle her upon reappointment to indefinite tenure.[7] This she did not show in the absence of some repetitive conduct by the University in treating a part-time, temporary, non-teaching, non-resident appointment as a "previous appointment" under the Faculty Handbook Section III (C) (2). Indeed, the evidence showed that Dr. Best herself was not

[7] It was the University's position that Dr. Best received only two simultaneous appointments and as of July 11, 1976, did not have a "previous appointment" under Section III (C) (2). Vice President Alexis testified that both of her appointments were executed on the same day and thus she was not reappointed to a regular position in the sense that someone in a regular faculty position would be reappointed; she was only given a term appointment.

always of the opinion that she had obtained indefinite tenure by virtue of her reappointment in July, 1976; her letters to Dean Hill and Vice President Alexis in 1979 state that she then was in the final year of her three-year probationary appointment. . . . This position is obviously inconsistent with her "previous appointment" theory and a clear showing of custom and practice was required in order to demonstrate her reasonable expectation at the time of her negotiations with Dean Robinson. Nor, given her reliance on the Handbook provision for "previous appointment," could reliance on other extrinsic evidence specific to her appointment – such as the correspondence between Dean Robinson and herself, the appointment papers, a press release regarding her appointment as acting dean and a form recommending her appointment as departmental chair[8] – fill the void about what generally occurred at the University with regard to indefinite tenure by reason of a "previous appointment" such as the one Dr. Best held. The examples of faculty members not in her same status (either because they had indefinite tenure before coming to the University and were granted indefinite tenure under "exceptional circumstances"[9] or because they held previous full-time teaching appointments for the usual probationary period) do not show custom and practice relevant to her theory, and failing to meet her burden of proof, the examples cannot be the basis for a finding by the jury in her favor.

As the District of Columbia Circuit pointed out in *Greene*, *supra*, "contracts . . . in and

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[8] Section II of the Faculty Handbook provides that the administrative functions of a dean are distinct from title and status as holders of academic positions. Dr. Best did not offer evidence of the University's custom and practice to appoint as acting dean only persons having indefinite tenure. Indeed, the circumstances under which she was appointed reflect an interim assignment as dean until a permanent dean could be selected; the faculty had presented a vote of no confidence to Vice President Alexis because, inter alia, of Dean Robinson's unilateral actions in abolishing and merging departments and his alleged irregularities in hiring faculty (including Dr. Best). Alexis and Robinson agreed that Robinson was probably moving too fast for the faculty and that it would be best if he stepped down as dean.

Nor is the justification in the form recommending that Dr. Best be appointed departmental chairman on July 1, 1976, evidence that she had indefinite tenure. The justification stated that Dr. Best "whose term as a part-time faculty member expires on June 30, 1979 [sic], has been recommended for reappointment as a full-time professor in the department effective 7/1/76." Vice President Alexis testified that in Dr. Best's case the President of the University had waived, as he had in the past to meet University needs, the requirement that the departmental chairman be tenured. Dr. Best did not present the President's testimony but argued only that Alexis was giving an interpretation of the President's action since nothing in the document signed by the President indicated that he had waived the tenure requirement.

[9] Dr. Best did not argue in the trial court that her contract awarded her indefinite tenure because of "exceptional circumstances" under the Faculty Handbook. See note 2, supra. In such cases, a professor would be granted indefinite tenure without prior service of the normal three-year probationary period during which the University could observe the professor and evaluate teaching and other relevant skills before making a decision on whether to grant indefinite tenure. According to Vice President Alexis, indefinite tenure occurred under "exceptional circumstances" when, in rare circumstances, the University was recruiting someone from another university who already had indefinite tenure and who was notable because of excellence, research and writing, and who was needed to fill a critical void at the University.

among a community of scholars, which is what a university is," "are to be read [] by reference to the norms of conduct and expectations founded upon them" in a particular manner, unlike, to some degree, contracts made in the ordinary course of doing business. 412 F.2d at 1135. The requirement for clear and satisfactory proof of the custom and practice of a University, in determining the reasonable expectations of the parties, reflects public policy concerns that indefinite tenure not occur by default. *Cusumano v. Ratchford*, 507 F.2d 980, 986 (8th Cir. 1974) ("It cannot serve the public welfare or promote the best interests of the University or its professorial staff to have a body of teachers . . . the permanent tenures of whom rest upon administrative neglect or oversight. . . ."), cert. denied, 423 U.S. 829(1975).

III.

The University also contends that Dr. Best failed to present evidence of custom and practice such that any reasonable jury could find that she was entitled to a three-year appointment as a result of the University's breach of her contract by late notice of the non-renewal of her appointment. The University maintains that no such evidence was presented and that under the Faculty Handbook Dr. Best was entitled only to a statement of reasons for her non-renewal. Further, the University maintains that her measure of damages is limited to the six months in which she did not receive the one-year prior notice to which she was entitled under the Handbook.

The special verdict form gave the jury five options in determining the appropriate remedy for breach by reason of late notice of non-renewal. The jury selected the fourth option, a three-year reappointment without indefinite tenure, and awarded Dr. Best $155,000.

As earlier noted, it has long been held in the District of Columbia that custom and practice must be established by "clear and satisfactory evidence." . . . This court has not had occasion to articulate a burden of proof standard for custom and practice, and we need not do so here. The University requested that the jury be instructed that it must defer to the University's decisions regarding reappointment and indefinite tenure if they were not arbitrary or capricious and had a rational basis. It also objected to the instructions before the jury retired, and in its post-trial motion, on the same grounds. The University did not, however, object at any time in the trial court, and does not argue on appeal, that the instructions incorrectly stated Dr. Best's burden of proof to show its custom and practice. Indeed, the University's proposed instructions state that Dr. Best's burden of proof on the issue of custom and practice was only a preponderance of the evidence. We conclude that Dr. Best's evidence was sufficient to satisfy the preponderance standard.

Dr. Best maintains that there was sufficient evidence from which the jury could find that under the circumstances she could reasonably expect to receive another three-year appointment at the University after June 30, 1979. She relies on the testimony of Captain Basdekian that if notice was untimely, a new appointment would result, and on the testimony of Dr. Telang that a person would have a job if notice of non-renewal was untimely. She also relies on the testimony of Dr. Scott that an initial probationary appointment usually is for three years, and the fact that her prior appointment was for three years. Vice President Alexis also testified that probationary faculty receiving late notice of non-renewal have the expectation of reappointment and that the Faculty Handbook suggests such an expectation.

Thus, the evidence was undisputed that Dr. Best had a reasonable expectation of reappointment. None of the witnesses on whom Dr. Best relies testified, however, that the appointment following late notice of non-renewal would necessarily be for the same length as the prior appointment or that it was the custom and practice of the University to reappoint for the same term as the late-notice term. This was, however, a reasonable inference from the evidence. The University maintained that Dr. Best had received only one regular appointment, the ninety-day appointment having been a special accommodation to Dr. Best. See note 7, supra. Vice President Alexis agreed that under the Faculty Handbook a person in Dr. Best's position, in the last year of a regular three-year probationary appointment, had a reasonable expectation of reappointment upon receiving late notice of non-renewal. In describing the University's custom and practice regarding notice of non-renewal to non-tenured faculty serving a term appointment, Dr. Alexis testified that if the faculty member had "a series of two-year appointments," he or she would have been at the University for six years, and that twelve months before the final, seventh, year an individual had to receive notice of whether or not there would be a favorable tenure recommendation. The evidence regarding a seven-year probationary period and the standard three-year probationary period, combined with Dr. Best's appointment papers showing a three-year term appointment, provided the quantum of evidence required for the jury reasonably to find that it was more likely than not that Dr. Best was entitled to a second three-year appointment when she did not receive timely notice of the non-renewal of her term appointment. No testimony was offered that the University's custom and practice upon late notice of non-renewal was either a six-month or one-year reappointment; the verdict form did not give the jury the option of choosing a two-year or four-year reappointment. The trial court submitted a verdict form to the jury that contained the alternative for a three-year appointment that the University had requested in its proposed instructions. The court's instructions to the jury on its options in selecting a remedy under Dr. Best's late notice theory were those requested by the University, and the University did not object to the submission of that alternative to the jury after all the evidence was presented or to the court's instructions.

Accordingly, we reverse the judgment based on the verdict finding that Dr. Best was entitled to indefinite tenure, and we remand the case with instructions to enter a judgment based on the alternative verdict finding that Dr. Best was entitled to a new three-year term appointment and $ 155,000 in damages.

Notes and Questions

1. Note that the jury made alternate findings that the University breached Professor Best's contract and that she had attained tenure by default, or *de facto* tenure. Is her reading of the Faculty Handbook a plausible one, in your judgment?

2. Note that the "penalty" the University must bear for late notification of non-renewal of a contract is another period of employment. Notice deadlines are common in faculty contracts. What policy reason underlies these long notice periods?

3. How could a college or university avoid *de facto* tenure claims such as Professor Best's, assuming that, from time to time, timely notice of non-renewal may not occur?

SECS. 1.4.2.4. and *1.4.3.3. State Common Law and Academic Custom and Usage*

Krotkoff v. Goucher College
585 F.2d 675 (4th Cir. 1978)

OPINION BY**:** BUTZNER

This appeal arises from the termination of Hertha H. Krotkoff's position as a tenured professor at Goucher College. Krotkoff sued Goucher, alleging that it violated the tenure provision of her contract. The college asserts that it eliminated Krotkoff's position and terminated her contract as part of a general retrenchment prompted by severe financial problems. The district court submitted the following issues to the jury, placing the burden of proof on the college in each instance:

(1) Was Goucher entitled to read into its contract of tenure with Krotkoff the condition of financial exigency; (2) Did the Trustees reasonably believe that a financial exigency existed at Goucher; (3) Did Goucher reasonably use uniform standards in selecting Krotkoff for termination; and (4) Did the College fail to make reasonable efforts to find Krotkoff alternate employment at Goucher?

The court instructed the jury that it must find in favor of Goucher on all four issues for the college to prevail; conversely, it instructed that if the jury found in favor of Krotkoff on any one of the four issues, Krotkoff should recover damages. The jury returned a general verdict of $180,000 for Krotkoff, but the district judge, perceiving error, stated that he would grant a new trial.

Subsequently, upon the representations of the parties that no additional evidence could be presented at a new trial, the court entered judgment for the college notwithstanding the verdict. In the alternative, should the judgment be reversed on appeal, the court granted the college's motion for a new trial on the ground that "the jury's verdict was against the overwhelming weight of the evidence." Satisfied that the college has met the stringent requirements for a judgment notwithstanding the verdict, we affirm.

I.

Krotkoff began teaching German at Goucher in 1962 and was granted "indeterminate tenure" in 1967. In June 1975, the college notified Krotkoff that because of financial problems, it would not renew her 1975-76 contract when it expired on June 30, 1976. The college acknowledges that Krotkoff has at all times been a fine teacher and that the termination was not based on her performance or behavior.

Goucher is a private, liberal arts college for women in Towson, Maryland. Beginning in 1968-69, the college operated at a deficit each academic year through 1973-74. The deficit for 1973-74 was $ 333,561, and the total deficit from 1968-69 through 1973-74 was $ 1,590,965. By the end of the 1973-74 year, the college's expendable endowment, which was used to cover these deficits, amounted to less than one-half of the 1973-74 deficit. In 1974-75, as a result of a substantial reduction in expenditures, the college showed a meager surplus of $ 1,482. This was increased to $ 5,051 in 1975-76, but, partially as a result of a revision of the curriculum to attract more students, the deficit in 1976-77 was anticipated to be in excess of $ 100,000. The college's enrollment fell every year from 1969-70 through 1976-77, reducing revenue generated by tuition and fees, a major source of income.

This financial situation convinced the trustees that action was needed to ensure the institution's future. After a review of the finances and curriculum, the board adopted a more aggressive investment policy to seek a higher rate of return on endowment and promoted rental of the auditorium and excess dormitory space. It also froze salaries, cut administrative and clerical staffs, and deferred maintenance.

As a part of its retrenchment, the college did not renew the contracts of 11 untenured and four tenured faculty members, including Krotkoff. These professors were selected largely on the bases of the dean's study of enrollment projections and necessary changes in the curriculum. In addition, the faculty elected a committee to review curricular changes suggested by the administration. Among the administration's proposals were elimination of the classics department and the German section of the modern language department, which were staffed exclusively by tenured professors. The classics department was dropped, but the faculty committee recommended that the college continue a service program in German staffed by one teacher for students majoring in other disciplines who needed the language as a research skill. The administration accepted this recommendation.

The German faculty consisted of Krotkoff, who taught mostly advanced literature courses, and another tenured teacher, Sybille Ehrlich, who taught chiefly introductory language courses. The dean, concurring with the chairman of the department, recommended retention of Ehrlich primarily because she had more experience teaching the elementary language courses

that would be offered in a service program and because she also was qualified to teach French. The president followed this recommendation.

The faculty grievance committee, to which Krotkoff then turned, applied the criteria by which the college faculty were regularly evaluated and recommended her retention. The committee, however, did not suggest that Ehrlich's appointment be terminated, and it did not address the problem of keeping both tenured professors. The president declined to accept the committee's recommendation, and the trustees sustained her decision. The president also rejected a suggestion that both teachers be retained by assigning Krotkoff to teach the German courses, dismissing an assistant dean, and designating Ehrlich as a part-time French teacher and a part-time assistant dean.

Goucher sent Krotkoff a list of all positions available for the next year. Krotkoff insisted that any new position carry her present faculty rank, salary, and tenure. She expressed interest in a position in the economics department, but the school declined to transfer her because the department's chairman estimated that she would need two to four years of training to become qualified.

In accordance with its notice of June 1975, the college terminated her appointment on June 30, 1976.

II.

The primary issue is whether, as a matter of law, Krotkoff's contract permitted termination of her tenure by discontinuing her teaching position because of financial exigency.

The college's 1967 letter to Krotkoff granting her "indeterminate tenure" does not define that term. The college by-laws state:

> No original appointment shall establish "tenure," i. e., the right to continued service unless good cause be shown for termination. Reappointment as Professor or Associate Professor, after three years of service in either rank, or appointment or reappointment to any professorial rank after five years of service as Instructor or in any higher rank, shall establish tenure. The term "service" as used in this section shall mean instructional service in full-time appointments.

The by-laws also specify that the college may terminate a teacher's employment at age 65 or because of serious disability or cause. The parties agree that Krotkoff's appointment was not terminated for any of these reasons. Financial exigency is not mentioned in the by-laws, and the college concedes that it is not considered to be a ground of dismissal for cause.

The national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide. Dr. Todd Furniss, Director of the Office of Academic Affairs of the American Council on Education, testified on behalf of Goucher:

> The (common) understanding was that the person who held tenure would be employed for an indeterminate or indefinite period up to retirement, unless two conditions held. The first condition would be some inadequacy on that person's part, either incompetency or neglect of duties or moral turpitude.
>
> In that instance, the person was guaranteed that he would not be dismissed without the institution's being ready to submit formal charges and the opportunity to answer those charges, if he desired in a hearing, with the burden of proving the charges upon the institution.
>
> Now, that is instance number one.
>
> The second instance under which the tenure contract might be terminated is a group that includes, of course, death, includes disability, includes resignation, obviously, but chiefly includes what has been called financial exigency.

Dr. Furniss based his opinion in part on the *1940 Statement of Principles on Academic Freedom and Tenure*, which was developed by the Association of American Colleges and the American Association of University Professors. This statement was later adopted by a number of professional organizations. With respect to the security afforded by tenure, the statement explains:

> After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.
>
> In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Probably because it was formulated by both administrators and professors, all of the secondary authorities seem to agree that it is the "most widely-accepted academic definition of tenure." Brown, "Tenure Rights in Contractual and Constitutional Context," 6 *Journal of Law and Education* 279, 280 (1977). See also, M. Mix, *Tenure and Termination in Financial Exigency* 4 (1978); Byse, "Academic Freedom, Tenure, and the Law," 73 *Harv.L.Rev.* 304, 305 (1959).

The reported cases support the conclusion that tenure is not generally understood to preclude demonstrably bona fide dismissal for financial reasons. In most of the cases, the courts have interpreted contracts that contained an explicit reference to financial exigency. See, e.g., *Browzin v. Catholic University*, 527 F.2d 843 (1975); *Bellak v. Franconia College*, 386 A.2d 1266 (N.H.1978); *American Association of University Professors v. Bloomfield College*, 322 A.2d 846 (N.J. Super., Ch.Div.1974), 346 A.2d 615 (N.J. Super., App.Div.1975); *Scheuer v. Creighton University*, 260 N.W.2d 595 (Neb. 1977). In others, where the contracts did not mention this term, the courts construed tenure as implicitly granting colleges the right to make bona fide dismissals for financial reasons. See *Johnson v. Board of Regents*, 377 F. Supp. 227, 234-35 (W.D.Wis.1974), aff'd, 510 F.2d 975 (7th Cir. 1975) (table); *Levitt v. Board of Trustees*, 376 F. Supp. 945 (D.Neb.1974); Cf. *Rehor v. Case Western Reserve University*, 331 N.E.2d 416 (Ohio 1975). No case indicates that tenure creates a right to exemption from dismissal for financial reasons. As one commentator has noted: "In whatever way the courts have chosen to view the quality of the right or interest the tenured faculty member holds, there is little doubt that tenure is not enforceable if financial exigency is claimed and supported." M. Mix, *Tenure and Termination in Financial Exigency* 10 (1978).

A concept of tenure that permits dismissal based on financial exigency is consistent with the primary purpose of tenure. Tenure's "real concern is with arbitrary or retaliatory dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting. . . . It is designed to foster our society's interest in the unfettered progress of research and learning by protecting the profession's freedom of inquiry and instruction." *Browzin v. Catholic University*, 527 F.2d 843, 846 (D.C. Cir. 1975). See also *Rehor v. Case Western Reserve University*, 331 N.E.2d 416, 421 (Ohio 1975); "Note, Dismissal of Tenured Faculty for Reasons of Financial Exigency," 51 *Ind.L.J.* 417 n.2 (1976). Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teachers. A professor whose appointment is terminated because of financial exigency will not be replaced by another

with more conventional views or better connections. Hence, bona fide dismissals based on financial exigency do not threaten the values protected by tenure.

Parties to a contract may, of course, define tenure differently in their agreement. But there is no significant evidence that Krotkoff and Goucher contracted with reference to a peculiar understanding of tenure. The Goucher by-laws and other relevant documents do not define the rights and obligations of tenured teachers during financial exigency. The only evidence of a peculiar understanding of tenure at Goucher was the testimony of Krotkoff and three other tenured professors, whose appointments also had been terminated, that they understood tenure at Goucher to preclude dismissal for financial reasons. Four other tenured faculty members testified to a contrary understanding. None of these witnesses relied on any policy established by the trustees regarding the effect of financial exigency on tenure; the conclusions they expressed were largely subjective. The college introduced evidence that during the depression of the 1930s it had been forced to terminate the appointments of tenured professors because of its precarious financial condition. The former president of the college who signed Krotkoff's letter conferring "indeterminate tenure" testified that he used this phrase in light of the general understanding in the academic world that tenure would terminate if the position to which the professor had been appointed were eliminated either for lack of funds or lack of students.

In sum, there was no evidence of a general understanding in the Goucher community that the tenured faculty had greater protection from dismissal for financial reasons than the faculty at other colleges. The Krotkoff-Goucher contract must be interpreted consistently with the understanding of the national academic community about tenure and financial exigency. Although Judge McGowan addressed a different factual situation in *Greene v. Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969), his comments are appropriate here:

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.

By defining Krotkoff's relationship with the college in terms of tenure, the contract did not exempt her from demonstrably bona fide dismissal if the college confronted financial exigency. See "Note, Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions," 62 *Iowa L.Rev*. 481, 508-09 (1976).

III.

Having determined that Krotkoff's contract permitted termination of her employment because of financial exigency, we consider whether the district court erred in holding as a matter of law that the college did not breach this contract.

Krotkoff urges that the jury was entitled to assess the reasonableness of the trustees' belief that the college faced financial exigency. In support of this position, she emphasizes that the college had a large endowment and valuable land. She is entitled, she claims, to have a jury determine whether the trustees acted unreasonably in failing to secure judicial permission to invade these assets and whether the trustees should have sold land which they were holding for a better price.

Courts have properly emphasized that dismissals of tenured professors for financial reasons must be demonstrably bona fide. Otherwise, college administrators could use financial exigency to subvert academic freedom. The leading case on this aspect of tenure is *American Association of College Professors v. Bloomfield Colleg*e, 322 A.2d 846 (N.J. Super. Ch.Div.1974), aff'd, 346 A.2d 615 (N.J. Super., App.Div.1975). There, the court concluded that Bloomfield College used its genuine financial difficulties as a subterfuge to achieve its goal of abolishing tenure at the institution. Since Bloomfield acted in bad faith, the court ordered it to reinstate the tenured teachers that it had dismissed. *Bloomfield*, however, establishes that the trustees' decision to sell or retain a parcel of land was not a proper subject for judicial review:

> Whether . . . (the sale of land) to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation. Hence the emphasis upon the alternative use of this capital asset by the trial judge in reaching his conclusion that a financial exigency did not exist was unwarranted and should not have been the basis of decision. 346 A.2d at 617.

The same principle, we believe, should apply to the dissipation of an endowment. The reasonableness of the trustees' decision concerning the disposition of capital did not raise an issue for the jury. Stated otherwise, the existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets. See "Note, The Dismissal of Tenured Faculty for Reasons of Financial Exigency," 51 *Ind.L.J.* 417, 420-23 (1976); Cf. *Scheuer v. Creighton University*, 260 N.W.2d 595, 599-601 (Neb. 1977).

Krotkoff has acknowledged that the trustees and other college officials did not act in bad faith. The evidence overwhelmingly demonstrates that the college was confronted by pressing financial need. As a result of the large annual deficits aggregating more than $ 1,500,000 over an extended period and the steady decline in enrollment, the college's financial position was precarious. Action undoubtedly was required to secure the institution's future. Because of Krotkoff's disavowal of bad faith on the part of the college and because of the unrefuted evidence concerning the college's finances and enrollment, we believe that this aspect of the case raised no question for the jury. These facts and all the inferences that properly can be drawn from them conclusively establish that the trustees reasonably believed that the college was faced with financial exigency. We therefore hold that with respect to this issue, the district court correctly entered judgment for the college notwithstanding the verdict.

IV.

We turn next to Krotkoff's claim that the court properly submitted to the jury whether Goucher used reasonable standards in deciding not to retain Krotkoff and whether it made reasonable efforts to find her another position at the college.

The college asserts that neither of these issues is a proper subject for judicial review. It relies on a number of cases in which courts have evinced reluctance to oversee the decisions of college administrators or to intrude on the prerogatives of trustees.[6] These cases, however, generally have involved the application of the fourteenth amendment to state institutions or the interpretation of statutes prohibiting racial or sexual discrimination. Since Goucher is a private college and Krotkoff does not allege the type of unlawful conduct proscribed by civil rights acts, the cases on which the college relies to forestall judicial inquiry are not dispositive.

Krotkoff's claims must be resolved by reference to her contract. This involves ascertaining, first, what contractual rights she had, and second, whether the college breached them. Viewing the evidence in the light most favorable to Krotkoff, as we must for purposes of this appeal, we believe that the district court correctly held that she was contractually entitled to insist: (a) that the college use reasonable standards in selecting which faculty appointments to terminate, and (b) that it take reasonable measures to afford her alternative employment.

Neither the letter granting Krotkoff tenure nor the documents setting forth Goucher's policy concerning tenure mentions the procedural rights to which a faculty member is entitled when the college proposes to terminate her appointment for financial reasons. Therefore, we

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[6] See, e. g., *Board of Curators v. Horowitz*, 435 U.S. 78, (1978); *Shaw v. Board of Trustees*, 549 F.2d 929, 932 (4th Cir. 1976); *Faro v. New York University*, 502 F.2d 1229, 1231 (2d Cir. 1974); *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D.Vt.1976).

must examine again the academic community's understanding concerning tenure to determine the nature of this unique contractual relationship.

As we mentioned in Part II, the *1940 Statement on Academic Freedom and Tenure* sanctions termination of faculty appointments because of financial exigency. But it also stipulates: "Termination of a continuous appointment because of financial exigency should be demonstrably bona fide." The evidence discloses that the academic community commonly understands that inherent in the concept of a "demonstrably bona fide" termination is the requirement that the college use fair and reasonable standards to determine which tenured faculty members will not be reappointed. The college's obligation to deal fairly with its faculty when selecting those whose appointments will be terminated is an attribute of tenure. Consequently, it is an implicit element of the contract of appointment.

Nevertheless, the evidence questioning the reasonableness of Goucher's procedures was insufficient to submit this issue to the jury. The necessity for revising Goucher's curriculum was undisputed. A faculty committee accepted elimination of the classics department and reduction of the German section of the modern language department as reasonable responses to this need. The only substantial controversy was whether the college should have retained Krotkoff or Ehrlich, both tenured professors. Nothing in Krotkoff's contract gave her precedence, and the college did not breach it by retaining Ehrlich instead of Krotkoff. Nor was the college under any contractual obligation to retain Krotkoff by demoting Ehrlich to part-time teaching and part-time administrative work. Therefore, the district court did not err in ultimately ruling for the college on this issue.

Whether the college was contractually obliged to make reasonable efforts to find Krotkoff alternate employment at Goucher was the subject of conflicting evidence. It is reasonable, however, to infer from the evidence that a demonstrably bona fide termination includes this requirement. See, "Note, Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions," 62 *Iowa L.Rev*. 481, 504-05 (1976); Cf. *Browzin v. Catholic University*, 527 F.2d 843, 847 (D.C. Cir. 1975). On the other hand, in the absence of an explicit contractual undertaking, the evidence discloses that tenure does not entitle a professor to training for appointment in another discipline. Cf. *Browzin v. Catholic University*, 527 F.2d 843, 850-51 (1975).

The evidence conclusively establishes that the college did not breach any contractual obligation concerning alternative employment. The constraints of tenure, rank, and pay that Krotkoff placed on alternative employment severely restricted the college's efforts to accommodate her. Apart from Ehrlich's position, the only vacancy in which she expressed interest was in the economics department. No evidence suggested that the head of that department or the president acted unreasonably in assessing the time and expense of retraining

Krotkoff for this position or in deciding that her transfer would not be feasible. Again, we conclude that the district judge did not err in holding that the college was entitled to judgment on these issues.

The judgment is affirmed.

Notes and Questions

1. Note the use of an expert witness to discuss the general understanding of the protections – and limitations – of tenure. How important do you think this was for the college's litigation strategy?

2. AAUP policies and statements acknowledge that a tenured faculty member may be dismissed for a "bona fide" financial exigency. Would it have made a difference to the outcome of this case if the college had not adopted the AAUP's *1940 Statement on Academic Freedom and Tenure*?

3. If you were advising a college that was developing or revising a faculty handbook, would you recommend the inclusion of language stating that a tenured position may be terminated on the grounds of financial exigency?

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SEC. 1.5.2. The State Action Doctrine

Krynicky v. University of Pittsburgh
742 F.2d 94 (3d Cir. 1984)

OPINION BY: BECKER, Circuit Judge.

These consolidated appeals present the question whether the recent Supreme Court decisions in *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982); and *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), in effect overruled this court's decision in *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc), which held that the University of Pittsburgh (and by implication Temple University) are "state actors" for purposes of 42 U.S.C. § 1983.

The district courts reached differing results. In *Krynicky* the district court concluded that the *Lugar* trilogy had undermined *Braden*, and held that, because the Commonwealth of Pennsylvania had not participated with the University of Pittsburgh in making the faculty tenure decision challenged by *Krynicky*, the University's decision was not subject to the constraints of the fourteenth amendment. In *Schier* the district court reached the opposite result, holding that *Braden* was still controlling, and that the Commonwealth had so far insinuated itself into the operation of Temple University that the institution was subject to the mandates of the fourteenth amendment in connection with *Schier*'s claim of retaliatory discharge.

Because we believe that *Braden* has not been overruled by the *Lugar* trilogy, we reverse in *Krynicky* and affirm *Schier*.

I. FACTUAL AND PROCEDURAL HISTORY

A. *Krynicky*

Harry Krynicky, an Assistant Professor of English at the University of Pittsburgh, brought suit against the University and various administrative officials under 42 U.S.C. § 1983, alleging that he had a "property" and "liberty" interest in his employment contract within the meaning of the fourteenth amendment, and that the University infringed those interests when it failed to notify him in a timely fashion of its decision to deny him tenure. In addition, Krynicky alleged that the tenure process generally denied him due process, and that the decision to deny him tenure was made in retaliation for his outspoken criticism of the University administration

and his unorthodox teaching methods. The linchpin of Krynicky's claim for purposes of this appeal is that the University's actions were taken "under color of state law" within the meaning of § 1983 because of the relationship between the Commonwealth of Pennsylvania and the University.

The University and the individual defendants moved for summary judgment, but did not contest the existence of state action. The district court granted the motions in part. 560 F. Supp. 803.[1] Defendants then amended their answer to assert that there was no state action as required by § 1983, and again moved for summary judgment. The district court thereupon granted the motion as to the remaining claims, stating that the reasoning of *Rendell-Baker* and *Blum* essentially superseded the Third Circuit's analysis in *Braden*, and that, therefore, *Braden* did not control. The court held that "the receipt of revenue from the state, membership of state nominees on the University's Board of Trustees, and statutory recognition that the University is part of the state's system of higher education are not sufficient to make the University's employment policies state decisions." *Krynicky v. University of Pittsburgh*, 563 F. Supp. 788, 789 (W.D. Pa. 1983).

B. *Schier*

Rosemary Schier, who was an employee of Temple University Hospital from September 1979 through September 3, 1981, brought suit against the University alleging that during the course of her employment, she was discriminated against on grounds of her sex, and that her supervisor had sexually harassed her, had retaliated against her for having filed internal complaints, and had forced her to sign a resignation memorandum. Schier sought relief under 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

At the close of discovery, Temple moved for summary judgment on all claims, asserting that the Title VII claim was time-barred and that Schier had not presented any facts to support her claim that Temple had acted under color of state law for the purposes of § 1983. The district

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[1] With respect to the due process claims under § 1983, defendants asserted that the University had provided Krynicky with complete procedural due process prior to the challenged employment decisions and that, furthermore, as a matter of law, Krynicky had no "property or liberty" right in continued employment at the University. With respect to the first amendment claim under § 1983, they asserted that it was barred by the applicable statute of limitation. The district court granted the motion as to the due process claim, but denied it as to the first amendment claim, stating that the cause of action was not time-barred.

With respect to the state-law claims, the defendants asserted that under University regulations, Krynicky had received notice within the specified time period and had failed to exhaust all internal University procedures and remedies before filing the suit. They also asserted that the emotional distress claims were time-barred. The district court granted the defendants' motion on these two claims.

court granted summary judgment on Schier's Title VII claim, but denied Temple's motion on the § 1983 claim, holding that, under the symbiotic relationship test for state action articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), the state had a sufficiently close relationship with Temple that actions taken by Temple were subject to constitutional scrutiny under section 1983. In reaching its decision, the district court considered the applicability of the Lugar trilogy to its decision, but concluded that *Blum* and *Rendell-Baker* did not overrule *Burton*, and that, therefore, the Third Circuit's opinion in *Braden* was still good law. *Schier v. Temple University*, 576 F. Supp. 1569, slip op. at 19-20 (E.D. Pa. 1984). However, recognizing that another district court in the circuit had reached the opposite result in the *Krynicky* case, the court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the question "whether, for the purposes of 42 U.S.C. § 1983, acts performed by employees of a statutorily designated 'state-related' institution of higher education such as Temple University constitute 'state action.'" We agreed to hear the appeal.

II. DISCUSSION

A. The State Action Requirement and the State Action Tests

The fifth and fourteenth amendments protect individuals only from governmental action. In order for Krynicky or Schier to benefit from these constitutional protections, they must show that the alleged violations of due process and freedom of speech are "fairly attributable to the state." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). The "state action requirement" preserves "individual freedom by limiting the reach of federal law and federal judicial power" and avoids "imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936.

The requirement of section 1983 that the challenged activity be taken "under color of state law"[2] has been treated as identical to the "state action" element of the fourteenth amendment. *Lugar*, 457 U.S. at 929; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 n.7, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). What constitutes sufficient state participation to attribute activity to the state under section 1983 has proved to be an extremely difficult question....

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[2] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court to date has not developed a uniform test for ascertaining when state action exists and has stated that no such unitary test is possible. *Reitman v. Mulkey*, 387 U.S. 369, 378, 18 L. Ed. 2d 830, 87 S. Ct. 1627 (1967). Instead, the Court has adopted a number of approaches whose application depends upon the circumstances. The Court has suggested that lower courts investigate carefully the facts of each case. *Burton*, 365 U.S. at 722. Two of the approaches are relevant to these appeals: the "symbiotic relationship" test and the "nexus" test.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), the Supreme Court found state action where there was a "symbiotic relationship" between the acting party and the state.[3] The Court held that state action exists when:

> The State has so far insinuated itself into a position of interdependence with... [the acting party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. *Id.* at 725.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974), the Court held that state action may also exist when the state becomes sufficiently involved in the particular challenged activity.[4] The Court suggested that in considering the state action issue, the "inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

In *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977), we confronted the question whether the University of Pittsburgh acted under the color of state law with respect to a claim almost identical to that of Ms. Schier. We rejected Pitt's contention that *Jackson* had overruled *Burton*, stating:

> Based on a review of the Supreme Court's opinion in *Jackson*, we believe that that decision would not preclude application of the precepts of *Burton* here,

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[3] In *Burton*, plaintiffs brought suit under 42 U.S.C. § 1983, alleging that the Wilmington Parking Authority, a state entity, was responsible for the racially discriminatory practices of a privately-owned coffee shop located in a building owned by the authority. In the lease between the coffee shop and the Authority, the shop had agreed to abide by all applicable laws, statutes, ordinances, rules, and regulations of any federal, state, or municipal authority. The Authority, in turn, agreed to provide all maintenance and upkeep of the premises and to make any necessary structural or exterior repairs.

[4] *Jackson* concerned a privately owned and operated utility. The plaintiff, a customer, alleged a violation of due process when the utility terminated her electric service without notice, a hearing, or any opportunity to pay the past due amounts. In the particular case, the Supreme Court held that the Commonwealth of Pennsylvania was not sufficiently involved in the particular challenged activity to convert it into state action.

> should the appropriate state-private relationship exist. Instead of overruling *Burton*, the *Jackson* Court merely distinguished the earlier opinion, finding "absent in [*Jackson*] the symbiotic relationship presented in *Burton* ..."

Braden, 552 F.2d at 957, citing *Jackson*, 419 U.S. at 357. Based on the provisions of University of Pittsburgh-Commonwealth Act, Pa. Stat. Ann. tit. 24, §§ 2510-201 to 211, we concluded that Pennsylvania had so far insinuated itself into a position of interdependence with the University of Pittsburgh that there was a symbiotic relationship between the two, and we therefore held that the actions of the University could fairly be attributed to the state for purposes of satisfying the state action requirement of section 1983.

Unless *Braden* has been overruled by the Supreme Court's recent *Lugar* trilogy, it is binding precedent for the proposition that the University of Pittsburgh and the Commonwealth of Pennsylvania are involved in a "symbiotic relationship,"[5] and therefore, that the actions of the University are actions taken under color of state law for purposes of section 1983. Moreover, since the Temple University-Commonwealth Act, which sets out the relationship between Temple and the State, is virtually identical to University of Pittsburgh-Commonwealth Act, which was the basis for our conclusion in *Braden* that Pitt and the Commonwealth have a symbiotic relationship, there can be no doubt that, if *Braden* has not been overruled, it requires the conclusion that the actions of Temple, like Pitt, are actions taken under color of state law.

Pitt and Temple make two arguments in support of their contention that *Braden* has been overruled:

> (1) the *Lugar* trilogy overruled or at a minimum, limited *Burton v. Wilmington Parking Authority* to its facts, and therefore *Braden*, which relies on *Burton*, is no longer good law; and
>
> (2) even if the symbiotic relationship test remains viable, the *Lugar* trilogy has clarified that test and, as a result, it is now clear that the Third Circuit in *Braden* misapplied *Burton* when it concluded that a symbiotic relationship existed between Pitt and the Commonwealth.

We consider these arguments in turn.

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[5] The statute analyzed in *Braden* continues in effect at this time.

B. The Impact of the *Lugar* Trilogy on *Burton*

In *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982), teachers who were discharged from the New Perspectives School, a non-public school, because they had opposed school policies and threatened to form a union, brought suit under 42 U.S.C. § 1983, alleging violations of their constitutional rights under the first, fifth, and fourteenth amendments. The plaintiffs cited several factors that allegedly supported attribution of the New Perspectives School's actions to the state. First, the New Perspectives School, which specializes in dealing with students who have difficulty completing high school, receives nearly all its students from referrals by various city school committees or from a state drug rehabilitation program. Second, the referring school committee pays for the student's education; consequently, the school receives almost 100 percent of its funding from the state. Third, in order to receive the tuition funding, the school must comply with various regulations created by the State, including some general administrative guidelines on personnel policies such as the type of records that must be kept. *Rendell-Baker v. Kohn*, 457 U.S. at 833.

Despite the presence of these factors offered to support state action, the Supreme Court held that the actions of the New Perspectives School could not be attributed to the state under § 1983. In reaching this determination, the *Rendell-Baker* Court first applied the nexus test of *Jackson* and determined that the state had not "compelled or even influenced by any state regulation" the decision to fire the plaintiffs. *Rendell-Baker*, 457 U.S. at 841. The Court then considered the assertion that the New Perspectives School met the symbiotic relationship test as set forth in *Burton*:

> In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. *Burton*, [365 U.S.] at 723, 81 S. Ct. at 860. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.

Id. 457 U.S. at 842-43. After finding that the New Perspectives School failed the "public function" test as well, *id*. at 842, the Court held that there was no state action, and consequently that no claim for relief under 42 U.S.C. section 1983 was stated.

Blum v. Yaretsky, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), also involved a suit under section 1983. The plaintiffs alleged violations of due process in the decision of a "Utility Review Committee" of The American Nursing Home in New York City to transfer Medicaid patients from high-care to lower-care facilities pursuant to federal regulations. The Supreme Court once again utilized the nexus test and failed to find state action, stating that there was no evidence that the State had "exercised coercive power or ... provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. The Court then applied the *Burton* symbiotic relationship test. It rejected the contention that state licensing and funding converts private action into state action, stating:

> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

Id. at 1011 (citations omitted). Finding that the American Nursing Home also failed to perform a function "traditionally the exclusive prerogative of the State," *id*. at 1011, citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, the Court again concluded that there was no state action.

Lugar v. Edmondson Oil Co., Inc., the final member of the trilogy, did not have occasion to discuss the *Burton* symbiotic relationship test, and, therefore, that case is not directly relevant to the present discussion.

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As is apparent from the preceding discussion, the Supreme Court in the *Lugar* trilogy clearly treated the symbiotic relationship test as a viable framework of analysis, but concluded that *Burton* was inapposite to the factual scenarios of those cases. The only indicia of state involvement in *Rendell-Baker* and *Blum* were financial assistance and routine state regulation.

By comparison, in *Burton* the state was much more intertwined with the Eagle Coffee Shop: the shop was located in a state-owned building; the state maintained the facility and made all necessary repairs; and the coffee shop and the state conferred mutual benefits on each other because of their location. Thus, we reject Temple and Pitt's assertion that *Rendell-Baker* and *Blum* eliminate the *Burton* symbiotic relationship test.

C. The Impact of the *Lugar* Trilogy on *Braden*

Alternatively, Pitt and Temple argue that *Blum* and *Rendell-Baker* preclude the finding of a symbiotic relationship unless it can be shown that the state benefits financially from the activities of the defendant. Such a financial relationship was present in the *Burton* case, but was not proved in *Braden*, and was not, the defendants contend, demonstrated here. Thus, the defendants argue that although *Burton* may still be good law after the *Lugar* trilogy, *Braden* has implicitly been overruled and we should find that there is no symbiotic relationship in the cases of Pitt and Temple.

It is true that the Supreme Court in *Blum* and *Rendell-Baker* focused on the financial relationship between the defendants and the State, but that was because the financial relationship was the only significant form of state influence over the defendants in those cases. The Court concluded that merely proving the existence of the limited type of financial relationship present in those cases was not sufficient to establish the requisite symbiotic relationship. By way of contrast, the Court in *Burton* emphasized the complete intermingling of state and private actions that were present in that case as grounds for its conclusion that a symbiotic relationship existed. The court referred to the fact that the state-owned Parking Authority financially benefited from renting to the coffee shop, but the Court also emphasized that the coffee shop was located in a building owned and operated by the State. It is apparent from the opinion that this second factor is at least as important as the financial relationship.

The Commonwealth's interrelationship with Pitt and Temple in these cases is more closely analogous to the complete intermingling of state and private actors found in *Burton* than to the relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker*. An examination of the statutes that create and define the Commonwealth's relationship with Pitt and Temple demonstrates this fact. Cf. Pa. Stat. Ann. tit. 24, §§ 2510-1 to 11 (Temple University-Commonwealth Act), Pa. Stat. Ann. tit. 24, §§ 2510-201 to 211 (University of Pittsburgh-Commonwealth Act). Since the two statutes are virtually identical, we will refer specifically only to the University of Pittsburgh statute.

To begin with, the statute was enacted to save the Commonwealth the expense of creating an additional state college.[6] In addition, the statute changes the name of the University of Pittsburgh to "The University of Pittsburgh – Of the Commonwealth System of Higher Education." Pa. Stat. Ann. tit. 24, § 2510-203 (Purdon 1966). Consonant with this linkage, the legislature declares it to be the purpose of the Act to extend the opportunities for higher education in the Commonwealth "by establishing University of Pittsburgh as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education." Pa. Stat. Ann. tit. 24, § 2510-202 (Purdon 1966) (emphasis added). This same section also provides:

> That the Commonwealth of Pennsylvania recognizes University of Pittsburgh as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and University of Pittsburgh for the purpose of improving and strengthening higher education by designating University of Pittsburgh as a State-related university.

Pa. Stat. Ann. tit. 24, § 2510-202 (Purdon 1966).

The statute also furnishes the "nuts and bolts" of this linkage. It provides that one-third of the University's trustees are to be selected by the Commonwealth, Pa. Stat. Ann. tit. 24, § 2510-204(b) (Purdon 1966), and that the Governor of Pennsylvania, the Mayor of the City of Pittsburgh, and the Superintendent of the Department of Public Instruction are trustees ex

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[6] As we stated in *Braden*:

> Prior to adoption of the Act, the University desperately needed a source of funds to maintain its operations. The situation was described by Pitt officials and trustees as grave. At the same time, the Commonwealth desired to satisfy the needs of the populace for expanded facilities for higher education. As the existing state educational institutions were insufficient to satisfy the public demand, and because the creation of new state universities would have been extremely expensive, the decision was made to incorporate established, but financially ailing private institutions into the Commonwealth System of Higher Education. The state thus was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly new institutions. Concomitantly, Pitt was able to survive as an institution of higher education, even though it may have been forced to relinquish its traditional autonomy as a private facility.

Braden, 552 F.2d at 961 (footnotes omitted).

officio.[7] Pa. Stat. Ann. tit. 24, § 2510-204(a) (Purdon 1966). The Act provides that the Commonwealth will make annual appropriations to the University, to be used as specified by the state, and that the appropriated funds must be kept in a specific account. Pa. Stat. Ann. tit. 4, § 2510-207 (1966).[8] The state may further set tuition and fee schedules for Pennsylvania students in the annual appropriation act. Pa. Stat. Ann. tit. 24, § 2510-206 (1966).

The Act also mandates that the University "file with the General Assembly and with the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account and other University accounts during the fiscal year." Pa. Stat. Ann. tit. 24, § 2510-207 (Purdon 1966). The statute entitles the University to benefit from all Commonwealth programs for capital development, Pa. Stat. Ann. tit. 24, § 2510-208 (Purdon 1968), and creates a state tax exemption for income derived from bonds issued by the University and loans secured by its mortgages. Pa. Stat. Ann. tit. 24, § 2510-209 (Purdon 1966). Finally, the Chancellor of the University must file annually a report of all University activities, "instructional, administrative and financial," with the Board of Trustees who "shall transmit [the report] to the Governor and to the members of the General Assembly." Pa. Stat. Ann. tit. 24, § 2510-210 (Purdon 1966).

The logic of *Rendell-Baker* and *Blum* is that state contributions to otherwise private entities, no matter how great those contributions may be, will not of themselves transform a private actor into a state actor. In the cases of Pitt and Temple, to the contrary, the issue is not whether the level of state contributions has reached a magic figure necessary to effect this transformation, but rather the affirmative state act of statutorily accepting responsibility for these institutions. This fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in *Rendell-Baker* and *Blum*.

In addition, unlike the school in *Rendell-Baker* and the nursing home in *Blum*, Temple and Pitt are not merely private contractors with the state. Not only do they receive present financial support, but also the state has committed itself to future financial aid and sets an annual appropriation policy and tuition rate. There is nothing to indicate that the state could not discontinue its support of the New Perspectives School or the American Nursing Home at any time by the simple means of not renewing their contracts. By contrast, it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth, and the idea that legislative appropriations to these institutions might be severely curtailed is unrealistic. Cf. Pa. Stat. Ann. tit. 24, § 2510(b). Furthermore, neither of the institutions in *Rendell-Baker* or *Blum*

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[7] In the Temple statute, the Mayor of Philadelphia, rather than the Mayor of Pittsburgh, is an ex officio trustee. Pa. Stat. Ann. tit. 24, § 2510-4(a) (1965).

[8] For example, for the fiscal year July 1982 through June 1983, the General Assembly appropriated $78,235,000 to the University of Pittsburgh.

had to submit to state-sponsored audits or make yearly reports to the State Assembly. Finally, unlike the institutions in *Blum* and *Rendell-Baker*, one-third of the Trustees of Pitt and Temple are now appointed by the state. Temple and Pitt are not merely "private contractors performing services for the government," *Rendell-Baker*, 457 U.S. at 843; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact.

In sum, we see nothing in either *Blum* or *Rendell-Baker* that conflicts with *Braden* or its rationale, and, therefore, we conclude that the Supreme Court did not overrule our decision in *Braden*.

III. CONCLUSION

We hold that the Supreme Court's recent decisions in the so-called *Lugar* trilogy do not overrule either the Supreme Court's decision in *Burton v. Wilmington Parking Authority* or our opinion in *Braden v. University of Pittsburgh*. Therefore, we are bound by Third Circuit precedent to hold that a "symbiotic relationship" exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. Actions taken by those two institutions are, therefore, actions taken under color of state law and are subject to scrutiny under section 1983. Consequently, we will reverse the judgment of the district court in *Krynicky v. University of Pittsburgh* and affirm the judgment of the district court in *Schier v. Temple University*, and will remand both cases for further proceedings consistent with this opinion.

Notes and Questions

1. As *Krynicky* illustrates, state action law was refined in significant ways by the trilogy of U.S. Supreme Court cases decided in 1982, the most important of which for higher education is *Rendell-Baker v. Kohn* (text, Section 1.5.2, pp. 28-31). Although the trilogy is compatible with the Second Circuit's prior reasoning on the matters addressed in *Krynicky*, and thus is supportive of the state action finding in this case, the trilogy does nevertheless confirm and fuel a narrowing trend in the law that has made state action findings less likely in other types of situations.

2. The court in *Krynicky* describes two basic approaches to state action analysis: the "symbiotic relationship" approach and the "nexus" approach. How do these two

approaches differ from one another? In what situations should the first approach be used, and in what situations the second? (See text, Section 1.5.2) Why did the court in *Krynicky* emphasize the symbiotic relationship approach rather than the nexus approach?

3. Under the symbiotic relationship test, what elements of the state's relationship with the two universities does the *Krynicky* court analyze? How must the state benefit from the relationship in order for the court to find state action under this test?

4. Compare *Krynicky* with the case of *Albert v. Carovano*, 851 F.2d 561 (2nd Cir. 1988), discussed in the text, Section 1.5.2. The college had suspended the student plaintiffs for violating its policy guide on freedom of expression and maintenance of public order – a guide the college had promulgated in compliance with a New York law that requires colleges to adopt rules for maintaining public order on campus and file them with the state. The students claimed that the college's action suspending them was state action and that it violated the Fourteenth Amendment due process clause. The appellate court disagreed. Is its reasoning based on the symbiotic relationship test, the nexus text, or neither?

5. Another approach to state action, not relied on in either *Krynicky* or *Albert*, is the "public function" approach. For a description of this approach, see the text, Section 1.5.2. And for a newer approach to state action, developed after *Krynicky* and *Albert* and called the "entwinement" approach, see the text, Section 1.5.2.

6. What policy considerations argue on behalf of applying the section 1983 statute and federal constitutional constraints to university officials in this case? Should administrators in private institutions generally be held to the same standard of civil rights liability as those in public institutions? What policy considerations would militate against such a uniformity of treatment?

SEC. 1.5.2. The State Action Doctrine

Borrell v. Bloomsburg University
870 F.3d 154 (3d Cir. 2017)

OPINION BY: HARDIMAN, Circuit Judge.

This appeal—which raises questions involving the state action doctrine and the Due Process Clause of the Fourteenth Amendment—has important ramifications for private hospitals that partner with public universities. Angela Borrell, a student working at a private hospital through a public university's clinical program, was dismissed for refusing to take a drug test in violation of hospital policy. She sued under 42 U.S.C. § 1983, claiming she was deprived of her property interest in the program without due process. Contrary to the judgment of the District Court, we hold that Defendants are entitled to judgment as a matter of law.

I.

In 2007, Geisinger Medical Center (Geisinger or GMC) partnered with Bloomsburg University to establish the Nurse Anesthetist Program (NAP or Program). A private hospital, Geisinger runs the "Clinical Training portion of the Program" for the aspiring nurse anesthetists while Bloomsburg, a public university, teaches them in the classroom. App. 1510. The Program operates subject to a written collaboration agreement that provides, among other things, that Geisinger and Bloomsburg will cooperate by: establishing a joint admissions committee, staffing an advisory committee, agreeing on how many students to admit, approving guidelines for clinical training, and promoting and marketing the Program. In other ways, Geisinger's and Bloomsburg's principal roles in the Program remain distinct. Geisinger provides certificates upon completion of its clinic and Bloomsburg confers Master of Science degrees to students who complete both the coursework and the clinical component.

NAP students in Geisinger's clinic administer medical care to patients under the supervision of Geisinger employees. Accordingly, the collaboration agreement states that Geisinger's policies—including its drug and alcohol policy—apply to NAP students while participating in the clinic. *See* App. 1512. The agreement also provides that Geisinger has sole authority to remove an enrollee from the clinical portion of the NAP due to unsatisfactory performance or failure "to comply with applicable policies and standards of Geisinger." App. 9. Likewise, Bloomsburg's Student Handbook requires students to "comply with the drug and alcohol policies and drug testing procedures as required by agencies affiliated with the

Department of Nursing," which includes Geisinger. *Borrell v. Bloomsburg Univ.*, 63 F.Supp.3d 418, 425 (M.D. Pa. 2014) (quoting policy).

Geisinger's drug and alcohol policy applies to all its employees and contractors (including clinical students working there). The policy states that drug tests "may be administered upon reasonable suspicion of substance abuse, (this may include [individual] situations ... where HR is made aware of alleged drug/alcohol use and deems it as reasonable cause to test the employee)." App. 1529. Any Geisinger worker "who refuses to cooperate in any aspect [of the testing process] ... shall be subject to disciplinary action, including termination, for a first refusal or any subsequent refusal." App. 1527. The policy does not provide for any pre-termination hearing or process.

The Director of the NAP at all times relevant to this case was a Geisinger nurse anesthetist named Arthur Richer. In that capacity, Richer became a joint employee of Geisinger and Bloomsburg, with Bloomsburg picking up a quarter of his salary. Richer managed the clinical component of the NAP at Geisinger while Michelle Ficca (Bloomsburg's Chair of Nursing) oversaw the Program's academic component.

In 2012, Richer terminated Angela Borrell for violating Geisinger's drug and alcohol policy by refusing to take a drug test when asked. Borrell, who previously had been a registered nurse at GMC, enrolled in the NAP in 2011 and began her clinical work in 2012. In September 2012, another nurse reported to Geisinger's Assistant Director of the NAP that Borrell used cocaine and "acted erratically" on a recent trip to New York. *Borrell*, 63 F.Supp.3d at 427. This claim was relayed to Richer, who had previously "noticed that Borrell appeared disheveled on a few occasions." *Id.* Richer discussed the allegation with three other GMC employees and Ficca—his counterpart at Bloomsburg. Richer and a member of Geisinger's Human Resources Department then met with Borrell and asked her to take a drug test. During this meeting, which lasted about an hour, Borrell asked several questions about the reason for the test and called her mother for advice. Borrell eventually refused to take the drug test, stating she "did not want her record to show that she submitted to a drug/urine screen." *Id.* at 428. Richer informed Borrell that she would have "no option to test later" and claims he told Borrell she might be terminated for refusing the test, but Borrell responded that she was willing to "face the consequences." Geisinger Br. 10. Borrell claims she was warned of "consequences" generally, but not termination. *Borrell*, 63 F.Supp.3d at 428.

After consulting with Geisinger's Human Resources Department, Richer decided to dismiss Borrell from the Program the next day. He claims he did so in his capacity as Director of the clinical training portion of the NAP, and that Bloomsburg and Ficca played no part in the decision—though he informed them of it. In a September 25, 2012 letter, Richer informed Borrell that she was terminated from the NAP for her refusal to take a drug test. A draft of that

letter was circulated among Geisinger Human Resources, Ficca, and Richer, who "all provided comments and suggestions as to the contents of the letter." *Id.* at 429. Richer then sent a final copy to Human Resources and Ficca. The letter was printed on joint GMC/Bloomsburg stationery and Richer and Ficca signed it. Richer signed as the "Director of the NAP," and Ficca signed indicating that she "reviewed the above information and agree[d] with the decision to terminate Angela Borrell from the ... Program." *Id.* (first alteration in original).

After she received the letter terminating her from the Program, Borrell tried to contact "Richer and others at both Geisinger and Bloomsburg ... to state her willingness to submit to a drug test." *Id.* That request was denied. Borrell then requested, but did not receive, a formal hearing from Bloomsburg to contest her termination from the Program. Ficca replied that since Bloomsburg had to honor Geisinger's drug policy, disqualification from GMC's clinic made her ineligible to complete her coursework at Bloomsburg necessary to complete the Program.

Borrell then commenced a § 1983 action in the United States District Court for the Middle District of Pennsylvania against GMC, Richer, Bloomsburg, and Ficca for, among other things, violation of her due process right to a pre-deprivation hearing. The District Court granted Borrell's motion for summary judgment with respect to GMC, Richer, and Ficca, holding them liable for denying Borrell due process. Essential to its holding, the District Court found that GMC and Richer were state actors and that Ficca was not entitled to qualified immunity. The Court then concluded that "because Defendants deprived Borrell of a property interest while acting under color of state law when they dismissed her from the NAP without due process, her motion for summary judgment as to liability on the procedural due process deprivation of property interest claim will be granted." *Id.* at 423. The case was then tried to a jury on the issue of damages. The jury awarded Borrell $415,000 in compensatory damages and $1,100,000 in punitive damages. Later granting the Defendants' remittitur motions, the District Court reduced Borrell's compensatory damages to $250,000 and her punitive damages to $750,000.

GMC, Richer, and Ficca timely appealed the adverse summary judgment along with other issues from the subsequent trial.

* * * *

III.

The primary issue on appeal is whether GMC, Richer, or Ficca are liable for denying Borrell due process when she was dismissed from the NAP. Because (A) GMC and Richer are not state actors with respect to Richer's decision to dismiss Borrell and (B) Ficca is entitled to qualified immunity for her involvement in Borrell's termination, we hold that no Defendant is

liable to Borrell.

A.

First, we must determine whether the conduct of GMC and Richer should be considered state action. "The Fourteenth Amendment governs only state conduct, not that of private citizens." *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009). So Borrell's claim is not cognizable unless she was harmed "under color of law," a standard identical to the Fourteenth Amendment's "state action" requirement. *United States v. Price*, 383 U.S. 787, 794 n.7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).

In *Kach*, this Court summarized "three broad tests generated by Supreme Court jurisprudence to determine whether state action exists" in close cases and they are all "fact-specific." 589 F.3d at 646. Those tests are: "(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; (2) whether the private party has acted with the help of or in concert with state officials; and (3) whether the state has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity." *Id.* (alterations and citation omitted). Of seminal importance to this appeal, we have clarified that the relevant question is not whether the private actor and the state have a close relationship generally, but whether there is "such a close nexus between the State and *the challenged action* that seemingly private behavior may be fairly treated as that of the State itself." *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005) (emphasis added) (citation omitted). . . .

Rather, the pertinent question is whether Richer was wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate Borrell. Actions taken "in the ambit of [non–state motivated] pursuits" are excluded from state action. *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The record shows that Richer's actions were authorized by Geisinger to enforce its drug and alcohol policy, and not pursued under any authority granted him by the state. Simply put, Richer did not need permission from Bloomsburg to fire a Geisinger worker who violated a hospital policy.

In concluding that Geisinger acted under color of state law, the District Court focused on the fact that it "was a willful participant in joint activity, the NAP, with Bloomsburg." *Borrell*, 63 F.Supp.3d at 436. But as we noted, that should have been the beginning of the inquiry, not the end of it. The government must have also been closely involved with the decision to terminate Borrell for *that action* to be "fairly attributable to the state." *Crissman v. Dover Downs Entm't Inc.*, 289 F.3d 231, 245 n.18 (3d Cir. 2002).

The District Court found, and Borrell argues, that Geisinger's termination of Borrell is

"fairly attributable to the state" for two main reasons: (1) Richer, a joint employee of GMC and Bloomsburg, terminated Borrell via a letter on "joint Bloomsburg-Geinsinger station[e]ry"; and (2) Ficca, a Bloomsburg employee, was involved in the termination process by providing input to Richer regarding Borrell's termination letter and by signing it. *Borrell*, 63 F.Supp.3d at 436. As discussed already, the fact that Richer was a joint employee does not answer the question of whether *his decision* to enforce GMC's drug and alcohol policy by terminating Borrell was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by ... a person for whom the State is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Richer's decision was to enforce the hospital's preexisting policy requiring employees to participate in drug tests when asked, and GMC had already fired four other nurses for violating the same policy.

Neither Bloomsburg nor its agreement with Geisinger played any part in creating the policy enforced in this case; the agreement merely made clear that Geisinger's employee policies would govern the behavior of clinical students while they were working at the hospital.

In light of the controlling legal principles we have articulated, the question boils down to which entity—the hospital or the university—exercised the authority to terminate Borrell for a violation of Geisinger policies. The District Court concluded that because Ficca signed the termination letter and was consulted regarding its contents, "Bloomsburg and Geisinger jointly participated in terminating Borrell from the NAP." *Borrell*, 63 F.Supp.3d at 436. The Court also stated that because Richer terminated Borrell in his capacity as Director of the NAP, the decision was made under the auspices of his employment by Bloomsburg and therefore under the color of state law. *Id.* at 437.

The agreement between Geisinger and Bloomsburg indicates otherwise. It makes clear that Geisinger retained the authority to unilaterally "exclude a Student from participation in the Clinical Training" if the student doesn't comply with a GMC policy. App. 1514. And when Richer made the decision to terminate Borrell for violating hospital policy, he acted in his capacity as a GMC employee, claiming he sought to maintain nursing standards at the hospital. And his capacity was not altered merely because he discussed this decision with—and received input on his letter from—Ficca and another joint-NAP employee. "Action taken by private entities with the *mere approval or acquiescence* of the State is not state action." *Kach*, 589 F.3d at 649 (citation omitted). Ficca's signature on the termination letter purports to do nothing more than concur with Richer's decision, which is not enough for state action. Rather, the state must have "exercised control over the particular conduct that gave rise to the plaintiff's alleged constitutional deprivation." *Id.* Under the collaboration agreement, Bloomsburg had no such control.

Notwithstanding his consultation with others, Richer made the decision to fire someone

working at GMC due to her violation of a preexisting policy of the hospital, and he had the authority to do so based on his position there. "[T]he authority of state officials ... was wholly unnecessary to effectuate Borrell's dismissal from the NAP." GMC Third-Step Br. 18. Accordingly, we must reverse the District Court's holding that GMC and Richer were state actors.

* * * *

IV.

For the reasons stated, we will reverse the District Court's summary judgment and remand the case for entry of judgment in favor of Geisinger, Richer, and Ficca.

Notes and Questions

1. In concluding that the director of the nurse anathesia program—a joint employee of the hospital and a public university—was acting in his capacity as a hospital employee and not his is capacity as university employee, the court characterized its inquiry as focused on whether the director was wearing his hospital "hat" or his public university "hat"? Based on this reasoning, under what types of circumstances might the court conclude that the director was wearing his public university "hat"?

2. In a very brief opinion concurring in part and concurring the judgment, Judge Roth concluded that the university was acting in an academic capacity rather than a disciplinary capacity in dimissing Borrell from the program. According to Judge Roth, Borrell was not dismissed from the university's program for refusing to take the drug test but, instead, because the refusal left her academically ineligible to continue in the program. Furthermore, Judge Roth stated that because the decision by the university was academic and not disciplinary, Borrell had received any due process to which she was entitled. Judge Roth does not elaborate on the issue of state action. Assuming that Borrell was entitled to some type of due process from the university, is Judge Roth correct in asserting that this standard was satisfied in this case because any university action was for an academic reason rather than a disciplinary one?

3. In its opinion, the appellate court in Borrell honed in on the specific action taken against Borrell in determining whether state action was present, namely requesting that Borrell submit to a drup test under the hospital's employee policies. In contrast, the lower court in *Borrell*, 955 F. Supp. 2d 390 (M.D. Pa. 2014), focused more on the overall relationship between the hospital and university in its state action inquiry, noting, for instance, that the hospital and the university both collaborated on meeting accreditation standards, admissions standards, program curriculum, and policies applicable to students. The court also noted that the hospital and the university shared the tuition and fees generated from the program and that both contributed to the program director's salary, who was a joint employee. Which court, the appeallate court or the lower court, provides a more compelling analysis of whether state action was present in this case?

SEC. 1.6.2
Religious Autonomy Rights of Religious Institutions and Their Personnel

Our Lady of Guadalupe v. Morrissey-Berru
140 S. Ct. 2049 (2020)

OPINION BY: ALITO

These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith. The First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116, 73 S. Ct. 143, 97 L. Ed. 120 (1952). Applying this principle, we held in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012), that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. We did not announce "a rigid formula" for determining whether an employee falls within this exception, but we identified circumstances that we found relevant in that case, including Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities. . . .

In the cases now before us, we consider employment discrimination claims brought by two elementary school teachers at Catholic schools whose teaching responsibilities are similar to Perich's. Although these teachers were not given the title of "minister" and have less religious training than Perich, we hold that their cases fall within the same rule that dictated our decision in *Hosanna-Tabor*. The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the

teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

I

A

1

The first of the two cases we now decide involves Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles. . . . For many years, Morrissey-Berru was employed at OLG as a lay fifth or sixth grade teacher. Like most elementary school teachers, she taught all subjects, and since OLG is a Catholic school, the curriculum included religion. . . . As a result, she was her students' religion teacher.

Morrissey-Berru earned a B. A. in English Language Arts, with a minor in secondary education, and she holds a California teaching credential. . . . While on the faculty at OLG, she took religious education courses at the school's request, and was expected to attend faculty prayer services,. Each year, Morrissey-Berru and OLG entered into an employment agreement, set out the school's "mission" and Morrissey-Berru's duties. The agreement stated that the school's mission was "to develop and promote a Catholic School Faith Community," and it informed Morrissey-Berru that "[a]ll [her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment."

The agreement explained that the school's hiring and retention decisions would be guided by its Catholic mission, and the agreement made clear that teachers were expected to "model and promote" Catholic "faith and morals." Under the agreement, Morrissey-Berru was required to participate in "[s]chool liturgical activities, as requested," and the agreement specified that she

could be terminated "for 'cause'" for failing to carry out these duties or for "conduct that brings discredit upon the School or the Roman Catholic Church." The agreement required compliance with the faculty handbook, which sets out similar expectations. The pastor of the parish, a Catholic priest, had to approve Morrissey-Berru's hiring each year.

Like all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was "considered a catechist," *i.e.*, "a teacher of religio[n]." Catechists are "responsible for the faith formation of the students in their charge each day." Morrissey-Berru provided religious instruction every day using a textbook designed for use in teaching religion to young Catholic students. Under the prescribed curriculum, she was expected to teach students, among other things, "to learn and express belief that Jesus is the son of God and the Word made flesh"; to "identify the ways" the church "carries on the mission of Jesus"; to "locate, read and understand stories from the Bible"; to "know the names, meanings, signs and symbols of each of the seven sacraments"; and to be able to "explain the communion of saints." She tested her students on that curriculum in a yearly exam. She also directed and produced an annual passion play.

Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. She also occasionally selected and prepared students to read at Mass. And she was expected to take her students to Mass once a week and on certain feast days (such as the Feast Day of St. Juan Diego, All Saints Day, and the Feast of Our Lady), and to take them to confession and to pray the Stations of the Cross. Each year, she brought them to the Catholic Cathedral in Los Angeles, where they participated as altar servers. This visit, she explained, was "an important experience" because "[i]t is a big honor" for children to "serve the altar" at the cathedral.

Morrissey-Berru also prayed with her students. Her class began or ended every day with a Hail Mary. She led the students in prayer at other times, such as when a family member was ill. And she taught them to recite the Apostle's Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession.

The school reviewed Morrissey-Berru's performance under religious standards. The "'Classroom Observation Report'" evaluated whether Catholic values were "infused through all subject areas"

and whether there were religious signs and displays in the classroom. Morrissey-Berru testified that she tried to instruct her students "in a manner consistent with the teachings of the Church," and she said that she was "committed to teaching children Catholic values" and providing a "faith-based education." And the school principal confirmed that Morrissey-Berru was expected to do these things. 5

2

In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and then filed suit under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.*, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher. The school maintains that it based its decisions on classroom performance—specifically, Morrissey-Berru's difficulty in administering a new reading and writing program, which had been introduced by the school's new principal as part of an effort to maintain accreditation and improve the school's academic program.

Invoking the "ministerial exception" that we recognized in *Hosanna-Tabor*, OLG successfully moved for summary judgment, but the Ninth Circuit reversed in a brief opinion. The court acknowledged that Morrissey-Berru had "significant religious responsibilities" but reasoned that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." Unlike Perich, the court noted, 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." In the court's view, these "factors" outweighed the fact that she was invested with significant religious responsibilities. The court therefore held that Morrissey-Berru did not fall within the "ministerial exception." OLG filed a petition for certiorari, and we granted review.

B

1

The second case concerns the late Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, another Catholic primary school in Los Angeles. For part of one academic year, Biel served as a long-term substitute teacher for a first grade class, and for one full year she was a full-time fifth grade teacher. Like Morrissey-Berru, she taught all subjects, including religion.

Biel had a B. A. in liberal studies and a teaching credential. During her time at St. James, she attended a religious conference that imparted "[d]ifferent techniques on teaching and incorporating God" into the classroom. Biel was Catholic.

Biel's employment agreement was in pertinent part nearly identical to Morrissey-Berru's. The agreement set out the same religious mission; required teachers to serve that mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases.

Biel's agreement also required compliance with the St. James faculty handbook, which resembles the OLG handbook. The St. James handbook defines "religious development" as the school's first goal and provides that teachers must "mode[l] the faith life," "exemplif[y] the teachings of Jesus Christ," "integrat[e] Catholic thought and principles into secular subjects," and "prepar[e] students to receive the sacraments." *Id.*, at ER 570-ER 572. The school principal confirmed these expectations.

Like Morrissey-Berru, Biel instructed her students in the tenets of Catholicism. She was required to teach religion for 200 minutes each week, and administered a test on religion every week. She used a religion textbook selected by the school's principal, a Catholic nun. The religious curriculum covered "the norms and doctrines of the Catholic Faith, including . . . the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, [and] Catholic prayers."

Biel worshipped with her students. At St. James, teachers are responsible for "prepar[ing] their students to be active participants at Mass, with particular emphasis on Mass responses," and Biel taught her students about "Catholic practices like the Eucharist and confession." At monthly

Masses, she prayed with her students. Her students participated in the liturgy on some occasions by presenting the gifts (bringing bread and wine to the priest).

Teachers at St. James were "required to pray with their students every day," and Biel observed this requirement by opening and closing each school day with prayer, including the Lord's Prayer or a Hail Mary.

As at OLG, teachers at St. James are evaluated on their fulfillment of the school's religious mission. St. James used the same classroom observation standards as OLG and thus examined whether teachers "infus[ed]" Catholic values in all their teaching and included religious displays in their classrooms. The school's principal, a Catholic nun, evaluated Biel on these measures. *Id.*, at 106a.

St. James declined to renew Biel's contract after one full year at the school. She filed charges with the EEOC, and after receiving a right-to-sue letter, brought this suit, alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer. The school maintains that the decision was based on poor performance—namely, a failure to observe the planned curriculum and keep an orderly classroom.

Like OLG, St. James obtained summary judgment under the ministerial exception, but a divided panel of the Ninth Circuit reversed, reasoning that Biel lacked Perich's "credentials, training, [and] ministerial background,"

Judge D. Michael Fisher, sitting by designation, dissented. Considering the totality of the circumstances, he would have held that the ministerial exception applied "because of the substance reflected in [Biel's] title and the important religious functions she performed" as a "stewar[d] of the Catholic faith to the children in her class."

An unsuccessful petition for rehearing en banc ensued. Judge Ryan D. Nelson, joined by eight other judges, dissented. Judge Nelson faulted the panel majority for "embrac[ing] the narrowest

construction" of the ministerial exception, departing from "the consensus of our sister circuits that the employee's ministerial function should be the key focus," and demanding nothing less than a "carbon copy" of the specific facts in *Hosanna-Tabor*. We granted review and consolidated the case with OLG's.

II

A

[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among other things, the 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. The First Amendment outlaws such intrusion.

[2] The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what we have termed "'matters of church government.'" This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

The "ministerial exception" was based on this insight. Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label "ministerial exception" because the individuals involved in pioneering cases were described as "ministers." Not all pre-*Hosanna-Tabor* decisions applying the exception involved "ministers" or even members of the clergy. See, *e.g.*, *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.

2d 277, 283-284 (CA5 1981); *EEOC* v. *Roman Catholic Diocese of Raleigh, N. C.*, 213 F. 3d 795, 800-801 (CA4 2000). But it is instructive to consider why a church's independence on matters "of faith and doctrine" requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. [9] The ministerial exception was recognized to preserve a church's independent authority in such matters.

B

When the so-called ministerial exception finally reached this Court in *Hosanna-Tabor*, we unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations. The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government. The three prior decisions on which we primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy. *Watson* v. *Jones*, 80 U.S. 679, 13 Wall. 679, 20 L. Ed. 666 (1872), involved a dispute about the control of church property, and both *Kedroff*, 344 U. S. 94, 73 S. Ct. 143, 97 L. Ed. 120, and *Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U. S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976), also concerned the control of property, as well as the appointment and authority of bishops.

* * * * *

C

In *Hosanna-Tabor*, Cheryl Perich, a kindergarten and fourth grade teacher at an Evangelical Lutheran school, filed suit in federal court, claiming that she had been discharged because of a disability, in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §12112(a). The school responded that the real reason for her dismissal was her violation of the

Lutheran doctrine that disputes should be resolved internally and not by going to outside authorities. We held that her suit was barred by the "ministerial exception" and noted that it "concern[ed] government interference with an internal church decision that affects the faith and mission of the church." We declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," and we added that it was "enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment." We identified four relevant circumstances but did not highlight any as essential.

First, we noted that her church had given Perich the title of "minister, with a role distinct from that of most of its members." Although she was not a minister in the usual sense of the term—she was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services—she was classified as a "called" teacher, as opposed to a lay teacher, and after completing certain academic requirements, was given the formal title "'Minister of Religion, Commissioned.'"

Second, Perich's position "reflected a significant degree of religious training followed by a formal process of commissioning."

Third, "Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms," and by claiming certain tax benefits.

Fourth, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." The church charged her with "'lead[ing] others toward Christian maturity'" and "'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'" Although Perich also provided instruction in secular subjects, she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in the liturgy twice a year. "As a source of religious instruction," we explained, "Perich performed an important role in transmitting the Lutheran faith to the next generation."

The case featured two concurrences. In the first, Justice Thomas stressed that courts should "defer to a religious organization's good-faith understanding of who qualifies as its

minister." That is so, JUSTICE THOMAS explained, because "[a] religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess" the group's sincere application of its religious tenets.

The second concurrence argued that application of the "ministerial exception" should "focus on the function performed by persons who work for religious bodies" rather than labels or designations that may vary across faiths. (opinion of ALITO, J., joined by KAGAN, J.). This opinion viewed the title of "minister" as "relevant" but "neither necessary nor sufficient." It noted that "most faiths do not employ the term 'minister'" and that some "consider the ministry to consist of all or a very large percentage of their members." *Ibid.* The opinion concluded that the "'ministerial' exception" "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."

D

1

In determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important. The circumstances that informed our decision in *Hosanna-Tabor* were relevant because of their relationship to Perich's "role in conveying the Church's message and carrying out its mission," but the other noted circumstances also shed light on that connection. In a denomination that uses the term "minister," conferring that title naturally suggests that the recipient has been given an important position of trust. In Perich's case, the title that she was awarded and used demanded satisfaction of significant academic requirements and was conferred only after a formal approval process, and those circumstances also evidenced the importance attached to her role, *ibid.* But our recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases.

Take the question of the title "minister." Simply giving an employee the title of "minister" is not enough to justify the exception. And by the same token, since many religious traditions do not

use the title "minister," it cannot be a necessary requirement. Requiring the use of the title would constitute impermissible discrimination, and this problem cannot be solved simply by including positions that are thought to be the counterparts of a "minister," such as priests, nuns, rabbis, and imams. Nuns are not the same as Protestant ministers. A brief submitted by Jewish organizations makes the point that "Judaism has many 'ministers,'" that is, "the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism." For Muslims, "an inquiry into whether imams or other leaders bear a title equivalent to 'minister' can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections."

If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.

For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. See, *e.g.*, Brief for Ethics and Religious Liberty Commission of the Southern Baptist Convention et al. as *Amici Curiae* 12 ("many Protestant groups have historically rejected any requirement of formal theological training"). In short, these circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases.

What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and

training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. As we put it, Perich had been entrusted with the responsibility of "transmitting the Lutheran faith to the next generation. One of the concurrences made the same point, concluding that the exception should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*."

Religious education is vital to many faiths practiced in the United States. This point is stressed by briefs filed in support of OLG and St. James by groups affiliated with a wide array of faith traditions. In the Catholic tradition, religious education is "'intimately bound up with the whole of the Church's life.'" Catechism of the Catholic Church 8 (2d ed. 2016). Under canon law, local bishops must satisfy themselves that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." Code of Canon Law, Canon 804, §2 (Eng. transl. 1998).

* * * * *

2

When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties. 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. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they 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. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not

include the term “minister,” and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools’ definition and explanation of their roles is important. 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.

III

In holding that Morrissey-Berru and Biel did not fall within the *Hosanna-Tabor* exception, the Ninth Circuit misunderstood our decision. Both panels treated the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same. That approach is contrary to our admonition that we were not imposing any “rigid formula.” Instead, we called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception.

The Ninth Circuit’s rigid test produced a distorted analysis. First, it invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles. It is true that Perich’s title included the term “minister,” but we never said that her title (or her reference to herself as a “minister”) was necessary to trigger the *Hosanna-Tabor* exception. Instead, “those considerations . . . merely made Perich’s case an especially easy one.” Moreover, both Morrissey-Berru and Biel had titles. They were Catholic elementary school *teachers*, which meant that they were their students’ primary teachers of religion. The concept of a teacher of religion is loaded with religious significance. The term “rabbi” means teacher, and Jesus was frequently called rabbi. And if a more esoteric title is needed, they were both regarded as “catechists.”

Second, the Ninth Circuit assigned too much weight to the fact that Morrissey-Berru and Biel had less formal religious schooling than Perich. The significance of formal training must be

evaluated in light of the age of the students taught and the judgment of a religious institution regarding the need for formal training. The schools in question here thought that Morrissey-Berru and Biel had a sufficient understanding of Catholicism to teach their students, and judges have no warrant to second-guess that judgment or to impose their own credentialing requirements.

Third, the *St. James* panel inappropriately diminished the significance of Biel's duties because they did not evince "close guidance and involvement" in "students' spiritual lives. Specifically, the panel majority suggested that Biel merely taught "religion from a book required by the school," "joined" students in prayer, and accompanied students to Mass in order to keep them "'quiet and in their seats.'" This misrepresents the record and its significance. For better or worse, many primary school teachers tie their instruction closely to textbooks, and many faith traditions prioritize teaching from authoritative texts. See Brief for InterVarsity Christian Fellowship USA et al. as *Amici Curiae* 26; Brief for Senator Mike Lee et al. as *Amici Curiae* 24-27. As for prayer, Biel prayed with her students, taught them prayers, and supervised the prayers led by students. She prepared them for Mass, accompanied them to Mass, and prayed with them there.

In Biel's appeal, the Ninth Circuit suggested that the *Hosanna-Tabor* exception should be interpreted narrowly because the ADA, and Title VII, §2000e-2, contain provisions allowing religious employers to give preference to members of a particular faith in employing individuals to do work connected with their activities. But the *Hosanna-Tabor* exception serves an entirely different purpose. Think of the quintessential case where a church wants to dismiss its minister for poor performance. The church's objection in that situation is not that the minister has gone over to some other faith but simply that the minister is failing to perform essential functions in a satisfactory manner.

While the Ninth Circuit treated the circumstances that we cited in *Hosanna-Tabor* as factors to be assessed and weighed in every case, respondents would make the governing test even more rigid. In their view, courts should begin by deciding whether the first three circumstances—a ministerial title, formal religious education, and the employee's self-description as a minister—are met and then, in order to check the conclusion suggested by those factors, ask whether the

employee performed a religious function. Brief for Respondents 20-24. For reasons already explained, there is no basis for treating the circumstances we found relevant in *Hosanna-Tabor* in such a rigid manner.

Respondents go further astray in suggesting that an employee can never come within the *Hosanna-Tabor* exception unless the employee is a "practicing" member of the religion with which the employer is associated. In hiring a teacher to provide religious instruction, a religious school is very likely to try to select a person who meets this requirement, but insisting on this as a necessary condition would create a host of problems. As pointed out by petitioners, determining whether a person is a "co-religionist" will not always be easy. Deciding such questions would risk judicial entanglement in religious issues.

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For these reasons, the judgment of the Court of Appeals in each case is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

* * * *

JUSTICE **SOTOMAYOR**, with whom JUSTICE **GINSBURG** joins, dissenting.

Two employers fired their employees allegedly because one had breast cancer and the other was elderly. Purporting to rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were "ministers" of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable

standard of review, and collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

I

A

Our pluralistic society requires religious entities to abide by generally applicable laws. Consistent with the First Amendment (and over sincerely held religious objections), the Government may compel religious institutions to pay Social Security taxes for their employees, deny nonprofit status to entities that discriminate because of race, require applicants for certain public benefits to register with Social Security numbers, enforce child-labor protections, and impose minimum-wage laws.

Congress, however, has crafted exceptions to protect religious autonomy. Some antidiscrimination laws, like the Americans with Disabilities Act, permit a religious institution to consider religion when making employment decisions. Under that Act, a religious organization may also "require that all applicants and employees conform" to the entity's "religious tenets." Title VII further permits a school to prefer "hir[ing] and employ[ing]" people "of a particular religion" if its curriculum "propagat[es]" that religion. These statutory exceptions protect a religious entity's ability to make employment decisions—hiring or firing—for religious reasons.

The "ministerial exception," by contrast, is a judge-made doctrine. This Court first recognized it eight years ago in *Hosanna-Tabor*, concluding that the First Amendment categorically bars certain antidiscrimination suits by religious leaders against their religious employers. When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's

religious beliefs or practices. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.

When this Court adopted the ministerial exception, it affirmed the holdings of virtually every federal appellate court that had embraced the doctrine. Those courts had long understood that the exception's stark departure from antidiscrimination law is narrow. Wary of the exception's "potential for abuse," federal courts treaded "case-by-case" in determining which employees are ministers exposed to discrimination without recourse. Thus, their analysis typically trained on whether the putative minister was a "spiritual leade[r]" within a congregation such that "he or she should be considered clergy." *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1168-1169 (CA4 1985) (internal quotation marks omitted). That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees.

* * * * *

Hosanna-Tabor did not upset this consensus. Instead, it recognized the ministerial exception's roots in protecting religious "elections" for "ecclesiastical offices" and guarding the freedom to "select" titled "clergy" and churchwide leaders. To be sure, the Court stated that the "ministerial exception is not limited to the head of a religious congregation. Nevertheless, this Court explained that the exception applies to someone with a leadership role "distinct from that of most of [the organization's] members," someone in whom "[t]he members of a religious group put their faith," or someone who "personif[ies]" the organization's "beliefs" and "guide[s] it on its way."

This analysis is context-specific. It necessarily turns on, among other things, the structure of the religious organization at issue. Put another way (and as the Court repeats throughout today's opinion), *Hosanna-Tabor* declined to adopt a "rigid formula for deciding when an employee qualifies as a minister." Rather, *Hosanna-Tabor* focused on four "circumstances" to determine whether a fourth-grade teacher, Cheryl Perich, was employed at a Lutheran school as a "minister": (1) "the formal title given [her] by the Church," (2) "the substance reflected in that

title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church." Confirming that the ministerial exception applies to a circumscribed sub-category of faith leaders, the Court analyzed those four "factors," to situate Perich as a minister within the Lutheran Church's structure.

* * * * *

II

Until today, no court had held that the ministerial exception applies with disputed facts like these and lay teachers like respondents, let alone at the summary-judgment stage.

Only by rewriting *Hosanna-Tabor* does the Court reach a different result. The Court starts with an unremarkable view: that *Hosanna-Tabor*'s "recognition of the significance of " the first three "factors" in that case "did not mean that they must be met—or even that they are necessarily important—in all other cases." True enough. One can easily imagine religions incomparable to those at issue in *Hosanna-Tabor* and here. But then the Court recasts *Hosanna-Tabor* itself: Apparently, the touchstone all along was a two-Justice concurrence. To that concurrence,"[w]hat matter[ed]" was "the religious function that [Perich] performed" and her "functional status." Today's Court yields to the concurrence's view with identical rhetoric. "What matters," the Court echoes, "is what an employee does."

* * * * *

Today's decision thus invites the "potential for abuse" against which circuit courts have long warned. Nevermind that the Court renders almost all of the Court's opinion in *Hosanna-Tabor* irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable. Indeed, today's decision reframes the ministerial exception as broadly as it can, without regard to the statutory exceptions tailored to protect religious practice. As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a

leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication.

* * * * *

The Court's conclusion portends grave consequences. As the Government (arguing for Biel at the time) explained to the Ninth Circuit, "thousands of Catholic teachers" may lose employment-law protections because of today's outcome. Other sources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets.

In expanding the ministerial exception far beyond its historic narrowness, the Court overrides Congress' carefully tailored exceptions for religious employers. Little if nothing appears left of the statutory exemptions after today's constitutional broadside. So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.

This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived "discrimination against religion." Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. One must hope that a decision deft enough to remold *Hosanna-Tabor* to fit the result reached today reflects the Court's capacity to cabin the consequences tomorrow.

I respectfully dissent.

Notes and Questions

1. The majority and dissent have very different interpretations of the Supreme Court's previous decision in *Hosanna Tabor* (2012). Which do you think is the better interpretation of the intent of the Religion Clauses in the First Amendment (the Establishment Clause and the Free Exercise Clauses)?

2. In a dissent in *Hosanna Tabor*, Justice Thomas opined that a court should simply take the word of the religious organization that the plaintiff in a lawsuit against that organization performs religious duties and thus qualifies for the ministerial exception. How close to that perspective is the majority's opinion in *Our Lade of Guadalupe*?

3. Note the prediction of the dissent that the impact of the majority's opinion in this case wil gut the protections of the nondiscrimination laws for any employee of a religious organization. Although Title VII has an exemption for religious organizations that make employment decisions on the basis of religiou, the other nondiscrimination laws do not. Is this case a *per se* exemption for the other nondiscrimination laws for religious organizations?

4. This case deals with elementary schools. Can it be argued that its application to a college or university should be limited to individuals whose responsibilities are more clearly linked to religious duties?

SEC. 1.6. Religion and the Public-Private Dichotomy

Witters v. Washington Department of Services for the Blind
474 U.S. 481 (1986)

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and III of which O'CONNOR, J., joined. WHITE, J., filed a concurring opinion. POWELL, J., filed a concurring opinion, in which BURGER, C.J., and REHNQUIST, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment.

Justice MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

I.

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash.Rev.Code § 74.16.181 (1981).[1] That statute authorized the Commission, *inter alia,* to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for vocational rehabilitation assistance under the terms of the statute . . . . He was at the time attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington, and studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director.

[1] In 1983 the Washington Legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, ch. 194, § 3. We shall refer to respondent for purposes of this opinion as "the Commission."

The Commission denied petitioner aid. It relied on an earlier determination embodied in a Commission policy statement that "[t]he Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas," App. 4, and on its conclusion that petitioner's training was "religious instruction" subject to that ban. That ruling was affirmed by a state hearings examiner, who held that the Commission was precluded from funding petitioner's training "in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion." App[endix] to Pet[ition] for Cert. F-6. The hearings examiner cited Wash. Const., Art. I, § 11, providing in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const., Art. IX, § 4, providing that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." That ruling, in turn, was upheld on internal administrative appeal.

Petitioner then instituted an action in State Superior Court for review of the administrative decision; the court affirmed on the same state-law grounds cited by the agency. The State Supreme Court affirmed as well. *Witters v. Commission for the Blind*, 102 Wash.2d 624, 689 P.2d 53 (1984). The Supreme Court, however, declined to ground its ruling on the Washington Constitution. Instead, it explicitly reserved judgment on the state constitutional issue and chose to base its ruling on the Establishment Clause of the Federal Constitution. The court stated: "The Supreme Court has developed a 3-part test for determining the constitutionality of state aid under the establishment clause of the First Amendment. 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion.'"' *Lemon v. Kurtzman*, (403 U.S. 602, 612-613 (1971).) To withstand attack under the establishment clause, the challenged state action must satisfy each of the three criteria." *Id.*, at 624, 627-628, 689 P.2d, at 55.

The Washington court had no difficulty finding the "secular purpose" prong of that test satisfied. Applying the second prong, however, that of "principal or primary effect," the court held that "[t]he provision of financial assistance by the State to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion." *Id.*, at 629, 689 P.2d, at 56. The court, therefore, held that provision of aid to petitioner would contravene the Federal Constitution. In light of that ruling, the court saw no need to reach the "entanglement" prong; it stated that the record was in any case inadequate for such an inquiry.

* * * *

II.

The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.*, at 612 . . . . Nonetheless, the Court's opinions in this area have at least clarified "the broad contours of our inquiry," *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 948 (1973), and are sufficient to dispose of this case.

We are guided, as was the court below, by the three-part test set out by this Court in *Lemon* . . . . Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well being of the visually handicapped through the provision of vocational rehabilitation services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education. No party suggests that the State's "actual purpose" in creating the program was to endorse religion, *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'CONNOR, J., concurring), or that the secular purpose articulated by the legislature is merely "sham." *Wallace, supra*, 472 U.S. at 64 (POWELL, J., concurring).

The answer to the question posed by the second prong of the *Lemon* test is more difficult. We conclude, however, that extension of aid to petitioner is not barred on that ground either.[3] It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a

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[3] Respondent offers extensive argument before this Court relating to the practical workings of the state vocational assistance program. Focusing on the asserted practical "nature and operation of that program," Brief for Respondent 6, respondent asserts that the nature of the program in fact leads to an impermissible "symbolic union" of governmental and religious functions, "requir[ing] government choices at every step of the rehabilitation process" and "intertwining ... governmental decisionmaking ... with decisionmaking by church and school authorities." *Id.*, at 20. Respondent contends that the program therefore violates the second and third prongs of the *Lemon* test in a way that "hands off" aid, such as that provided pursuant to the GI Bill, does not. *Id.*, at 11.

This argument, however, was not presented to the state courts, and appears to rest in large part on facts not part of the record before us. Because this Court must affirm or reverse upon the case as it appears in the record, *Russell v. Southard*, 12 How. 139, 159, 53 U.S. 139, 159 (1851); see also *New Haven Inclusion Cases*, 399 U.S. 392, 450, n. 66 (1970), we have no occasion to consider the argument here. Nor is it appropriate, as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings. On remand, it will be up to the Washington Supreme Court as a matter of state procedural law whether and to what extent it should reopen the record for the introduction of evidence on the issues raised for the first time in this Court.

paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in-kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District v. Ball*, 473 U.S., at 394. Aid may have that effect even though it takes the form of aid to students or parents. *Ibid* . . . . The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible "direct subsidy."

Certain aspects of Washington's program are central to our inquiry. As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S., at 782-783, and is in no way skewed towards religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court," *id.*, at 785. It creates no financial incentive for students to undertake sectarian education, see *id.*, at 785-786. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783 . . . . The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program.

The combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend a highly attenuated one.

On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. See *Lynch v. Donnelly*, 465 U.S., at 688 (O'CONNOR, J., concurring). Thus, while *amici* supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is "clearly prohibited under the Establishment Clause," *Grand Rapids, supra*, 473 U.S., at 395, because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause.[5]

III.

We therefore reject the claim that, on the record presented, extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment. On remand, the state court is of course free to consider the applicability of the "far stricter" dictates of the Washington State Constitution, see *Witters v. Commission for the Blind*, 102 Wash.2d, at 626, 689 P.2d, at 55. It may also choose to reopen the factual record in order to consider the arguments made by respondent and discussed in nn. 3 and 5, *supra*. We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we express no opinion on that matter.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[5] We decline to address the "entanglement" issue at this time. As a prudential matter, it would be inappropriate for us to address that question without the benefit of a decision on the issue below. Further, we have no reason to doubt the conclusion of the Washington Supreme Court that that analysis could be more fruitfully conducted on a more complete record.

* * * *

Justice POWELL, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring.

The Court's omission of *Mueller v. Allen,* 463 U.S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one . . . .

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. *Mueller,* 463 U.S., at 398-399. Thus, in *Mueller,* we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. *Id.,* at 401. We noted the State's traditionally broad taxing authority, *id*., at 396, but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. *Id*., at 397. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school age children." *Mueller,supra,* 463 U.S., at 399.

The state program at issue here provides aid to handicapped students when their studies are likely to lead to employment. Aid does not depend on whether the student wishes to attend a public university or a private college, nor does it turn on whether the student seeks training for a religious or a secular career. It follows that under *Mueller* the State's program does not have the "principal or primary effect" of advancing religion.[3]

The Washington Supreme Court reached a different conclusion because it found that the program had the practical effect of aiding religion *in this particular case. Witters v. Commission for the Blind,* 102 Wash.2d 624, 628- 629, 689 P.2d 53, 56 (1984) . . . .

[But] nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole. Mueller, supra* 463 U.S., at 397-400 . . . . This is the appropriate

[3] [fn. in concurrence] Contrary to the Court's suggestion, this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training. Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions. Compare *Mueller v. Allen,* 463 U.S., at 401, with *id*., at 405 (MARSHALL, J. dissenting). Nevertheless, the aid was thus channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon.*

perspective for this case as well. Viewed in the proper light, the Washington program easily satisfies the second prong of the *Lemon* test.

* * * *

Justice O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion, and concur in the judgment. I also agree with the Court that both the purpose and effect of Washington's program of aid to handicapped students are secular. As Justice POWELL's separate opinion persuasively argues, the Court's opinion in *Mueller v. Allen*, 463 U.S. 388 (1983), makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." (POWELL, J., concurring). The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'CONNOR, J., concurring).

Notes and Questions

1. Note that the state Commission, the state hearings examiner, the administrative appeal panel, and the lower state court (the Superior Court) all relied on the Washington State constitution in denying the student aid. The highest state court (the state Supreme Court), however, relied only on the U.S. Constitution, specifically the First Amendment's establishment clause, to deny aid. The U.S. Supreme Court, in turn, relied only on the federal establishment clause, but contrary to the state Supreme Court, construed it to permit the state to award the aid to the student. In subsequent proceedings in the state courts, however, the Washington State constitution did again become the focus of concern (see the text, Section 1.6.3). Why were there such later state court proceedings? In what respects was the U.S. Supreme Court's ruling not dispositive of the entire matter?

2. The U.S. Supreme Court's decision in the *Witters* case is discussed on p. 46 of the text. The "*Lemon* test" used by the Court is discussed on pp. 45-46 of the text.

3. The *Witters* case creates an important distinction between government aid programs that extend aid directly to institutions and governmental aid programs that extend aid to students. What is the rationale for this distinction, and why is it an important distinction to make under the federal establishment clause? See Text Section 1.6.3, pp. 46-52, for discussion of institutional aid cases.

4. Would the result in the case have been different if numerous aid recipients, in addition to the plaintiff, had used their government aid to attend religious colleges? How do the majority opinion and the Justice Powell concurring opinion differ on this point? U.S. Supreme Court decisions after *Witters*, especially *Zelman v. Simmons-Harris* (Text, p. 46), apparently support the concurring Justices' position on this point.

5. Near the end of the majority opinion, the Court briefly mentions the other religion clause in the First Amendment – the free exercise clause. That clause also became involved in the subsequent state court proceedings in the *Witters* case (see Text, p. 48). How would you distinguish the free exercise clause issues in the case from the establishment clause issues? (See generally Text Section 1.6.1.) First Amendment free exercise issues concerning government aid programs are now generally governed by the U.S. Supreme Court's 2004 decision in *Locke v. Davey*, Text, pp. 48-50, and by *Trinity Lutheran Church of Columbia v. Comer*, Text, pp. 51-52 and CPM p. 70.

SEC. 1.6. Religion and the Public-Private Dichotomy

Trinity Lutheran Church of Columbia, Inc. v. Missouri Department of Natural Resources
137 S.Ct. 2012 (2017)

ROBERTS, C.J., delivered the opinion of the Court, except as to footnote 3. KENNEDY, ALITO, and KAGAN, JJ., joined that opinion in full, and THOMAS and GORSUCH, JJ., joined except as to footnote 3. THOMAS, J., filed an opinion concurring in part, in which GORSUCH, J., joined. GORSUCH, J., filed an opinion concurring in part, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

Chief Justice ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I.

A.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and

surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.". . . After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.

The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

B.

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment. Trinity Lutheran sought declaratory and injunctive relief prohibiting the Department from discriminating against the Church on that basis in future grant applications.

The District Court granted the Department's motion to dismiss. The Free Exercise Clause, the District Court stated, prohibits the government from outlawing or restricting the exercise of a religious practice; it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the Department's denial of the scrap tire grant to the situation this Court encountered in *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. Finding the present case "nearly indistinguishable from *Locke*," the District Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran. . . .

The Court of Appeals for the Eighth Circuit affirmed. The court recognized that it was "rather clear" that Missouri *could* award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (2015). But, the Court of Appeals explained, that did not mean the Free Exercise Clause compelled the State to disregard the antiestablishment principle reflected in its own Constitution. . . .

Judge Gruender dissented. He distinguished *Locke* on the ground that it concerned the narrow issue of funding for the religious training of clergy, and "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." 788 F.3d, at 791 (opinion concurring in part and dissenting in part).

Rehearing en banc was denied by an equally divided court.

We granted certiorari . . . and now reverse.

II.

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke,* 540 U.S., at 718, 124 S.Ct. 1307 (internal quotation marks omitted).

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533, 542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (internal quotation marks omitted). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel v. Paty,* 435 U.S. 618, 628, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)).

In *Everson v. Board of Education of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), for example, we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. In the course of ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." *Id.,* at 16, 67 S.Ct. 504.

Three decades later, in *McDaniel v. Paty,* the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.' " 435 U.S., at 627, 98 S.Ct. 1322....

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been

careful to distinguish such laws from those that single out the religious for disfavored treatment.

For example, in *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), we held that the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred. Accepting that "[t]he building of a road or the harvesting of timber ... would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," we nonetheless found no free exercise violation, because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs." *Id.,* at 449, 108 S.Ct. 1319. The Court specifically noted, however, that the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Ibid.*

In *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. Along the same lines as our decision in *Lyng,* we held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. . . .

Finally, in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances had a discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. We agreed. . . .

III.

A.

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi,* 508 U.S., at 546, 113 S.Ct. 2217. This conclusion is unremarkable in light of our prior decisions.

Like the disqualification statute in *McDaniel,* the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as

McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: "To condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." 435 U.S., at 626, 98 S.Ct. 1322 (plurality opinion) (alterations omitted).

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi,* which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church. . . .

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng,* 485 U.S., at 450, 108 S.Ct. 1319. . . .

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert,* 374 U.S., at 405, 83 S.Ct. 1790. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. . . .

B.

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. In *Locke,* the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the

money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." 540 U.S., at 716, 124 S.Ct. 1307 (internal quotation marks omitted). Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *Id.*, at 720–721, 124 S.Ct. 1307. At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." *Id.*, at 721, 124 S.Ct. 1307. Davey was not denied a scholarship because of who he *was* ; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." ... Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches.... But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit.". . .

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.

C.

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi*, 508

U.S., at 546, 113 S.Ct. 2217.

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. *McDaniel*, 435 U.S., at 628, 98 S.Ct. 1322 (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. . . . In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Widmar*, 454 U.S., at 276, 102 S.Ct. 269.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.

* * * *

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * * *

Notes and Questions

1. Footnote 3 of the majority opinion in *Trinity Lutheran*, which was joined by four justices, contained the statement that the Court did not "address religious uses of funding or other forms of discrimination." In future cases, how might courts seek to identify when a religious organization is using a grant or other public funds for a religious use or purpose? For example, if a state made available an energy saving grant to non-profit organizations, could, after *Trinity Lutheran*, a state still deny funding to a church that wanted to use the grant to renovate its worship hall?

2. Legal disagreement has arisen concerning the extent to which public colleges and universities can place nondiscrimination requirements on student organization as a

condition of receiving official university recognition (see *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), in Part J of the CPM and which is discussed in the Text Section 10.1.4). What is the potential impact of *Trinity Lutheran* on campus nondiscrimation policies as a condition for student groups to receive official institutional recognition?

1.6.4. Religious Autonomy Rights of Individuals in Public Postsecondary Institutions

Chaudhuri

v.

State of Tennessee, Tennessee State University;
Dr. Annie Neal; Dr. Decatur Rogers; Dr. James A. Hefner; and Dr. Arthur C. Washington
130 F.3d 232 (6th Cir. 1997)

DAVID A. NELSON, Circuit Judge.

The question presented here is whether a nonsectarian prayer or moment of silence at a public university function violates the First Amendment. We answer the question "no." Tennessee State University formerly made it a practice to include invocations and benedictions at certain university events. The plaintiff, Dilip K. Chaudhuri, Ph.D., brought the present lawsuit to contest the constitutionality of this practice. The university then discontinued the prayers and adopted a moment of silence instead. Dr. Chaudhuri challenged the moment of silence as well, alleging that the intent behind the change was to allow the continuation of prayers. Finding no violation of either the Establishment Clause or the Free Exercise Clause of the First Amendment, the district court entered summary judgment for the defendants. We agree that the practices in question are not unconstitutional. The judgment will be affirmed.

I.

Dr. Chaudhuri came to this country from India in 1971, and in due course he became a naturalized United States citizen. He is a tenured professor of mechanical engineering at Tennessee State University in Nashville. An adherent of the Hindu religion, he repeatedly expressed his unhappiness over TSU's custom of having prayers offered at university functions such as graduation exercises, faculty meetings, dedication ceremonies, and guest lectures.

Responding to a complaint from Dr. Chaudhuri, the general counsel of the State University and Community College System of Tennessee issued an opinion letter to its member institutions in May of 1988. The letter stated that prayers at university events are not unconstitutional if they do not appear to favor or endorse any particular religious view. The letter went on to suggest that a moment of silence would be an "appropriate vehicle for allowing the tradition of prayer without running afoul of the Constitution."

Based on this opinion letter, perhaps, TSU officials decided that prayers at university events should be of a "generic," nonsectarian nature. Many of the newly genericized prayers were

delivered by Dr. James Haney, a clergyman and associate professor of history. Such prayers were also offered by local religious leaders at the invitation of TSU. The university did not review the prayers in advance and did not provide any guidelines for content, other than to request that the prayers be nonsectarian and that references to Jesus Christ be omitted.

The following prayer, delivered by Dr. Haney at commencement exercises in May of 1991, was typical:

> Let us pray. Most Heavenly Father, we're thankful for the opportunity to gather here in honor of this class of 1991. For we know that there are so many stories and so many here that are a part of this class today, and we're so grateful, O Heavenly Father, that you've allowed us to come to this occasion, so that we might be able to understand in God all things are possible. "And so Most Heavenly Father, we thank you for allowing those that have come from such a long distance so that they too might be a part of this great celebration today. With all its important faculty, Tennessee State University is a great institution, and it is a great institution because of the people who are in Tennessee State University.
>
> And so we're thankful for the faculty that has prepared this class for graduation today. Sometimes it looked as if the prospects for some of them completing the task were quite dim. But we know that they held on through all the trials and tribulations, and they believed in themselves and they believed in Tennessee State University, and so they are part of it today.
>
> We're thankful for the Administration here at Tennessee State University. Our new president, may he be able to be blessed with the kind of vision that is needed so that he might lead us into the 21st century. O Heavenly Father, we thank Thee for the Maintenance Department and the Janitorial Department, and everybody and everything that had anything to do with the greatness of this great institution.
>
> Bless us as we go throughout this program. Give us all the things that we need. And deliver us, Most Lovable Heavenly Father, from pessimistic expectations. These and all blessings we ask from a God that we know, let us all say ... Amen.

Dr. Chaudhuri filed his civil rights action against the State of Tennessee, TSU, and several TSU administrators in January of 1991. The complaint . . . alleged that the practice of

offering prayers at TSU functions violated rights protected by the Establishment and Free Exercise Clauses of the First Amendment.

Dr. Chaudhuri asserted that, as a TSU faculty member, he was required to attend university functions at which prayers were offered. His performance evaluations were based in part on a "university service" component, and he maintained that this included participation in university events.

The defendants responded that Dr. Chaudhuri was not required to attend the functions in question and did not receive lower scores for absenting himself. Faculty members were encouraged to attend certain university-wide events, according to the defendants, but were not required to do so. Attendance was not monitored. The defendants represent that no employee of TSU – including Dr. Chaudhuri – has suffered any adverse consequences for failing to attend a university function of the sort with which we are concerned in this case.

In April 1993 Dr. Chaudhuri moved for a preliminary injunction that would have prevented the offering of a prayer at commencement exercises scheduled for the next month. At about the same time that the motion was filed, TSU President James Hefner issued a policy statement announcing that there would be no verbal prayers at the exercises. He informed graduation planners that a moment of silence would be acceptable to "afford dignity and formality to the event ... and to solemnize the occasion." On the strength of the new TSU policy, the district court denied Dr. Chaudhuri's request for injunctive relief.

The program for the May graduation exercises included a moment of silence. On reaching that point in the program, the speaker asked everyone to rise and remain silent. The moment that followed proved less than silent. Someone, or a group of people, began to recite the Lord's Prayer aloud. Many audience members joined in – spontaneously, by all accounts – and loud applause followed. TSU officials say they had no advance knowledge of what was going to happen.

Dr. Chaudhuri filed a second motion for a preliminary injunction, pointing out that prayers were still being delivered at university functions other than graduation ceremonies. In light of the incident at the graduation ceremony, he asked that moments of silence be enjoined as well. President Hefner responded with an affidavit stating that moments of silence would replace prayers at all university functions where prayers had been offered in the past. Dr. Hefner also attested that he had instructed his staff to clarify that faculty attendance at university events, while encouraged, was not mandatory. The district court denied the injunction.

Summer graduation exercises were scheduled for early August 1993. The keynote speaker was Dr. David Jones, Jr., a prominent educator and administrator in the Nashville public school system. As noted in the commencement program, Dr. Jones was also the pastor at a local church. When Dr. Jones asked the audience to stand for a moment of silence, a portion of the audience again

recited the Lord's Prayer. TSU officials denied complicity in this incident as well. The defendants eventually moved for summary judgment on all of Dr. Chaudhuri's claims. In January of 1995 the district court granted the motion on the Establishment Clause and Free Exercise Clause claims. *Chaudhuri v. State of Tennessee*, 886 F. Supp. 1374 (M.D.Tenn.1995). After a final judgment had been entered, Dr. Chaudhuri appealed the disposition of his First Amendment claims.

II.

* * * *

A.

Although the university has abandoned its practice of including verbal prayers at its events, Dr. Chaudhuri's challenge to that practice remains a live controversy insofar as he is seeking money damages on account of it. His claims for injunctive and declaratory relief with respect to the prayers appear to have become moot, however.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court adopted a three-part test for determining whether state-sponsored activity can pass muster under the Establishment Clause:

> First, the [state action] must have a secular ... purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [state action] must not foster an excessive government entanglement with religion. (Citations and quotation marks omitted.)

Although widely criticized and occasionally ignored, the Lemon test "still appears to govern Establishment Clause cases." *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir.1992) (en banc); see also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("we do not accept the invitation ... to reconsider our decision in *Lemon v. Kurtzman*"); *Agostini v. Felton*, 520 U.S. 1141 (1997) (applying *Lemon*).

1.

In considering whether a challenged state action has a "secular purpose" under *Lemon*, we inquire "whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quotation and citation omitted). The government's purpose need not be exclusively secular, *Lynch v. Donnelly*, 465 U.S. 668, 681 and n. 6 (1984). Unless it seems to be a sham, moreover, the government's assertion of a legitimate secular purpose is entitled to deference. *Edwards*, 482 U.S. at 586-87. We must be cautious about attributing unconstitutional motives to state officials.

TSU's former practice of including nonsectarian prayers at its events met the "secular purpose" element of the *Lemon* test, in our opinion. A prayer may serve to dignify or to memorialize a public occasion. As TSU puts it, quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in the judgment), the prayers "solemniz[ed] public occasions, express[ed] confidence in the future, and encourag[ed] the recognition of what is worthy of appreciation in society." These are legitimate secular purposes. See *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir.), *cert. denied*, 522 U.S. 814 (1997). We do not believe that these asserted purposes are a sham designed to allow TSU to proselytize students and faculty members. Any prayer has a religious component, obviously, but a single-minded focus on the religious aspects of challenged activities – which activities, in an Establishment Clause case, are religiously oriented by definition – would extirpate from public ceremonies all vestiges of the religious acknowledgments that have been customary at civic affairs in this country since well before the founding of the Republic. The Establishment Clause does not require – and our constitutional tradition does not permit – such hostility toward religion. The people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.

Rejecting the label "nonsectarian," Dr. Chaudhuri and amicus curiae (the National Committee for Public Education and Religious Liberty) persist in labeling the prayers in question as "Christian." The plaintiff and the Committee imply that TSU's purpose in allowing the prayers was to advance the cause of Christianity. But these prayers, lacking any explicit or implicit reference to Jesus Christ, do not strike us as overtly Christian. The prayers did, to be sure, evoke a monotheistic tradition not shared by Hindus such as Dr. Chaudhuri. But "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh v. Chambers*, 463 U.S. 783, 794- 95 (1983).

If the verbal prayers had a legitimate secular purpose, as we believe they did, it follows almost a fortiori that the moments of silence have such a purpose . . . . The record in the case at bar shows that TSU President Hefner instituted the moment of silence in order to "afford dignity and formality to the event ... and to solemnize the occasion." A moment of silence is clearly a legitimate way to accomplish those objectives.

Dr. Chaudhuri contends that the moments of silence are a ruse designed to foster prayer at TSU functions. In this connection he cites the 1988 opinion letter in which the general counsel of the State University and Community College System said that a moment of silence would be an "appropriate vehicle for allowing the tradition of prayer...." That is not the purpose asserted by TSU's president, however – and for reasons already suggested, we do not believe that the Constitution would be offended if it were.

Dr. Chaudhuri also protests that, on each of two separate occasions, members of a graduation audience interrupted a moment of silence with a recital of the Lord's Prayer. But Dr. Chaudhuri admits that there is no evidence of complicity by the university in these incidents. Amicus curiae suggests that the university's failure to admonish the crowd amounted to encouragement or endorsement of the recitation of this Christian prayer. We disagree. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). The Establishment Clause does not require TSU to silence an audience of private citizens.

2.

We must also determine whether the principal or primary effect of the challenged state action either advances or inhibits religion. *Lemon*, 403 U.S. at 612. This part of the test requires us to consider the reaction of a hypothetical reasonable observer. If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of religion, then the challenged practice is unlawful.

The principal or primary effect of including generic prayers at public university functions, in our view, is not to advance or inhibit religion. A reasonable observer, it seems to us, would conclude that the nonsectarian prayers delivered at TSU events were intended to solemnize the events and to encourage reflection. A reasonable observer would not conclude that TSU was trying to indoctrinate the audience. It would not be reasonable to suppose that an audience of college-educated adults could be influenced unduly by prayers of the sort in question here. If these prayers "endorsed" religion, the endorsement was indirect, remote, and incidental – and a de minimis religious gesture does not, by itself, create an Establishment Clause problem. *Lynch*, 465 U.S. at 683; *Tanford*, 104 F.3d at 986. The prayers were no more than a "tolerable

acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792 (1983).

As far as the moment of silence is concerned, it seems even clearer to us that the primary effect entails no significant advancement or inhibition of religion. No reasonable observer could conclude that TSU, merely by requesting a moment of silence at its functions, places its stamp of approval on any particular religion or religion in general. A moment of silence is not inherently religious; a participant may use the time to pray, to stare absently ahead, or to think thoughts of a purely secular nature. The choice is left to the individual, and no one's beliefs are compromised by what may or may not be going through the mind of any other participant.

3.

To pass the final part of the *Lemon* test, the challenged government action must avoid excessive entanglement of church and state. *Lemon*, 403 U.S. at 613. It does not seem to us that the practice of including nonsectarian prayers or moments of silence at TSU events creates any church-state entanglement at all, let alone "excessive" entanglement. As to the inclusion of prayers, the role of TSU officials consisted of: (1) inviting a local church leader to deliver an invocation and benediction, and (2) requesting that the prayers be nonsectarian in nature. TSU neither reviewed the prayers nor prescribed guidelines for their content, except to request that there be no reference to Jesus Christ. The moments of silence involved no interaction whatever between TSU administrators and any church – and there is, as we have said, nothing inherently religious about a moment of silence.

In sum, any entanglement resulting from the inclusion of nonsectarian prayers at public university functions is, at most, de minimis. See *Tanford*, 104 F.3d at 986. The entanglement created by a moment of silence is nil. Part three of the *Lemon* test poses no more of a problem here than do parts one and two.

B.

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court held it unconstitutional to offer nonsectarian prayers at public middle school and high school graduation exercises. The "dominant facts mark[ing] and control[ling]" the Court's decision were these: "State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for public schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school does not require attendance as a condition for receipt of the diploma." *Id*. at

586. While the graduation exercises in *Lee* were technically not mandatory, the Court thought it would be "formalistic in the extreme" to say that there was any real choice to miss "the one school event most important for the student to attend." *Id*. at 595, 597. In the primary and secondary school context, moreover, there is "subtle coercive pressure" to conform to the state-directed religious exercise. *Id*. at 592. "The prayer exercises in this case are especially improper," the Court concluded, "because the State has in every practical sense compelled attendance in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Id*. at 598.

Lee v. Weisman does not control the case at bar. In fact, the *Lee* Court explicitly declined to decide the question presented here: "Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not ... place primary and secondary school children in this position." *Id*. at 593. *Lee* attached particular importance to the youth of the audience and the risk of peer pressure and "indirect coercion" in the primary and secondary school context. "[T]here are heightened concerns," the Court emphasized, "with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id*. at 592. In contrast to *Lee*, "here there was no coercion – real or otherwise – to participate" in the nonsectarian prayers. *Tanford*, 104 F.3d at 985. Faculty attendance at TSU functions is encouraged but not mandatory. TSU has represented without contradiction that it does not monitor faculty attendance at the university events in question and that no faculty member has ever been penalized for non-attendance. The dean of the engineering school has attested that Dr. Chaudhuri's attendance or non-attendance never affected his evaluations. By no stretch of the imagination can we say that Dr. Chaudhuri's attendance at TSU graduation exercises was "in a fair and real sense obligatory." *Lee*, 505 U.S. at 586. Even if Dr. Chaudhuri had been obliged to attend these events, moreover, he would not have had to participate in the prayers or pay any attention to them. See *Tanford*, 104 F.3d at 985. There was absolutely no risk that Dr. Chaudhuri – or any other unwilling adult listener – would be indoctrinated by exposure to the prayers. The peer pressure and "subtle coercive pressure" that concerned the Court in *Lee* were simply not present here.

We cannot accept the notion that Dr. Chaudhuri was "coerced" into participating in the prayers merely because he was present. He may have found the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional. *Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation"). Dr. Chaudhuri and amicus curiae say that to focus on a plaintiff's relative maturity would be to turn the Establishment Clause into a children's rights measure. But the Establishment Clause clearly requires case-by-case examination of the

particular facts presented. *Lee*, 505 U.S. at 597-98. The Supreme Court has always considered the age of the audience an important factor in the analysis. See *Mergens*, 496 U.S. at 250; *Edwards*, 482 U.S. at 583-84; *Marsh*, 463 U.S. at 792 ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure") (citations omitted); cf. *Widmar*, 454 U.S. at 274 n. 14 ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion").

We may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are. To find a constitutional violation where there is no real threat to religious liberty would be to divorce Establishment Clause analysis from the very purpose of the clause. We conclude that the obvious difference between plaintiffs such as Dr. Chaudhuri and children at an impressionable stage of life "warrants a difference in constitutional results." *Edwards*, 482 U.S. at 584 n. 5 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring)).

III.

Dr. Chaudhuri also contends that TSU's prayers and moments of silence violate the Free Exercise Clause. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ") (emphasis added). Having found that Dr. Chaudhuri was not required to participate in any religious exercise he found objectionable, we conclude that his Free Exercise claim is without merit. There has been no showing that his practice of Hinduism was constrained or abridged in any way.

IV.

"The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religion exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Lee*, 505 U.S. at 598 (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)). TSU's bland expressions of gratitude (for the work of campus janitors, e.g.), like its expressions of hope for presidential vision and the blessings of divine providence generally, posed no real constitutional threat. They cast nothing more than shadows of constitutional concern. And

now that moments of silence have replaced verbal prayers at TSU, even those shadows have been dissipated.

The judgment of the district court is AFFIRMED.

NATHANIEL R. JONES, Circuit Judge, concurring and dissenting.

I write separately to express my disagreement with the majority's ambiguous treatment of the nonsectarian prayer-based challenge brought by Chaudhuri. I believe that the issue is ripe for consideration and should have been decided in favor of Chaudhuri. Still, I concur with the majority holding with respect to the moment of silence practices of Tennessee State University (the "University").

Although, as the majority opinion states, "we must be cautious about attributing unconstitutional motives to state officials", we must be equally – if not more so – vigilant to guard against quantifying the humiliation visited upon one who follows a non-Christian religion or tradition within a nation that maintains a strong Christian tradition . . . .

The violation here occurred due to an institutional refusal to abandon Christian prayer. Even though the University instructed those delivering invocations to eliminate the name "Jesus Christ" from their prayers, several of the speakers testified that the removal of that name constituted the only difference in prayers after the cessation of sectarian prayers.[2] The mere omission of the name Jesus Christ does not ipso facto render an otherwise Christian prayer neutral. Rather than determining that a particular name has been omitted from state-sponsored speech, we are required to determine whether the effect of a given state-sponsored practice establishes religion. "[W]e must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling dominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" Cf. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 597 (1989) (plurality opinion) (quoting *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

[2] A review of the prayer contained in the majority opinion reveals the following references to the Christian Deity:

> "Heavenly Father" contains a package of religious bias. First, the term, "heaven," is Christian. Although other religions may have some concept of an afterlife, the district imagery and technical lineage of that word stems from the Christian religions.
>
> Second, the term, "Father," denotes a single male deity. According to Chaudhuri's Hindu faith, there is a female deity, Durga, who resides on earth.

I find it significant that the prayer practices were initially Christian-based. It was only after repeated questioning by Chaudhuri that the University instituted the non-sectarian prayer policy. Given the context, it is likely that the nonsectarian prayers would have been viewed by Christian adherents as an attempt to preserve the tradition of Christian prayer. Moreover, as is clear from the litigation, inspired in some measure by the nonsectarian prayer policy, nonadherents perceived the policy as disapproving of their religious practices. While the prayers at issue here may not be "overtly Christian," even a slightly Christian prayer poses a serious constitutional problem, in my judgment.

The majority has applied a litmus test that will certainly confuse future officials and policy-makers confronted with the increasingly diverse religious orientation of the American public . . . . [U]pon a full consideration of the merits, I am convinced that the University sufficiently "established" religion to justify the grant of declaratory and injunctive relief in favor of Chaudhuri. To that extent, I, therefore, respectfully dissent.

Notes and Questions

1. Would this decision also apply to prayers at other college and university events, such as dedication ceremonies, public lectures, faculty meetings, and athletic events? What other variables or considerations may become relevant in such settings, and could these variables and considerations change the result from that in *Chaudhuri*?

2. If the plaintiff in *Chaudhuri* had been a student rather than a faculty member, would/should there have been any pertinent differences in reasoning or result?

3. Subsequent to the *Chaudhuri* decision, the U.S. Supreme Court decided another major case on prayers at school sponsored events, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which could have some effect on the continuing validity of *Chaudhuri*. See Text Section 1.6.4, p. 54. Should it make any difference that *Santa Fe* is a secondary education case while *Chaudhuri* is higher education? Are there relevant differences between elementary/secondary education and higher education that would call for some different application of the *Lemon* test or the coercion test at one level of education compared to the other?

4. For an earlier case similar to *Chaudhuri* and reaching the same result, see *Tanford v. Brand*, 104 F. 3d 982 (7th Cir. 1997). *Tanford* and *Chaudhuri* are discussed in Text Section 1.6.4, pp. 52-53.

B.

CHAPTER II: LEGAL PLANNING AND DISPUTE RESOLUTION

SEC. 2.2.2. Judicial (Academic) Deference

Kunda v. Muhlenberg College
621 F.2d 532 (3d Cir. 1980)

This case is set out in Part I (E) of these materials.

Notes and Questions

1. How does the appellate court justify the trial court's award of "conditional tenure" in light of its statements about the importance of deferring to academic judgment?

2. The court could have remanded Professor Kunda's tenure decision to the college for another review after she received her master's degree. Why did the court choose not to use this otherwise routine resolution to the case?

3. If the president had decided against tenure for Professor Kunda because he judged her scholarship and teaching to be inadequate, rather than because she lacked a master's degree, would the outcome of the case have been different?

SEC. 2.3. Alternate Dispute Resolution

California Faculty Association v. The Superior Court of Santa Clara County
75 Cal. Rptr. 2d 1 (Cal. Ct. App. 1968)

Bamattre-Manoukian, J.

This case arises from a decision by the president of San Jose State University denying tenure and promotion to a probationary faculty member. The matter was submitted to arbitration pursuant to the grievance procedure set forth in the collective bargaining agreement between the employer, the trustees of the California State University (hereafter CSU), and the California Faculty Association (hereafter CFA), which represented the aggrieved faculty member. The arbitrator overturned the president's decision and directed that the university grant tenure to the faculty member and promote her to the rank of associate professor. CSU then filed a motion in superior court to vacate the arbitration award.

The superior court granted the motion to vacate, pursuant to Code of Civil Procedure section 1286.2, subdivision (d), on the ground that the arbitrator had exceeded the authority given him under the terms of the collective bargaining agreement and the parties' stipulated submission. The court ordered that the matter be remanded for a new hearing before a different arbitrator. CFA now petitions this court for a writ of mandate directing the superior court to vacate its order and to confirm the arbitration award.

We will deny the writ petition and affirm the trial court's order.

BACKGROUND

In 1988, M. Rivka Polatnick (hereafter the grievant) was hired at San Jose State University (hereafter the University) as an assistant professor in the social science department. She was a probationary faculty employee, subject to periodic performance reviews for the purpose of retention. The normal probationary period was six years, after which time she would be considered and evaluated for tenure and promotion. A denial of tenure at the end of the six-year period would mean that she had no further reemployment rights. A grant of tenure would normally be accompanied by promotion to associate professor and would mean that she had the right to continued permanent employment at the University.

The grievant's letter of appointment in 1988 informed her generally of what was expected of her during her probationary period at the University: "The Social Science Department expect faculty members to demonstrate growth and accomplishment in academic,

professional and scholarly activities reflected by student and collegial teaching evaluations, the presentation of conference papers, the preparation of manuscripts for publication and other research-related activities. These expectations supplement the more general statement of criteria and standards contained in the University and School of Social Sciences policies on appointment, tenure, retention and promotion."

The University's criteria and standards were developed by the academic senate and are contained in a University policy document entitled"Appointment, Retention, Tenure, and Promotion Criteria, Standards, and Procedures for Regular Faculty Employees" (hereafter ARTP Policy). This document provides that "[e]xcellence in education is dependent above all upon the quality of the faculty. The purpose of these procedures for recruitment, retention, tenure, and promotion is to provide just recognition and encouragement of genuine achievement. The basic evaluation of faculty members' potential, performance and achievement should be made by their peers both within their department and their disciplines at large."

The University ARTP Policy sets forth the two "basic criteria" for evaluating a probationary faculty member: "effectiveness in academic assignment and scholarly or artistic or professional achievement." Scholarly achievement refers in general to "work based on research and entailing theory, analysis, interpretation, explanation or demonstration," and includes "books, articles, reviews, technical reports, computer software . . . or papers read to scholarly associations." The ARTP Policy further describes the guidelines for evaluating a faculty member's scholarly achievements: Such achievements "should be thoroughly evaluated by one's disciplinary peers, within and/or outside one's department, not merely enumerated. Acceptance of scholarly or artistic work by an editorial or review board (or jury) constitutes an evaluation of that work. Work in progress and unpublished work should be assessed whenever possible. When appropriate, professional contributions should be evaluated by professional persons in a position to assess the quality and significance of the contributions. Ordinarily the number or length of publications *per se* shall not be a criterion for tenure or promotion."

The ARTP Policy stresses that the decision regarding tenure is "perhaps the most important decision the university must make with respect to its faculty since, in effect, it represents a commitment on the part of the university which may entail three or four decades of service on the part of the faculty members. The granting of tenure is not solely a reward for services performed during the probationary years, but is an expression of confidence that a faculty member will continue to be a valued colleague, a good teacher and an active scholar, artist or leader in his or her profession. Accordingly, tenure decisions should be based upon thorough review of faculty members during their probationary years. . . . Tenure should be granted only to individuals whose record of teaching and contributions to their professional communities indicates the potential to earn promotion to the ranks of associate and full

professor." Because of its importance, "an award of tenure requires more than potential or promise." It requires that the candidate have made professional contributions to the particular discipline, evidencing "both the commitment to and the potential for continued development and accomplishment throughout the candidate's career."

The University ARTP Policy also sets forth the requirements for promotion to associate professor, which is the second highest academic rank. "The rank of associate professor presupposes that a faculty member has considerable academic or professional experience and accomplishments during the probationary period. . . . In addition [to academic effectiveness], there should be evidence that scholarly or artistic or professional activity is a continuing part of a faculty member's professional life. . . . [P]romotion to associate professor . . . require[s] demonstrable achievement or contribution to the candidate's discipline or professional community. Professional contributions should demonstrate the development of a candidate's potential for leadership in his or her professional community, or other valuable contributions to the profession. Similarly, a candidate's scholarly or artistic achievements should exhibit qualities of intellectual, artistic or professional competence and the promise of continuing development and growth on the part of the faculty member."

The University president has the ultimate authority to make tenure and promotion decisions. Such decisions, however, must be based upon information and documentation contained in the faculty member's personnel file, including recommendations from three separate retention and tenure committees – a department-level committee consisting of six tenured faculty, a college-level committee consisting of a representative from each of nine departments, and a university-level committee consisting of a representative from each of nine colleges – as well as from the dean of the college and the associate academic vice-president for faculty affairs. Only tenured full-time faculty and academic administrators may engage in deliberations and make recommendations to the president regarding the evaluation of a probationary faculty member. Each participant in this peer review process "must be thoroughly trained in the use of the present university policy on Appointment, Retention, Tenure, and Promotion Criteria, Standards, and Procedures for Regular Faculty Employees. Department chairs, college deans, and the Associate Academic Vice President for Faculty Affairs shall arrange for appropriate training in the application of this policy." At all levels of review, the probationary faculty member is to be given a copy of the recommendations and may submit a rebuttal or response and/or request a meeting to discuss the recommendation.

Pursuant to ARTP Policy standards and procedures, the grievant in this case was evaluated for retention during every year of her six-year probationary period, with the exception of one year. During the academic year 1994-1995, she was evaluated for tenure and promotion. The evaluation process produced 721 pages of materials, which comprised her dossier, or

personnel file. Her reviewers were divided on their recommendations. With respect to the evaluations for tenure, the vice president, seven members of the university committee, two members of the college committee and five members of the department committee recommended granting tenure. Two members of the university committee, five members of the college committee, one member of the department committee and the dean voted against granting tenure. With respect to promotion, the votes were similar except that the college committee voted one in favor of promotion and six opposed.

Robert Caret, the university president, reviewed the documentation and recommendations and decided against granting tenure and promotion. In a letter to the grievant dated May 26, 1995, he wrote: "After reviewing the recommendations of your peers, the appropriate administrators and the record set forth in your 1994-1995 dossier, I have decided that the University will not continue your employment beyond May 31, 1996. This decision was made after considering your record and the evaluations of all reviewers. This assessment shows that you have not met the criteria for tenure at the rank of Assistant Professor at San Jose State University. While you have achieved a record of effectiveness in academic assignment, your record [of] scholarly productivity is meager and does not express confidence that you will continue to be an active scholar in your profession. Given this evidence, I have decided that 1995-1996 will be your terminal year."

Polatnick filed a grievance in accordance with the procedures provided in the collective bargaining agreement (hereafter the agreement) between CSU and CFA. The agreement provides first for an informal dispute resolution process, which is mandatory. This involves a certain period of time during which the grievant presents a written claim and may request a meeting with the president, at which the grievant has the right to representation by the CFA. If the claim is thereafter denied, the president must provide a written response, stating the reasons for denying it. In this case, no resolution was reached during this informal period and the grievant then requested arbitration, pursuant to article 10.7 of the agreement. The arbitration was conducted on April 30, 1996 and May 14, 1996.

Article 10.18 of the collective bargaining agreement describes the arbitration procedure. Subdivisions (d), (e) and (f) specifically delineate the authority of the arbitrator respecting tenure and promotion disputes. Since the limits of the arbitrator's authority are at the heart of the issue before us, we set forth these paragraphs in full:

"10.18 *Arbitration*

"(d) The arbitrator's award shall be based solely upon the evidence and arguments appropriately presented by the parties in the hearing and upon any post-hearing briefs.

“(e) The arbitrator shall have no authority to add to, subtract from, modify or amend the provisions of this Agreement.

“(f) The authority of an arbitrator with respect to granting appointment, reappointment, promotion or tenure shall be as follows:

“In cases involving appointment, reappointment, promotion or tenure, the arbitrator shall recognize the importance of the decision not only to the individual in terms of his/her livelihood, but also the importance of the decision to the institution involved.

“The arbitrator shall not find that an error in procedure will overturn an appointment, reappointment, promotion, or tenure decision on the basis that proper procedure has not been followed unless:

> “1. there is clear and convincing evidence of a procedural error; and
>
> “2. that such error was prejudicial to the decision with respect to the grievant.

“The normal remedy for such a procedural error will be to remand the case to the decision level where the error occurred for reevaluation, with the arbitrator having authority in his/her judgment to retain jurisdiction.

“An arbitrator shall not grant appointment, reappointment, promotion or tenure except in extreme cases where it is found that:

> “1. the final campus decision was not based on reasoned judgment;
>
> “2. but for that, it can be stated with certainty that appointment, reappointment, promotion or tenure would have been granted; and
>
> “3. no other alternative except that remedy has been demonstrated by the evidence as a practicable remedy available to resolve the issue.

“The arbitrator shall make specific findings in his/her decision as to the foregoing.

"In the event the CSU seeks to vacate an arbitration award in the manner prescribed by the California Code of Civil Procedure, the court may, among the other matters it considers, determine whether or not the arbitrator has exceeded his/her authority with respect to the foregoing."

Consistent with these provisions of the collective bargaining agreement, CSU and CFA stipulated that the issue submitted to the arbitrator was: "[D]id [the university president] engage in reasoned judgment in denying tenure and promotion to [the grievant]? If not, what is the appropriate remedy?" The parties agreed that the grievant bore the burden of showing conclusively that the university president did not engage in reasoned judgment and that she was entitled to tenure and promotion.

After hearing testimony from a number of witnesses, including the grievant herself, regarding her academic performance and scholarly achievement, the arbitrator concluded, in the language of the collective bargaining agreement, that "the final campus decision by [the university president] was not based on reasoned judgment; but for that, it can be stated with certainty that promotion and tenure would have been granted; there is no other alternative remedy available." The arbitrator stated his reasons, finding that the evidence showed conclusively that the grievant was an excellent teacher and was effective in academic assignment. As to her scholarly productivity, the arbitrator disagreed with the university president's assessment of the grievant's achievements in this area and stated that he was persuaded by the witnesses who testified favorably upon the quality of the grievant's scholarly performance. The arbitrator directed that the university president grant tenure to the grievant and promote her to the rank of associate professor, with full benefits. The decision, dated July 18, 1996, was made effective May 27, 1996.

CSU filed a motion in superior court to vacate the arbitration award under Code of Civil Procedure section 1286.2, subdivision (d), on the ground that the arbitrator had exceeded his authority under the collective bargaining agreement by substituting his judgment for the president's on the quality of the grievant's scholarly achievements. CFA filed a motion to confirm the arbitrator's award. Each party opposed the other's motion.

The superior court, in an order dated June 11, 1997, granted the motion to vacate the arbitration award and denied the motion to confirm. The court noted its limited scope of review and acknowledged that it was not the function of the court to rule on the correctness of either the arbitrator's decision or the decision of the University president. The court found, however, that the arbitrator did not decide the question before him using the limited standards of review set forth in the collective bargaining agreement. The court therefore remanded the matter for another hearing before a new and different arbitrator.

CFA filed a petition for a writ of mandate in this court, seeking to vacate the superior court's order. We asked for opposition and then issued an alternative writ commanding the superior court to show cause why the relief sought should not be granted. Both parties have now responded to the order to show cause and the matter has been fully briefed and argued.

ISSUES

Standard of Review

It is well settled that the scope of judicial review of arbitration awards is extremely narrow. . . . Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award. ". . . an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 6 (1992); see also pp. 25-28.) These rules "vindicate[] the intentions of the parties that the award be final" (*id*. at p. 11) and support the "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Id*. at p. 9, quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312 (1983).)

Consistent with this policy, the Legislature has specifically set forth, in Code of Civil Procedure section 1286.2, subdivisions (a) through (f), the *only* grounds which will justify vacating an arbitration award. Subdivision (d) is the relevant subdivision here. Under that subdivision, a court "*shall*" vacate the award if it determines that "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.2, subd. (d).) In determining whether the arbitrators exceeded their powers, courts must give "substantial deference to the arbitrators' own assessments of their contractual authority . . . ." A deferential standard is in keeping with the general rule of arbitral finality and ensures that judicial intervention in the process is minimized. "A rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality."

. . [A]lthough an arbitrator generally enjoys substantial discretion to determine the scope of his or her contractual authority, courts are bound to uphold the parties' express agreement to restrict or limit that authority. Otherwise, arbitrators would possess the "unusual power" of being able to determine their own jurisdiction and Code of Civil Procedure section 1286.2, subdivision (d), would be a nullity.

Guided by these standards, this court conducts a de novo review, independently of the trial court, of the question whether the arbitrator exceeded the authority granted him by the parties' agreement to arbitrate.

The Scope of the Arbitrator's Authority in the Collective Bargaining Agreement

At the outset it is important to recognize that the agreement in this case does not contain a standard arbitration clause, whereby the parties typically agree to arbitrate any or all disputes arising out of a particular contractual relationship. . . .

The agreement before us is quite different. Here the decision on tenure and promotion is not submitted to arbitration in the first instance. Instead, the arbitrator sits in a reviewing capacity. By the time a faculty status matter is submitted to arbitration, the University president will have reached a decision after a lengthy peer review process involving evaluations and recommendations from between 20 to 30 faculty members and administrators. And the grievant will have had the opportunity to participate in a mandatory review and resolution process within the University.

The parties' agreement regarding arbitration sets forth a detailed two-tiered scope of review regarding faculty status decisions, clearly reflecting an intent that the arbitrator have only limited authority in this area. (Art. 10.18, subd. (f).) The arbitrator is not empowered to decide, or even to redecide, the issue whether a particular candidate is worthy of tenure or promotion. Rather the arbitrator's limited task is to review the decision-making process, under certain specific standards. If the arbitrator finds, by "clear and convincing evidence," that there has been error in the procedure which was prejudicial to the grievant, the arbitrator is authorized to remand the case "to the decision level where the error occurred" so that the decision-makers can reevaluate and correct the error. (Art. 10.18, subd. (f).) Only in "extreme cases" is the arbitrator authorized to directly grant tenure or promotion. If the arbitrator takes this extreme measure, he or she must make three specific findings supporting that action. He or she must find that the decision made by the president regarding faculty status "was not based on reasoned judgment." Second, the arbitrator must be able to state "*with certainty*" that, but for the lack of reasoned judgment, the candidate would have been granted tenure or promotion. Finally, the arbitrator must find that there was "no other . . . practicable remedy available to resolve the issue." (Art. 10.18, subd. (f).)

Acknowledging "the importance of the [faculty status] decision," not only to the candidate but also to the University, the parties have chosen to treat such decisions differently from other areas of possible dispute arising from the agreement, as to which the arbitrator enjoys broader powers. Subdivision (i) of article 10.18 provides that "[t]he standard of review for the

arbitrator in other than faculty status cases is whether the CSU violated, misapplied, or misinterpreted a specific term(s) of this Agreement."

Thus, unlike the arbitration agreements interpreted in the extensive body of case law on this subject, the parties here have taken pains to define the issue to be arbitrated and to specifically describe the limits of the arbitrator's review authority and the available remedies. As a further safeguard, the parties have included a paragraph allowing for the possibility of judicial review of the arbitrator's exercise of authority with respect to faculty status decisions. It provides that if the University seeks to vacate the award, the court may determine, among other things it considers, "whether or not the arbitrator has exceeded his/her authority . . . ." (Art. 10.18, subd. (f).)

The limited review accorded tenure decisions by the parties' arbitration agreement furthers the University ARTP Policy, which provides that such decisions be made only after a comprehensive peer review process to assess and evaluate a candidate's professional qualifications and achievements. Furthermore, important public policy interests are served by restricting judicial, or as in this case arbitral, review of a University's decisions regarding lifetime academic tenure. Such decisions, because they "'comprehend discretionary academic determinations which . . . entail review of the intellectual work product of the candidate . . . [are] most effectively made within the university . . . .'" (*Pomona College v. Superior Court* (1996) 45 Cal. App. 4th 1716, 1724-1725, quoting *Kunda v. Muhlenberg College* (3d Cir. 1980) 621 F.2d 532, 547-548.) "'[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution.'" (*Id*. at p. 548.)

"'Wherever the responsibility lies within the institution, it 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.' [Citation.]

"Such deference toward academic expertise is further warranted because the essential characteristic of tenure is continuity of service, in that the institution in which the teacher serves has relinquished the freedom or power it otherwise would possess to terminate the teacher's service. [Citation.] This enormous commitment of subsidizing a qualified scholar's research and teaching for the rest of his or her life is how a college or university ensures freedom of teaching and research and of extramural activities, and a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security,

hence, tenure, are indispensable to the success of an educational institution in fulfilling its obligations to its students and to society. [Citation.]

"These purposes of tenure can be fulfilled only if the individuals selected to receive tenure in fact possess the intellectual and personal qualifications to carry out the institutions' essential missions of research and instruction. Those granted tenure define the intellectual character of the institution for decades after their selection. The determination each year of who should receive tenure thus has the potential either to greatly enrich the institution and its students or to jeopardize the institution's very existence.

"Only one group of people is suited to undertake the responsibility of making these decisions: the candidate's academic peers who are knowledgeable about the candidate's chosen field of study and about the particular needs of the institution. These peers, unlike nonacademics, are equipped to evaluate the candidate's teaching and research according to their conformity with methodological principles agreed upon by the entire academic community. They also have the knowledge to meaningfully evaluate the candidate's contributions within his or her particular field of study as well as the relevance of those contributions to the goals of the particular institution. Moreover, because their individual academic reputations are intertwined with that of the university, the candidate's peers have the greatest stake in choosing people whose future work will reflect favorably on the institution. It is for these reasons that courts have been reluctant to review the merits of a tenure decision . . . ." (*Pomona College v. Superior Court, supra*, 45 Cal. App. 4th at pp. 1725-1726, fns. omitted.)

Where the candidate's personnel file contains conflicting views of academic scholars, as is often the case, courts "cannot hope to master the academic field sufficiently to review the merits of such views and resolve the difference of scholarly opinion." (*Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984).) Courts have thus consistently reached the conclusion that ". . . universities should be 'free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities.'" (*Pomona College v. Superior Court, supra*, 45 Cal. App. 4th at p. 1726, quoting *Zahorik v. University, supra*, 729 F.2d at p. 94.)

The United States Supreme Court has observed that it is essential to academic freedom that a university is able to determine for itself on academic grounds who may teach. (*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); see also *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978)). Submitting the merits of such determinations for de novo review by a nonacademic would severely impact this freedom, and was neither intended nor provided for by the parties here.

The criteria and standards for evaluating a candidate for promotion or tenure are contained within the University ARTP Policy. These standards were developed by the academic senate and approved by the University president and are outside the scope of the collective bargaining agreement. The University policy statement acknowledges that the decision regarding tenure is "perhaps the most important decision the university must make with respect to its faculty since, in effect, it represents a commitment on the part of the university which may entail three or four decades of service . . . ." This decision is made only after a multilevel peer review process involving several committees formed for the specific purpose of evaluating candidates for tenure and comprised of tenured faculty members who have received training in the applicable criteria and standards. The ARTP Policy stresses that a candidate's qualifications, particularly in the area of scholarly achievements, must be "thoroughly evaluated by one's disciplinary peers, within and/or outside one's department . . . ." Although the parties agree to submit a grievance regarding the eventual tenure decision to arbitration by a nonacademic, it is clearly not for purposes of reevaluating whether the candidate is worthy of tenure and promotion, but simply to determine whether the decision-making process was flawed or the decision was not based on reason.

* * * *

Two previous arbitration decisions involving CFA and CSU, which interpreted the same arbitration clause in the parties' agreement were part of the record below. Although they are not precedential authority, we find them instructive. In a decision from California State University, Northridge, the arbitrator wrote: "Clearly, the language ["reasoned judgment"] does not mean that the University's determination to deny tenure is unassailable so long as it gives reasons for its action. If that were the case, there would be no purpose in having an arbitrator review the action, since in every case the University could undoubtedly state some reason to support denial of promotion or tenure. The parties have granted the arbitrator authority to judge the reasons that are proffered. But the negotiated language plainly contemplates that the parties did not intend to grant the arbitrator unfettered authority to redecide tenure and promotion decisions based on his or her own evaluation of the candidate's record, as indicated by the restrictive language which states that an arbitrator cannot overturn denial of appointment, promotion, or tenure 'except in extreme cases' and only if 'it can be said with certainty' that tenure would have been granted but for the lapse of 'reasoned judgment.'"

"The question for the arbitrator is not which way she would have balanced the scale, had the decision been hers to make. Rather, the question is whether the decision made by those charged with making it was not reasoned."[3]

In another decision, from California State University, Long Beach, the arbitrator explained that, "the 'reasoned judgment' criterion allows the University considerable discretionary authority in promotion and other faculty status matters. For an arbitrator to conclude that 'reasoned judgment' was not exercised in a particular case would normally require a strong showing, e.g., that the University's decision was based on criteria different from those set forth in established policies; that criteria were applied in an arbitrary, inconsistent or discriminatory manner; that evidence strongly in the applicant's favor was ignored; or that the decision-making process was demonstrably defective for some other concrete reason. The 'reasoned judgment' criterion gives an arbitrator the authority to protect faculty members against abuse of the University's discretion; it does not permit the Arbitrator to substitute his judgment for that of the University just because he or someone else might have evaluated the case differently."[4]

Under University ARTP Policy the president's decision regarding tenure or promotion amounts to an exercise of discretion, which must be based on an evaluation of numerous reviews and recommendations submitted by tenured faculty and administrators. The arbitrator's task, as set forth in the agreement and supported by important policy considerations, is not to undertake an independent evaluation of the grievant's performance and qualifications, but to determine whether the president's decision was based on reason, or in other words whether it constituted an abuse of discretion.

The Arbitrator's Decision

The arbitrator determined, and the parties do not disagree, that of the "Two Basic Criteria" to be considered in a faculty status decision, the focus in this case was on the grievant's scholarly or professional achievement. Thus, the issue before the arbitrator can be narrowed to the question whether this was an "extreme case[]" where the president's assessment that the grievant's scholarly and professional achievement was insufficient to meet the criteria for tenure was "not based on reasoned judgment."

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[3] In the Matter of a Controversy Between CSU and CFA re Denial of Tenure of Dr. Carol Kovach (1992) No. 222-92-G3a.

[4] In the Matter of a Controversy Between CFA and CSU, Involving the Grievance of Daniel Barber (1986) No. L85-933.

In this, we believe the arbitrator exceeded his authority. Although the arbitrator's award recites the language of the agreement in finding that the campus decision was "not based on reasoned judgment," the opinion itself clearly shows that the arbitrator disagreed with the president's evaluation of the grievant's scholarly achievement and substituted his own judgment for the president's.

Whereas the president had determined that the grievant's scholarly productivity [was] meager," and also somewhat belated, and he stated that he did not feel confident she would continue to be an active scholar in her profession, the arbitrator expressed a different opinion. He wrote: "I cannot agree that [the grievant's] scholarly productivity is 'meager.' Rather, I believe for an Assistant Professor with relatively few years of teaching and many burdens imposed upon her, her scholarly productivity is more than satisfactory under the standards for promotion and tenure."[5]

Furthermore, the arbitrator offered his own interpretation of University ARTP standards and criteria, which are matters outside the scope of the collective bargaining agreement. He expressed his view that the decision makers participating in the ARTP process had not evaluated the evidence properly: "This is another example of decision makers putting too much emphasis on the number of articles rather than the quality thereof." He suggested that the reviewers "should read the articles, be well informed about the reputation of the publication and not be concerned whether the cover of the journal is hard or soft."

The arbitrator clearly misperceived the authority granted him to perform a limited deferential review of the president's decision. He stated he believed he was in a *better* position than the president to evaluate the grievant's performance because ARTP Policy provided that the president make his decision based upon an evaluation of the written information and documentation contained in the grievant's personnel file. "I had an advantage which President Caret did not have," wrote the arbitrator. "He was working primarily and deciding from what lawyers call a 'cold record'; I heard the testimony and could form impressions of what witnesses knew and what they did not know about scholarship and other aspects of the Grievant's service." Thus the arbitrator based his decision in large part on evidence, which the president could not have considered under ARTP Policy. The arbitrator weighed this evidence and wrote that he was "very impressed by the testimony of witnesses . . . who commented favorably upon all aspects of the Grievant's performance including scholarship," while he discounted the views of some of the faculty reviewers who had voted to deny tenure, finding it "obvious" that they had "little or no idea of what the Grievant has accomplished in her publications."

[5] The grievant had one article accepted for publication in a recognized journal in her field, in December 1994, her tenure decision year, and also had authored an article that had been published in a book.

Finally, the arbitrator noted that he was impressed by the testimony of one committee member, who had not even been present when the recommendations were made regarding the grievant's faculty status, but who testified that "had he not been absent when the Grievant's case was heard, he would have been able to educate his fellow committee members on important aspects of the Grievant's service and scholarly publications."

We believe these excerpts from the arbitrator's opinion demonstrate precisely the kind of unwarranted interference with academic decision-making that the parties expressly sought to preclude. The arbitrator disregarded the clear intent of the parties as expressed in the restrictive language of the agreement describing a deferential review. Instead he undertook a reevaluation of the evidence, interpreted the applicable criteria and formed his own opinion regarding the grievant's scholarly achievement. The award thus fails to conform to the specific limitations of the parties' submission and intrudes on areas outside the scope of the arbitrator's authority.

We are well aware that the standard of review of arbitration awards discussed in *Moncharsh, AMD*, and the other cases in this area, generally prohibits courts from reviewing the validity of the arbitrator's reasoning, including any mistake of fact or law, and likewise prohibits judicial review of the sufficiency of the evidence supporting the award. CFA argues that we are bound to uphold the award under *Moncharsh* and *AMD* even if it appears it was the product of a mistake or erroneous reasoning. That is not the issue here, however. This is not a case, as in *Moncharsh*, where the arbitrator merely reached an erroneous decision. Here the arbitrator failed to adhere to the specific restrictions and limitations imposed on him by the parties and engaged in a decision-making process, which exceeded his authority. Thus, unlike *Moncharsh*, the arbitrator in this case "strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate." (*Moncharsh, supra*, 3 Cal. 4th at p. 28.)

* * * *

We conclude the arbitrator in this case failed to conform to the specific restrictions of the parties' agreement and engaged in a decision-making process outside the scope of his authority. In such a case a reviewing court *must* vacate the award on the ground the arbitrator has exceeded his or her powers. (Code Civ. Proc., § 1286.2, subd. (d).)

DISPOSITION

The petition for a writ of mandate is denied. The trial court's order vacating the arbitrator's award and remanding the matter for another hearing before a new and different arbitrator is affirmed. Each party is to bear its own cost.

Notes and Questions

1. Note that the arbitrator concluded that the grievant deserved to be awarded tenure, based upon testimony of other faculty members. What is the role of the arbitrator in this case? Where does the arbitrator's authority come from?

2. The court states that a reviewing court may not overturn an arbitration award based upon the arbitrator's mistake of fact, yet the court overturns this arbitration award. What grounds does the court cite for its decision?

3. Under what circumstances could an arbitrator find that a college president had not used "reasoned judgment" in making a tenure or promotion decision?

4. How can the parties draft contract language that will afford a grievant a fair review of the promotion and/or tenure decision-making process while respecting the roles of peer review and review by university administrators? Should an arbitrator ever be able to award tenure? What alternative remedies might be appropriate if a tenure decision was infected with discrimination or some other unlawful or inappropriate influences?

C.

CHAPTER III: THE COLLEGE'S AUTHORITY AND LIABILITY

SEC. 3.2.1. Institutional Tort Liability -- Overview

Lewis v. St. Cloud University
693 N.W.2d 466 (Minn. Ct. App. 2005)

OPINION BY: STONEBURNER, Judge

Appellant Richard D. Lewis challenges summary judgment granted to respondents St. Cloud State University (SCSU) and Minnesota State College & University System (MnSCU) dismissing his defamation claim. Appellant argues that respondents are liable as publishers of SCSU's student-run newspaper for defamatory statements about appellant published in the student newspaper. Because there is no genuine issue of material fact that respondents' policy prohibited SCSU from exercising any control over the content of the student newspaper, the district court did not err by concluding that respondents are not liable for defamation and by granting summary judgment.

FACTS

SCSU is a member of the MnSCU system and is governed by the MnSCU Board of Trustees. Minn. Stat. §§ 136F.02, .06, .10 (2004). The *University Chronicle* (the *Chronicle*) is the bi-weekly student-run newspaper at SCSU. Part five of MnSCU Board Policy 3.1, "Student Rights & Responsibilities," relating to student publications, provides in relevant part that "student-funded publications shall be free of censorship and advance approval of copy, and their editors and managers shall be free to develop their own editorial and news coverage policies." The policy is binding on SCSU.

Appellant is a faculty member of SCSU who has filed an age-discrimination charge against SCSU for demoting him from his position as Dean of the College of Social Sciences in Fall 2003. Shortly after appellant's demotion, the *Chronicle* published an article about appellant that included statements that, for purposes of summary judgment, are considered to be defamatory.

Appellant sued respondents asserting that, as publishers of the *Chronicle*, they are liable for the defamation. Respondents moved to dismiss under Minn. R. Civ. P. 12.02 (e) for failure to state a claim on which relief can be granted.

Because the parties presented materials outside of the pleadings, the district court treated the motion as one for summary judgment and granted judgment to respondents. The district court concluded that because respondents have no editorial control over the *Chronicle*, they cannot be held liable for defamatory statements published in the *Chronicle.* This appeal followed.

ISSUES

1. Did the district court err by concluding that respondents are not liable as publishers for defamatory statements published in the student-run newspaper because it is undisputed that respondents' policy prohibits SCSU from exercising any editorial control over the newspaper?

2. Did the district court abuse its discretion by not allowing appellant to conduct additional discovery prior to granting summary judgment?

3. Should respondent's motion to strike documents in appellant's supplemental appendix and statements in appellant's reply brief be granted?

ANALYSIS

I. Summary judgment on defamation claim

Two questions are considered on appeal from summary judgment: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Evidence must be viewed in the light most favorable to the nonmoving party, but "summary judgment cannot be defeated with unverified and conclusory allegations or by postulating evidence that might be developed at trial." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (quotation omitted).

Whether a state university and its governing authority can be liable as publishers of defamatory material contained in a student-run newspaper is a question of first impression in Minnesota. The district court relied on the policy that prohibits SCSU from exercising editorial control over the *Chronicle* and adopted the reasoning in two cases from other jurisdictions that have addressed the issue: *Milliner v. Turner*, 436 So. 2d 1300 (La. App. 1983), and *McEvaddy v. City Univ.*, 220 A.D.2d 319, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995).

In *Milliner*, the trial court granted judgment to state college faculty members on their defamation action against student newspaper reporters, and the reporters were granted judgment on their third-party action against a state university for defamation per se published in the student newspaper. *Milliner*, 436 So. 2d at 1301. Liability of the university was premised on: (1) a state statute making teachers answerable for damages caused by scholars under their superintendence when the teacher could have but failed to prevent the act that caused the damage; and (2) the trial court's holding that the university had recklessly failed to provide adequate faculty guidance to the student paper as required in the Student Guide, which required each student organization to have two faculty representatives as advisors for all their activities. *Id.* at 1302.

The Louisiana Court of Appeals reversed judgment against the state university based on its conclusion that the First Amendment to the United States Constitution precludes a state institution, including a state university, from exercising "prior restraint on expression with regard to public areas . . . because of its message, ideas, subject matter or its contents," and that the First Amendment preempts operation of the state law with regard to a university's right to and degree of control over its student publications. *Id.*

> The present situation is distinguishable from one in which a private newspaper, and its publisher, are involved in disseminating the news to the community or the public at large. The state may no more restrict the right of a private paper, or be held accountable for any libel it might publish, than can [state university] control or be responsible for possible libels published in its student paper. . . . The relationship between a university and its student newspaper is anomalous and cannot be compared with a publisher and its newspaper. The latter may exercise censorship to the fullest, as it deems commercially proper to do so, but the former is almost completely barred from censoring its student paper since that would be prior restraint and would impede the free flow and expression of ideas. *Id*. (citations omitted).

The Louisiana Court of Appeals relied in part on *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), for the proposition that the First Amendment to the United States Constitution precludes a state university's control over the content of a student newspaper. *Milliner*, 436 So. 2d at 1302. *Joyner* involved an appeal by the editor-in-chief of the official student newspaper of a university from a district court order denying his suit to reinstate university financial support of the newspaper and permanently enjoining future financial support for the campus newspaper, which had been denied support because the university disagreed with the newspaper's editorial policy. The Fourth Circuit Court of Appeals reversed the district court, stating:

> Fortunately, we travel through well[-]charted waters to determine whether the permanent denial of financial support to the newspaper because of its editorial policy abridged the freedom of the press. The First Amendment is fully applicable to the states, . . . and precedent establishes "that state colleges and universities are not enclaves immune from [its] sweep." A college, acting "as the instrumentality of the State, may not restrict speech . . . simply because it finds the view expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 180, 187, 92 S. Ct. 2338, 2345, 2349, 33 L. Ed. 2d 266 (1972).

Id. at 460 (citations omitted). The *Joyner* court noted that, "the principles reaffirmed in *Healy* have been extensively applied to strike down *every form* of censorship of student publications at state-supported institutions." *Id.* (emphasis added).

McEvaddy v. City Univ. of New York is a memorandum decision of an appellate division of the New York Supreme Court affirming summary dismissal of a defamation action against City University of New York based on an allegedly libelous article published in the student newspaper. 633 N.Y.S.2d at 4. The brief opinion is based on previous New York cases analyzing whether a student newspaper is an "agent" of the state institution for purposes of liability for defamation. *Id*. (citing *Mazart v. State of New York*, 109 Misc. 2d 1092, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981), which held that vicarious liability in a defamation case brought against the state fails where the state, as alleged principal, has no right of control over the alleged agent). *Mazart* based lack of control of a state college over a student newspaper on First Amendment restrictions on a state university's ability to censor such newspapers. *Mazart*, 441 N.Y.S.2d at 605-06. *McEvaddy* held that the presence of a faculty advisor to the paper, whose advice was not binding, and the financing of the paper through student activity fees dispensed by the university "do not demonstrate such editorial control or influence over the paper by [City University] as to suggest an agency relationship." *McEvaddy*, 633 N.Y.S.2d at 4.

Appellant points out that the cases relied on by the district court are lower-level court opinions from foreign jurisdictions that do not reflect any broad or widespread pattern. We disagree with this assertion; the cases relied on by the district court simply follow the firmly established policy of giving students on college campus as many first amendment rights protections as the community at large. See *Healy*, 408 U.S. at 180-81, *citing Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

Appellant insists that the issue in this case has nothing to do with whether respondents can or should censor the student newspaper, but is solely a matter of "who is legally responsible, as the publisher, for the libel?" We conclude that the district court properly rejected this strict-

liability argument and correctly focused on the issue of whether there was any evidence that respondents controlled or could have controlled the content of the publication.

"At common law, the general rule was that everyone involved with the publication of a defamatory statement or in procuring it to be published was equally responsible with the author." M. David LeBrun, Annotation, *Liability of Commercial Printers for Defamatory Statements Contained in Printed Matter Printed for Another*, 16 A.L.R.4th 1372, 1373 (1982). In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court, balancing the tension between the First Amendment to the United States Constitution and a state's interest in assuring compensation for wrongful harm to one's reputation, established a level of constitutional protection for publishers of defamation of a public person. See *id.* In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court held that "*so long as they do not impose liability without fault*, the states may define for themselves the appropriate standard of liability for a publisher of defamatory falsehood injurious to a private individual." *Id.* at 347 (emphasis added).

In Minnesota, the basis for holding the publisher of a newspaper vicariously liable for defamation in the newspaper is the relationship of principal and agent between the publisher and the newspaper. *See Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925) (applying principal/agent reasoning to determine liability of a newspaper publisher for alleged libel about a candidate for public office that appeared in one of publisher's newspapers). *Friedell* focused on the publisher's power to select his own employees and on whether the employees acted within the scope of their employment. *Id.* at 234, 203 N.W. at 977. *Friedell* explicitly notes the publisher's right to discharge employees and to control the content of the publication through control over its employees. *Id.*

As the district court in the case before us correctly noted, however, respondents' relationship with the *Chronicle* is, by virtue of MnSCU's policy and First Amendment constraints, significantly different from a private publisher's relationship with its newspapers. Respondents, unlike a private publisher, have no control over the content of the *Chronicle.* Despite the "plethora of connections" between *The Chronicle* and SCSU asserted by appellant and accepted by the district court for purposes of summary judgment,[6] it cannot be disputed that

[6] For purposes of summary judgment, it is undisputed that SCSU plays a role in selection of the *Chronicle's* editor, business manager, and faculty advisor; provides start-up operating funds at the beginning of each year; requires the *Chronicle* to undergo a certification process each year; allows the use of SCSU's trademarked logo; provides equipment, services, and facilities free of charge; provides a full-time faculty advisor employed by SCSU whose role is to represent and protect the interests of SCSU; requires the *Chronicle* to have a constitution and bylaws, which state that it exists for the benefit of, and concerning, the students, faculty, staff, administration, and St. Cloud community; and requires the *Chronicle* to submit an annual recognition form listing officers and pledging its compliance with all SCSU policies and procedures in the code of conduct and student-organization manual.

respondents' policy prohibits SCSU from exercising any control over the content of the *Chronicle*.

Appellant argues that the district court erred by failing to make an "informed and reasoned decision as to the responsibility" of respondents for the defamatory publication. Appellant relies on *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) which considered whether the act of a student newspaper constituted state action. *Sinn* did not involve a claim of defamation, but rather was an action against the newspaper itself, asserting that the newspaper's refusal to print plaintiff-roommate-advertisers' ads that indicated a gay or lesbian orientation violated the advertiser's First Amendment rights. *Id.* at 663. The Eighth Circuit affirmed the district court's conclusion that "as a result of [a] careful study of the many safeguards preventing the state from interfering with the [student newspaper]. . . the action of the newspaper was not 'fairly attributable' to the state."[7] *Id.* at 665. In reaching its conclusion, the Eighth Circuit rejected a per se rule either imposing or prohibiting attribution of a student newspaper's act to a state university, in favor of a case-by-case approach. *Id.* at 666.

Appellant asserts that in this case the district court erred by adopting a per se rule. Whether a per se rule is or is not appropriate in this case, we disagree with appellant's claim that the district court adopted a per se rule. The district court, contrary to appellant's assertions, made an informed and reasoned decision based on the specific facts of this case asserted by appellant and the undisputed MnSCU policy. We conclude that the district court's approach in this case is consistent with the approach in *Sinn* of determining each case on its underlying facts.

Appellant argues that to absolve respondents of liability for defamation based on MnSCU's policy is to carve out a "liability-free zone" that is contrary to public policy because it would deprive appellant of a remedy for the harm done to him. Appellant conceded that he might have a remedy against the author of the article or the editor of the *Chronicle*, but asserts that such a remedy is inadequate. We are not unsympathetic to this argument and recognize that our holding disadvantages some worthy plaintiffs, but we reject the assertion that this result is necessarily bad public policy. Justice Powell, writing in *Gertz* about a similar problem created for plaintiffs by the United States Supreme Court's holding in *New York Times v. Sullivan*, 376 U.S. at 283, stated:

> Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times*

[7] Appellant's complaint and argument is based on his argument that SCSU and MnSCU are publishers of the *Chronicle*. The district court in this case was not called upon to make the state-action analysis required in *Sinn.*

> privilege should be available to publishers and broadcasters . . . . We believe that the *New York Times* rule states an accommodation between [the interests of the press] and the limited state interest present in the context of a libel action brought by public persons.

Gertz, 418 U.S. at 342-43, (citation omitted). Holding that respondents are not liable for defamation as publishers of the student-run newspaper in this case is a similar accommodation between appellant's claim for compensation for harm and the First Amendment and policy restrictions placed on respondents.

* * * *

DECISION

Because MnSCU's policy, which is binding on SCSU, prohibits SCSU from exercising any editorial control over the contents of SCSU's student-run newspaper, the district court did not err by granting summary judgment to MnSCU and SCSU on appellant's claim that MnSCU and SCSU are liable for defamation published in the newspaper.

Affirmed; motion granted.

Notes and Questions

1. The court cites the seminal case of *Mazart v. State of New York*, which is discussed on pp. 807-809 of the Text. How does the court's analysis in *Lewis* compare with *Mazart*?

2. Given the outcome in *Lewis*, how would you recommend that colleges and universities structure their relationship, if any, with the student newspaper? Would the fact that a student newspaper has a faculty advisor be more likely to suggest that the institution has some control, and thus potential liability, for the acts of student editors and journalists?

3. Student newspapers receive student fees at some colleges and universities. Is the source of the newspaper's funding relevant in a situation where a plaintiff is seeking to hold the institution responsible for alleged negligence by student editors or journalists? For assistance with your answer, see *Rosenberg v. Rectors of the University of Virginia*, discussed in Sections 7.1.4 and 10.1.5 of the text.

SEC. 3.2.2. Negligence

Bradshaw v. Rawlings
612 F.2d 135 (3d Cir. 1979)

ALDISERT, Circuit Judge:

The major question for decision in this diversity case tried under Pennsylvania law is whether a college may be subject to tort liability for injuries sustained by one of its students involved in an automobile accident when the driver of the car was a fellow student who had become intoxicated at a class picnic. Another question relates to the liability of the distributor who furnished beer for the picnic that led to the intoxication of the driver. Still another question concerns the tort liability of the municipality where the plaintiff's injuries occurred.

The district court permitted the question of negligence to go to the jury against the college, the beer distributor and the municipality. From an adverse verdict of $1,108,067, each of the defendants has appealed, advancing separate arguments for reversal. The plaintiff has filed a conditional cross-appeal.[1]

I.

Donald Bradshaw, an eighteen-year-old student at Delaware Valley College, was severely injured on April 13, 1975 in Doylestown, Pennsylvania, while a backseat passenger in a Saab automobile driven by a fellow student, Bruce Rawlings.[2] Both were sophomores and had attended their class picnic at a grove owned by the Maennerchor Society on the outskirts of the borough.[3] Returning to the college from the picnic, Rawlings drove through Doylestown on Union Street, which is colloquially known as "Dip Street" because it was constructed with drainage dips, instead of sewers, to carry surface water runoff. While proceeding through one of the dips, Rawlings lost control of the automobile, which then struck a parked vehicle. As a result of the collision Bradshaw suffered a cervical fracture, which caused quadriplegia.

The picnic, although not held on college grounds, was an annual activity of the sophomore class. A faculty member who served as sophomore class advisor participated with

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[1] For convenience we refer to the plaintiff in the singular although joining the injured plaintiff, Donald Bradshaw, were his mother and stepfather who recovered $ 5,000 each.

[2] Saab Motor Company, the manufacturer of the vehicle, and Gilbert Rawlings, the owner of the vehicle, were originally named as defendants, but plaintiff voluntarily dismissed them.

[3] Although originally named as a defendant, the Maennerchor Society is not a party to this appeal.

the class officers in planning the picnic and co-signed a check for class funds that was later used to purchase beer. The advisor did not attend the picnic, nor did he get another faculty member to attend in his place. Flyers announcing the picnic were prominently displayed across the campus. They were mimeographed by the college duplicating facility and featured drawings of beer mugs. Approximately seventy-five students attended the picnic and consumed six or seven half-kegs of beer. The beer was ordered from Marjorie Moyer, trading as Sunny Beverages, by the sophomore class president, who was underage.

The legal drinking age in Pennsylvania was, and is, twenty-one years, but the great majority of the students drinking at the picnic were sophomores of either nineteen or twenty years of age. Rawlings had been at the picnic for a number of hours. He testified that he had no recollection of what occurred from the time he left the picnic until after the accident. Bradshaw testified that Rawlings had been drinking and another witness, Warren Wylde, expressed his opinion that Rawlings was under the influence of alcohol when he left the picnic grove. That there was sufficient evidence on the question of Rawlings' intoxication to submit to the jury cannot be seriously questioned.

II.

On appeal, the college argues that Bradshaw failed to present sufficient evidence to establish that it owed him a duty for the breach of which it could be held liable in tort. The district court, apparently assuming that such a duty existed, submitted the question of the college's liability to the jury, stating:

> In any event, the college owes a duty to use due care under the circumstances to prevent an unreasonable risk of harm to sophomores who attend a class function. Restatement (Second) of Torts §§ 282 and 283 (1965) provide:
>
> > § 282. Negligence Defined
> >
> > In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest in others.

§ 283. Conduct of a Reasonable Man:

The Standard

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Bradshaw v. Rawlings, 464 F. Supp. 175, 181 (E.D.Pa.1979). In its post-trial opinion, the district court attempted to justify this instruction by stating:

> I submitted this case to the jury on the above concept. The College was permitted to argue to the jury that it was not negligent because it was powerless to control the habits of college sophomores in regard to drinking beer. The jury rejected the College's defense that it acted in a reasonable manner under the circumstances. It should be noted that the College's liability is predicated on the concept of want of due care which a reasonable man would exercise under the circumstances. *Id.*

A.

The college's argument strikes at the heart of tort law because a negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant. "Negligence in the air, so to speak, will not do."[4] As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." "'Duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."[5] Thus, we may perceive duty simply as an obligation to which the law will give recognition in order to require one person to conform to a particular standard of conduct with respect to another person.

These abstract descriptions of duty cannot be helpful, however, unless they are directly related to the competing individual, public, and social interests implicated in any case. An interest is a social fact, factor, or phenomenon existing independently of the law that is reflected by a claim, demand, or desire that people seek to satisfy and that has been recognized as socially

[4] F. Pollock, *Law of Torts* 468 (13th ed. 1929).

[5] W. Prosser, *Law of Torts* 333 (3d ed. 1964).

valid by authoritative decision makers in society.[6] Certainly, the plaintiff in this case possessed an important interest in remaining free from bodily injury, and thus the law protects his right to recover compensation from those who negligently cause him injury. The college, on the other hand, has an interest in the nature of its relationship with its adult students, as well as an interest in avoiding responsibilities that it is incapable of performing.

B.

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment,[7] written[8] and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. For example except for purposes of purchasing alcoholic beverages, eighteen-year-old persons are considered adults by the Commonwealth of Pennsylvania. They may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective. Pennsylvania has set eighteen as the age at which criminal acts are no longer treated as those of a juvenile, and eighteen-year-old students may waive their testimonial privilege protecting confidential statements to school personnel. Moreover, a person may join the Pennsylvania militia at an even younger age than eighteen and may hunt without adult supervision at age sixteen. [All footnote cites omitted.] As a result of these and other similar developments in our society, eighteen-year-old students are now identified with an expansive

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[6] See, e.g., Pound, "A Survey of Social Interests," 57 *Harv. L. Rev*. 1; Llewwllyn, "A Realistic Jurisprudence: The Next Step," 30 *Colum. L. Rev*. 431, 441-47 (1930).

[7] Section one of the twenty-sixth amendment to the United States Constitution provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

[8] See, e.g., *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); *Papish v. Board of Curators*, 410 U.S. 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) (per curiam); *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.[9] In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will. In 1972 Justice Douglas summarized the change:

> Students who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.

Healy v. James, 408 U.S. 169, 197, 92 S. Ct. 2338, 2354, (1972) (Douglas, J., concurring).

Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred

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[9] See generally *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Healy v. James*, 408 U.S. 169, 171, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1971); See also *Report of the President's Commission on Campus Unrest* (1970); *Report of the American Bar Association Commission on Campus Government and Student Dissent* (1970); S. Kelman, *Push Comes to Shove: The Escalation of Student Protest* (1970); A. Adelson, *SDS* (4th ed. 1970).

because society considers the modern college student an adult, not a child of tender years. It could be argued, although we need not decide here, that an educational institution possesses a different pattern of rights and responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school. Under such circumstances, after weighing relevant competing interests, Pennsylvania might possibly impose on the institution certain duties of protection, for the breach of which a legal remedy would be available. See, e.g., *Chappel v. Franklin Pierce School District*, 71 Wash.2d 17, 426 P.2d 471 (1967); *McLeod v. Grant County School District*, 42 Wash.2d 316, 255 P.2d 360 (1953); Restatement (Second) of Torts § 320 (1965).[10] But here, because the circumstances show that the students have reached the age of majority and are capable of protecting their own self interests, we believe that the rule would be different.[11] We conclude, therefore, that in order to ascertain whether a specific duty of care extended from Delaware Valley College to its injured student, we must first identify and assess the competing individual and social interests associated with the parties.

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[10] § 320. Duty of Person Having Custody of Another to Control Conduct of Third Persons One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

[11] For example, Restatement (Second) of Torts § 315 (1965) states the general rule: There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

III.

A.

In the process of identifying the competing interests implicated in the student-college relationship, we note that the record in this case is not overly generous in identifying the interests possessed by the student, although it was Bradshaw's burden to prove the existence of a duty owed him by the college in order to establish a breach thereof. *Bradshaw* has concentrated on the school regulation imposing sanctions on the use of alcohol by students. The regulation states: "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action. The same rule will apply to every student regardless of age." *App*. at 726a-727a. We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case. We assume that the average student arrives on campus at the age of seventeen or eighteen, and that most students are under twenty-one during the better part of their college careers. A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its students so as to make operative the provisions of § 320 of the *Restatement (Second) of Torts*. See footnote 26, *Supra*.

Thus, we predict that the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm. Absent proof of such a relationship, we do not believe that a prima facie case of custodial duty was established in order to submit the case to the jury on this theory.[12]

B.

We next examine the facts adduced at trial to determine whether a special relationship existed as a matter of law, which would impose upon the college either a duty to control the conduct of a student operating a motor vehicle off-campus or a duty to extend to a student a right of protection in transportation to and from off-campus activities. We conclude that Bradshaw also failed to meet his burden of proving either of these duties. Bradshaw's primary argument is that the college had knowledge that its students would drink beer at the picnic, that this conduct

[12] See *Hegel v. Langsam*, 29 Ohio Misc. 147, 273 N.E.2d 351, 55 Ohio Op.2d 476 (1971).

violated a school regulation and state law, that it created a known probability of harm to third persons, and that knowledge by the college of this probable harm imposed a duty on the college either to control Rawling's conduct or to protect Bradshaw from possible harm.

Although we are aware of no Pennsylvania decision that has addressed this precise issue, the supreme court of that state has held that a private host who supplies intoxicants to a visibly intoxicated guest may not be held civilly liable for injuries to third parties caused by the intoxicated guest's negligence. *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). Only licensed persons engaged in the sale of intoxicants have been held civilly liable to injured parties, *Id*. at 239, 310 A.2d at 76 (citing *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550 (1964)), and the source of this liability derives from the common law, *Corcoran v. McNeal*, 400 Pa. 14, 161 A.2d 367 (1960), as well as from a violation of Pennsylvania's Dram Shop statute, 47 P.S. § 4-493(1), *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965). Because the Pennsylvania Supreme Court has been unwilling to find a special relationship on which to predicate a duty between a private host and his visibly intoxicated guest, we predict that it would be even less willing to find such a relationship between a college and its student under the circumstances of this case.

The centerpiece of Bradshaw's argument is that beer-drinking by underage college students, in and of itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and the means of exercising control over beer drinking by students at an off campus gathering. These contentions miss the mark, however, because they blur the distinction between establishing the existence of a duty and proving the breach thereof. Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity. Our national public policy, insofar as it is reflected by industry standards or by government regulation of certain types of radio-television advertising, permits advertising of beer at all times of the day and night even though Congress has banned advertisement of cigarettes[13] and the broadcasting industry has agreed to ban the advertisement of liquor.[14] What we know as men and women we must not forget as judges, and this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience. That this is true is not to suggest that reality always comports with state law and college rules. It does not. But the Pennsylvania law that prohibits sales to, and purchases by, persons under twenty-one

[13] 15 U.S.C. § 1335.

[14] National Association of Broadcasters, *The Television Code* 11 (19th ed. 1976); National Association of Broadcasters, *The Radio Code* 14 (20th ed. 1976).

years of age, is certainly not a universal practice in other countries,[15] nor even the general rule in North America.[16] Moreover in New Jersey, the bordering state from which the majority of Delaware Valley College students come, *App*. at 744a-746a, the legal drinking age is eighteen. Under these circumstances, we think it would be placing an impossible burden on the college to impose a duty in this case.

* * * *

Therefore, we conclude that Bradshaw failed to establish a prima facie case against the college that it should be charged with a duty of custodial care as a matter of law and that the district court erred by submitting the case to the jury.

* * * *

Notes and Questions

1. Could the college have better protected itself from potential liability in situations involving student activities and the consumption of alcohol? Would you suggest any changes in the college's written policies on alcohol? Any changes in enforcement of

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[15] For example, the legal age for drinking beer in Austria varies from state to state, ranging from fourteen to eighteen years; in Denmark, restaurants and hotels may not serve persons under eighteen; in England and Wales, a sixteen-year-old may purchase beer for consumption at a meal other than at a bar, otherwise the age requirement is eighteen; in France, minors less than sixteen years old may not enter bars unless accompanied by a parent or guardian, and must be eighteen in order to be served drinks stronger than beer or wine; in the Federal Republic of Germany, the legal age for drinking beer is sixteen and a juvenile over fourteen accompanied by an adult may buy or consume wine or beer in a public place; in Italy, the legal age is sixteen years; in the Netherlands, a hotel, restaurant or cafe may not sell beer to persons under sixteen but municipalities may prohibit by ordinance the sale to persons under twenty-one; in Norway, the legal age for drinking beer is eighteen, subject to the right of municipalities to impose tighter restrictions; in Sweden, the legal age is eighteen years; and in Switzerland, sixteen years. *Legal Drinking Age in the United Kingdom and Continental Europe* (November 1979) (Library of Congress Monograph, on file in the Library of the United States Court of Appeals for the Third Circuit, Pittsburgh Branch).

[16] Of the fifty states and the District of Columbia, only thirteen jurisdictions still retain the twenty-one year age requirement for the consumption of beer, while two require twenty years of age and nine, nineteen years. The remainder of the states permit beer drinking at age eighteen. *Information Please Almanc* 22 (1979).

None of the Canadian provinces or territories retain the twenty-one year age minimum. Seven place the legal drinking age at nineteen, and five at eighteen. *World Almanac* 136 (1979).

college alcohol policies? Any changes in the college's practices regarding supervision of student social functions? For cases discussing a college's duty to students with respect to social functions sponsored by fraternal organizations, see the Text Section 10.2.3.

2. Might the outcome of the case have differed if the picnic had occurred on a college field? In a residence hall? In a fraternity house? Regarding fraternities, consider the case of *Whitlock v. University of Denver,* discussed in the Text Section 3.2.2.5, in which the Colorado Supreme Court refused to find that the university owed a duty to a student injured while using a trampoline owned by a fraternity. Compare *Whitlock* with *Furek v. University of Delaware*, discussed in the Text Section 2.2.2.5. Can you distinguish the cases sufficiently to justify the opposing outcomes? Do these cases stand for the proposition that an institution can avoid liability by severing all ties, including the application of student codes of conduct, with fraternities? Is such a policy legally advisable? Educationally advisable? Should it matter whether the fraternity house is on-campus on university land or off-campus on land owned by others? For an extended discussion of institutional liability for torts committed by sorority and fraternity members, see the Text Section 10.2.3. For a discussion of institutional liability for torts committed off campus, see the Text Section 3.2.2.4.

3. While colleges and universities may escape liability for alcohol-related student injuries under certain circumstances, fraternity officers and others who procure liquor for or serve it to minors may be held liable for physical injuries to students involved subsequently in automobile accidents. See *Fassett v. Delta Kappa Epsilon,* 807 F.2d 1150 (3d Cir. 1986). The Supreme Court of Missouri, however, denied liability in a similar case because the state legislature had not passed a social host statute. *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W. 2d 547 (Mo. 1987).

4. Note the discussion in *Bradshaw* of the youth of most college students and the demise of *in loco parentis*, an issue also addressed in *Whitlock* (744 P.2d at 59-60), in *Mullins v. Pine Manor College* and in *Nero v. Kansas State University*, both of which are discussed in Section 7.6.2 of the Text. What implications do these matters have for risk management in higher education?

5. What types of actions or inactions of a college, and what types of circumstances, would serve to create legal duties to students? In regard to student consumption of alcohol? In regard to student social and recreational activities? In general? Compare *Bradshaw* and

Whitlock with *Mullins v. Pine Manor College*, where the court held that a legal duty to the student had been created.

6. Legal scholars have criticized *Bradshaw* and its progeny for placing the institution in a "bystander" role.

> *Bradshaw* [and its progeny] are variations of a common and sometimes deadly theme – alcohol, college students, and activities like driving, field trips, and dormitory and fraternity parties threaten student safety. Implicitly, these courts sensed the common theme and reacted to it in light of a common perception of the new relational reality on campus. The dominant image in these cases was that of newly empowered students who were beyond the control of the modern university. To the courts, the university was a helpless "bystander" to such student misconduct; no "duty" was owed to these "adults." Nor *should* a duty be owed given the "new" role of colleges.

Robert D. Bickel and Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* (Durham, NC: Carolina Academic Press, 1999), pp. 56-57.

SEC. 3.2.2.2. Negligence -- Premises Liability

Nero v. Kansas State University
861 P.2d 768 (Kan. 1993)

This case is reproduced in Section 7.6.2, along with questions regarding the institutional liability issues the case addresses.

SEC. 3.2.2.6

Student Suicide

Dzung Duy Nguyen v. Massachusetts Institute of Technology

96 N.E. 3d 128 (Mass. 2018)

OPINION BY**:** KAFKER, J.

The plaintiff, Dzung Duy Nguyen, commenced a wrongful death action against the defendants, Massachusetts Institute of Technology (MIT), MIT Professors Birger Wernerfelt and Drazen Prelec, and MIT assistant dean David W. Randall, arising out of the suicide of his son, Han Duy Nguyen (Nguyen). The defendants are alleged to have been negligent in not preventing Nguyen's suicide. The motion judge allowed summary judgment for MIT and the individual defendants, finding no duty to prevent Nguyen's suicide. Although we conclude that, in certain circumstances not present here, a special relationship and a corresponding duty to take reasonable measures to prevent suicide may be created between a university and its student, we affirm the decision of the motion judge that the defendants are entitled to judgment as a matter of law.

Background. We summarize the facts in the record in the light most favorable to the plaintiff. . . . We reserve additional facts for our discussion of the legal issues.

1. *The parties*. At the time of his death on June 2, 2009, Nguyen was a twenty-five year old graduate student in the marketing program at MIT's Sloan School of Management (Sloan) and lived off campus. Prelec was a Sloan faculty member and served as Nguyen's graduate research advisor. Wernerfelt was a Sloan faculty member and head of the Marketing Group Ph.D. program whose responsibility included advising graduate students concerning their coursework and research. Randall was an assistant dean in MIT's student support services (student support) office.

2. *MIT support resources*. In May, 2007, after his first academic year at MIT and two years before his death, Nguyen contacted Sloan's Ph.D. program coordinator, Sharon Cayley, for

assistance with test-taking problems. Nguyen explained to Cayley that he was “failing all of my classes because I don't know how to take [examinations (exams)]. I know the course material, but it just won't happen for me on exams.” Cayley then referred Nguyen to an MIT student disability services office coordinator, who described some of MIT's accommodations for individuals with disabilities. Nguyen declined such accommodations. In her notes from her meeting with Nguyen, the coordinator wrote that Nguyen “does *not* want to connect with MIT Medical. (I recommended that he do so.) Says it won't be helpful; no reason to do so.” (Emphasis in original.) After two meetings with the coordinator, Nguyen reported to Cayley that the meetings were of “absolutely no use … [the coordinator] seemed to think that because I was referred to her, that meant that I was disabled, and therefore had only disability accommodations to offer me.”

On June 25, 2007, Cayley referred Nguyen to MIT's mental health and counselling service (MIT Mental Health) and informed Wernerfelt that this referral was Cayley's “response to [Nguyen's] expressed need for remedial study skills.” On July 9, 2007, Nguyen met with Dr. Celene Barnes, a psychologist at MIT Mental Health. On meeting Barnes, Nguyen stated that he did not know why he “was referred here. My issues have nothing to do with [mental health].” During the intake meeting, Nguyen denied suicidal ideation. Barnes “provided [a] brief overview of [information] on test anxiety and gave him handouts used in the test anxiety workshop [and] [o]ffered to work with him on this issue.” Nguyen “declined, stating again that he did not want to seek[ ] services at [MIT Mental Health] due to the stigma associated with it.”

On July 25, 2007, Nguyen had a second appointment with Barnes. She conducted a general intake, which irritated Nguyen because “he didn't know what other [mental health] issues had to do with his test taking problem.” During this meeting, Nguyen disclosed to Barnes that he had had a long history of depression with two prior suicide attempts during college but denied any present suicidal ideation. Nguyen also disclosed that he had been in treatment prior to coming to MIT and that he had resumed treatment with a psychiatrist in the area. Although Nguyen had hoped that his test anxiety issue would be resolved in one appointment, he agreed to follow up with Barnes at the start of the school year.

On July 29, 2007, Nguyen told Cayley that he found MIT Mental Health to be “useless,” that Barnes “proceeded to turn me into a mental patient, and I was forced to discuss things that I really didn't want to,” and that he doubted that MIT Mental Health was the “correct agency to solve my problem.” Further, Nguyen questioned why Wernerfelt had to be informed of the referral to Barnes because Nguyen was “hoping to keep the circle as small as possible, since I'm very ashamed and embarrassed about [my test-taking problems].”

On August 9, 2007, Nguyen reported to Barnes that he was receiving treatment from Dr. John J. Worthington, a psychiatrist at Massachusetts General Hospital (MGH), not MIT Mental Health. Barnes offered to consult about treatment planning, but Nguyen declined. Subsequently, Nguyen informed Barnes that he had “been able to make other arrangements for treatment, so there will be no need to search any further, but I really appreciate all of your effort thus far.”

On September 6, 2007, Nguyen met with Randall, the assistant dean in the student support office. Before meeting with Randall, Nguyen had sent an electronic mail (e-mail) message to another student support dean, inquiring whether the student support office could help him with his problem, which was that he had “difficulty with taking exams, to the extent that [he was] failing classes” and asked if the student support office offered “any kind of counseling service that teaches study skills.” In their first meeting, Randall reported that Nguyen was “very committed to this not being seen as a ‘problem’ and [was] looking for a quick fix.” Toward the end of the meeting, Nguyen acknowledged that he had a long history of mental health issues and depression and that he was seeing a psychiatrist, Worthington, off campus.

On September 24, 2007, Nguyen returned to see Randall. Nguyen described a “long history of depression dating back to high school,” and treatment by “several … therapists during college.” He also “acknowledged two suicide attempts in the past and frequent suicidal thoughts.” Nguyen, however, stated that he “did not identify a specific plan [to commit suicide] … and [was] not imminently suicidal.” Although perceiving that Nguyen was not an imminent threat, Randall “strongly encouraged” Nguyen to visit MIT Mental Health. But after his recent MIT Mental Health meeting with Barnes, Nguyen was resistant and stated that his current psychiatrist was already aware of his prior suicidal ideation and that Nguyen also had plans to see another therapist, Dr. Stephen Bishop, in Rhode Island.

By the end of the September 24 meeting, Nguyen gave Randall permission to contact Worthington, Bishop, and Barnes. Later that day, Randall left a voice message for Worthington. Subsequently, Nguyen revoked Randall's permission to contact Worthington and stated in an e-mail message that he would “like to keep the fact of my depression separate from my academic problems. I'd prefer that we not any further discuss the depression, that my academic problems can be framed in terms of a deficit in study skills instead. If you can offer any such aid, I'd be happy to further employ your services.” On September 25, Randall acknowledged Nguyen's decision and replied that he “would still like to meet with you and think that I can be helpful.” Randall also stated in the e-mail message that Nguyen was permitted “to schedule another [appointment].” Nguyen did not respond to Randall's e-mail message and did not have any further meetings or contact with Randall after September, 2007.

Worthington followed up with Randall on September 27, 2007. Worthington was unable to share any information or confirm that Nguyen was his patient, but said that he could listen to Randall's concerns, especially regarding Nguyen's safety. Randall informed Worthington that Nguyen appeared “agitated, a little suspicious, and anxious, both at [the student support office] and MIT [Mental Health],” and of Nguyen's “suicidal thoughts and previous attempts.” Worthington did not discuss the case further, but agreed the information should be taken seriously. On September 28, 2007, Randall told Barnes that he had spoken with Worthington about Nguyen, and wrote, “Let's keep in touch about this student.” Barnes responded, “I agree, let's definitely keep in touch about [Nguyen].” Nguyen did not return to see Barnes or any other mental health provider at MIT Mental Health.

3. *Nguyen's mental health history*. Although Nguyen briefly sought out the student disability services office, MIT Mental Health, and the student support office between May and September, 2007, he extensively consulted with clinicians not affiliated with MIT. Between July, 2006, when Nguyen moved to Massachusetts, and May, 2009, Nguyen saw at least nine private mental health professionals who collectively recorded over ninety in-person visits during this period. There was no indication from any of these mental health professionals that Nguyen was at an imminent risk of committing suicide.

From July, 2006, two months before enrolling at MIT, to November, 2008, Nguyen was treated by Worthington, a psychiatrist at MGH. Over the course of their forty-three in-person appointments, Worthington discerned nothing indicating that Nguyen was at an imminent risk of suicide. Nguyen requested electroconvulsive therapy to treat his depression, and received six rounds of it at MGH in August and September, 2006.

Starting in September, 2006, Nguyen began therapy with a social worker at MGH and was scheduled for sixteen sessions. Nguyen disclosed to the social worker that he had occasional suicidal thoughts, but no suicidal intent or plan. After their twelfth visit, Nguyen canceled his remaining appointments stating that his "time together [with the social worker had] not resulted in an inch of progress."

Nguyen's next therapist was Bishop, whom he saw for several months in Rhode Island beginning in October, 2007. Bishop diagnosed Nguyen with dysthymic disorder, a chronic depressive condition. Nguyen saw Bishop six times between October, 2007, and March, 2008, but stopped seeing him because of the distance and because Bishop did not accept his health insurance plan.

From April, 2008, to March, 2009, Nguyen sought treatment from a doctor at a private practice group who specialized in sleep disorders. This doctor did not think that Nguyen was at risk of suicide during the time she was treating him. Starting in August, 2008, Nguyen saw a psychologist affiliated with the same private practice group. In February, 2009, Nguyen canceled his future appointments with the psychologist because he believed his "sleep patterns [were] beginning to converge on nonpathology."

Next, in November, 2008, Nguyen met twice with another doctor to complete a psychological test. During the interview, Nguyen told that doctor that he was "not imminently suicidal." That same month, Nguyen stopped seeing Worthington because Nguyen believed him to be "too autocratic and didn't consider [Nguyen's] input." Nguyen then began seeing yet another doctor and continued to see him through May, 2009. At Nguyen's initial appointment, that doctor noted that Nguyen "made two 'half-assed' suicide attempts. He denies suicidal ideation." At each appointment, the doctor and Nguyen discussed whether Nguyen had "any self-destructive thoughts … [or felt like] giving up." Nguyen denied any such thoughts or feelings.

In March, 2009, Nguyen began seeing a different doctor, with whom he had six visits. Nguyen told the doctor about his two prior suicide attempts but denied any current suicidal ideation. Throughout this time, the doctor did not believe that Nguyen was at an imminent threat of self-harm.

Nguyen's last appointment with this doctor was on May 28, 2009, five days before Nguyen's death. The doctor noted that Nguyen "did not say anything that sounded imminently suicidal or hopeless, and we discussed more things that he would do toward exploring thesis and career options, and we made a next [appointment] for [June 18]."

4. *Nguyen's academic challenges.* At times during his studies at Sloan, Nguyen struggled academically and performed "well below average" in some of his courses. During Nguyen's time at MIT, neither Wernerfelt nor Prelec was aware of Nguyen's history of severe depression or prior suicide attempts. Wernerfelt knew only that Nguyen had insomnia and test-taking anxiety, and that he was consulting off-campus mental health professionals.

On May 9, 2008, Prelec was informed by one of his MIT colleagues that Nguyen was reportedly "out of it" and "despondent," potentially because Nguyen was "having trouble sleeping as of late." On May 12, Prelec met with Nguyen and reported to Wernerfelt that Nguyen is "sleep deprived … and is taking something on prescription to help him sleep. He is seeing a psychiatrist regularly, at Mass General (not MIT). Same person he has been seeing since he got here." Wernerfelt replied that Nguyen "has had some serious issues with exam anxiety, so I worry about the general[ ] [exams]. Perhaps we can give them in a less concentrated form … [t]hat way he can get a good grade under his belt … I think that it would be good to give him some confidence."

On May 26, 2008, Wernerfelt was informed that Nguyen had performed poorly in a course that an MIT colleague taught. Nguyen had told that colleague that he had "medical problems that have prevented him from focusing on classes … [and] asked [the colleague] to consider his weakened health when he [took] the final." Wernerfelt responded to his colleague that Nguyen was "having serious problems. Some of his issues seem to peak at exam time, but there is much more to it than that. He has been seeing a psychiatrist at MGH (not MIT) as long as he has been

here. I thus have no official information, but I do believe that he is at risk." Wernerfelt suggested that his colleague be lenient and "grade him based on the problem sets" rather than his final examination.

On June 2, 2008, Wernerfelt sent an e-mail message to seven of Nguyen's professors, informing them that Prelec and he had "decided to reduce the pressure on [Nguyen] by spreading out his general[ ] [exams] over several weeks." On June 4, Wernerfelt, "[i]n an attempt to reduce the pressure on [Nguyen] as much as possible," further modified Nguyen's examination schedule allowing Nguyen to take the examinations when he was ready.

In a June, 2008, self-evaluation form, Nguyen stated that his academic performance was "[b]elow average, due to my medical condition." Nguyen indicated that the "primary nature of this illness [was] insomnia" and that he had "been seeing a team of doctors at [MGH] and elsewhere who have been trying to help me." Nguyen described how "horrendously bad" his medical condition was, stating that "[t]here were days during which I was so completely debilitated for the entire day that I was unable to get out of bed at all, much less function properly" and that at one point he "had to be hospitalized because I was so delirious and incoherent after not being able to sleep for over [seventy-two] hours." Nguyen further stated that he "would not be surprised if I have to be hospitalized again in the near future." Nguyen also stated that he was on his ninth different sleeping pill prescription and that he was still not functioning well. Nguyen did not disclose any history of depression, suicidal ideation, or his prior suicide attempts in his self-evaluation. After receiving Nguyen's self-evaluation, Wernerfelt offered to help Nguyen obtain a "leave from the program … such that [he] could return to a good situation once the [doctors] lick [his] sleeping problems."

On October 30, 2008, Nguyen sent an e-mail message to Wernerfelt and requested an examination schedule that would take place between January 12 and January 26, 2009, with his oral examination during the week of January 26 through January 30, 2009. Prelec testified that Nguyen's performance "varied some, but overall it was not a good performance."

After Nguyen had completed his general examinations, the faculty in his department met in January, 2009, to discuss Nguyen's performance and whether he had passed. Wernerfelt

advocated that “Nguyen should be passed and that the faculty should counsel him to pursue a master's degree.” Wernerfelt also stated that “they might end up with ‘blood on their hands’” if the faculty were to fail Nguyen. [9]

One of Wernerfelt's colleagues testified that the phrase, “blood on our hands,” was repeated several times. After the faculty passed Nguyen, Wernerfelt met with Nguyen to inform him that he had passed, although he was required to take certain additional courses to remain in the Ph.D. program. Further, Wernerfelt “laid out the path to a [Master's degree] … [and] [s]aid that all members of the faculty felt that he would be unhappy in a professorial job.” In March, 2009, Nguyen sent an e-mail message to Prelec, telling him that “to be a professor” is what Nguyen “want[ed] more than anything … [and he was not] convinced that anyone has really taken [his] health issues into consideration.” Nguyen remained insistent that he would “still do everything in [his] power to ensure that [he] will finish the PhD.”

Prelec met with Nguyen weekly during the spring of 2009 and noticed that Nguyen “seemed better” and was having fewer sleep problems. That semester, Nguyen served as a teaching assistant and, at the end of the semester, was offered another teaching assistant position for the fall of 2009, which he accepted. In May, 2009, Prelec recommended Nguyen for a summer research assistant position in an MIT laboratory. On May 27, 2009, Nguyen sent an e-mail message to the project investigator that he was “very excited about [the] project … [and] would be eager to begin very soon.” Nguyen also requested an update about funding logistics, as he was under the impression that the MIT laboratory's “coffers were bottomless.” Prelec was copied on this message and forwarded it to Wernerfelt, stating that he was “mildly nervous” about recommending Nguyen because “[w]ith this talk of bottomless coffers … [Nguyen] will rapidly offend … folks.” In response, Wernerfelt suggested that “someone should talk to [Nguyen] about sending more respectful e-mails” and that “[p]erhaps we should offer to prescreen his e-mails … after two or three [Nguyen] might get the idea.” Wernerfelt offered to take the lead on speaking with Nguyen about e-mail etiquette.

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[9] In contrast to failing a course, failing general examinations could lead to dismissal from the graduate program. Wernerfelt testified that if Nguyen were to fail his general examinations, there was a “very small chance that … something bad could happen … such as [Nguyen] hurting himself or others.”

5. *Nguyen's suicide*. At approximately 7 A.M. on June 2, 2009, Nguyen sent the project investigator an e-mail message, on which he blind-copied Prelec:

“I forgot to mention that this upcoming Monday I have a doctor's appointment that I had scheduled a long time ago, so I won't be able to come into the office until about 11:30 that day. I hope that that won't be a problem.

“If we can quickly follow up on the conversation that we had yesterday, if you'll forgive me, I'd like to be honest with you about something. [Prelec] recommended me for this position … [a]nd I'm not an undergrad anymore; I'm a grad[uate] student now. For those reasons, it was disturbing, as well as a little insulting, to me that yesterday you took pains to express your expectations of me in a manner that presumed that I would give you anything less than this project deserved, that you would ‘give me a signal’ if you didn't think that my contribution amounted to something deserving of authorship credit, that ‘there would be a problem’ if it turned out that ‘[you] could do [the work] faster [your]self,’ that you threatened me that you could tell by visual inspection whether my work was up to par. I like to feel like I've earned the right not to have my effectiveness or my integrity questioned anymore, and to hear you do that yesterday was kind of hurtful. I'm not sure that if you continue to do this that I'll be able to work as effectively as I'd like to be able to. Although I keep asking about it, I'm not just doing this for the money. I want to learn something and make a meaningful contribution … . Would it be possible that we could move forward with an understanding of good faith on my part?”

After receiving Nguyen's e-mail message, Prelec and the project investigator spoke about it. The project investigator told Prelec that Nguyen had taken his comments out of context and that Nguyen misinterpreted his intentions and the tone of the meeting.

Prelec forwarded the e-mail message to Wernerfelt, asking if Wernerfelt could “talk to [Nguyen] as a somewhat neutral party. … [Nguyen] is misreading things. Even so, the tone of reply is totally out of line.” Wernerfelt responded, “I am so sorry. I will talk to [Nguyen] and let you know what he says.”

At approximately 9 A.M. on June 2, Nguyen arrived at a laboratory in a building on MIT's campus. The laboratory coordinator noted that Nguyen's demeanor appeared “pretty normal” and that Nguyen was preparing for a research project. After a number of missed calls between Nguyen and Wernerfelt, at 10:51 A.M., Nguyen reached Wernerfelt by telephone. Nguyen left the laboratory to take the call. After the telephone call ended at approximately 10:59 A.M., Nguyen went to the roof of the building and jumped off the building to his death. A first responder administered first aid to Nguyen “a few seconds” after he landed and did not identify any signs of breathing, eye movement, pulse, or consciousness. It was determined that the immediate cause of Nguyen's death was “blunt trauma with head, skull, torso and extremity injuries” and that it occurred within “seconds.”

Meanwhile, after Wernerfelt finished speaking with Nguyen, at 11:04 A.M., Wernerfelt sent an e-mail message to Prelec:

“I read [Nguyen] the riot act

“Explained what is wrong about the e-mail

“Told him that you or I would look over future e-mails he send[s] …

“I said that we know that he is not out to offend anyone but that he seems poor at navigating the academe

“Said that this is an example of why we all recommended that he take a [Master's degree] and go out to get a job

“I talked about some papers he could turn into [a Master's] thesis and volunteered to supervise it

“Said that he made you look bad vs [the laboratory] and that some patching up was necessary

“He will call you about what to do”

Later in the afternoon on June 2, 2009, one of Wernerfelt's colleagues sent an e-mail message to Wernerfelt that "I know you were worried about suicide, but you can feel positive that we tried very hard to help [Nguyen] (and especially you did so much to help him)."

In 2011, the plaintiff commenced an action in the Superior Court, alleging that the defendants' negligence caused Nguyen's death. In March, 2016, the defendants moved for summary judgment and the plaintiff filed a cross motion for summary judgment. In October, 2016, the defendants' motion for summary judgment was allowed and the plaintiff's cross motion for summary judgment was denied. The plaintiff appealed from the denial of his motion, and we granted his motion for direct appellate review.

Discussion. The plaintiff contends that the defendants owed Nguyen a duty of reasonable care and committed a breach of this duty. Additionally, the plaintiff argues that the record supports claims for punitive damages, conscious pain and suffering, and breach of contract. The plaintiff also asserts that the Superior Court judge improperly denied the plaintiff's motion to amend the complaint to assert claims against former MIT chancellor Phillip Clay. Lastly, the plaintiff contends that summary judgment should be entered in his favor that Nguyen was not an MIT employee at the time of his death for workers' compensation purposes.

1. *Standard of review*. Where the parties have cross-moved for summary judgment, we review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the unsuccessful opposing party and drawing all permissible inferences and resolving any evidentiary conflicts in that party's favor, the successful opposing party is entitled to judgment as a matter of law . . .

2. *Negligence claim*. a. *General negligence principles*. "To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant [committed a breach of] this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Generally, there is no duty to prevent another from committing suicide. Under our case law, "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." *Cremins* v. *Clancy*, 415 Mass. 289, 296, 612 N.E.2d 1183 (1993) (O'Connor, J., concurring). "[T]he law has persistently

refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life." W.L. Prosser & W.P. Keeton, Torts § 56, at 375 (5th ed. 1984).

b. *Special relationships and the duty to prevent suicide*. We have, however, recognized that special relationships may arise in certain circumstances imposing affirmative duties of reasonable care in regard to the duty to rescue, including the duty to prevent suicide. The classic case is the custodial relationship, particularly jails or hospitals. In *Slaven* v. *Salem*, 386 Mass 885, 888, 438 N.E.2d 348 (1982), we addressed the duty and accompanying responsibilities of a jailor for the suicide of a prisoner in his or her custody.

"One who is required by law to take or voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a duty (1) to protect them against unreasonable risk of physical harm, and (2) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others."

Id. at 887, citing Restatement (Second) of Torts § 314A (1965). We further explained that "[t]he comments to § 314A state that a 'defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury.'" *Slaven*, *supra*, citing Restatement (Second) of Torts, *supra* at § 314A comment e. Finally, we noted that in cases in other jurisdictions "that have addressed the issue of the liability of a jailor for the suicide of one in his custody, most have required that there be evidence that the defendant knew, or had reason to know, of the plaintiff's suicidal tendency." *Slaven*, *supra* at 888.

We likewise conclude that there are other special relationships, outside the custodial context, that may impose affirmative, albeit limited, duties in regard to suicide prevention. We therefore turn to the scope of the university-student relationship, and the duties, if any, it imposes regarding suicide prevention.

c. *The modern university-student relationship*. We begin with the Restatement (Third) of Torts, which states that "[a]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship." Restatement

(Third) of Torts: Liability for Physical and Emotional Harm § 40(a) (2012). Included in the list of special relationships giving rise to such duty is "a school with its students." *Id.* at § 40(b)(5). This, of course, is the beginning and not the end of the analysis. There is a wide range of schools — from elementary to graduate school — and great differences in the scopes of student-school relationships. Additionally, the Restatement (Third) of Tort's formulation of special relationship is not focused on the specific question of student suicide.

The particularities of the university-student relationship are of paramount importance in defining any duty. Universities are clearly not bystanders or strangers in regards to their students. See *Mullins* v. *Pine Manor College*, 389 Mass. 47, 51-52, 449 N.E.2d 331 (1983). The primary mission of universities is academic in nature. Universities also sponsor and have special relationships with their students regarding athletics and other potentially dangerous activities. See also Massie, Suicide on Campus: The Appropriate Legal Responsibility of College Personnel, 91 Marq. L. Rev. 625, 641 (2008) (Suicide on Campus). . . . . They are also property owners and landlords responsible for their students' physical safety on campus.. . .. Furthermore, university involvement extends widely into other aspects of student life. See Dall, Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship, 29 J.C. & U.L. 485, 519 (2003) (universities "do not conceive of their educational role narrowly … and foster many aspects of student life and community involvement such as residential life, multicultural programs, student organizations, student government, student media, community service, internships and externships, technology, health and fitness, and spirituality"). Accord Regents of the Univ. of Cal. *vs*. Superior Court of Los Angeles, Supreme Court of Cal., No. S230658, slip op. at 27 (Mar. 22, 2018) (*Regents*) ("Along with educational services, colleges provide students social, athletic, and cultural opportunities. Regardless of the campus layout, colleges provide a discrete *community* for their students").

But universities are not responsible for monitoring and controlling all aspects of their students' lives. "There is universal recognition that the age of in loco parentis has passed and that the duty, if any, is not one of a general duty of care to all students in all aspects of their collegiate life." Suicide on Campus, 91 Marq. L. Rev. at 640. . . .

University students are young adults, not young children. Indeed, graduate students are adults in all respects under the law. Universities recognize their students' adult status, their desire for independence, and their need to exercise their own judgment. Consequently the modern university-student relationship is respectful of student autonomy and privacy. . . .This includes students' personal mental health decisions. Indeed, the privacy of student mental health records is generally protected, absent the student's consent or an emergency where disclosure is necessary to protect the health or safety of the student or other persons. See Family Educational Right and Privacy Act of 1974, 20 U.S.C. § 1232g (2012). See also Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-6 (2012) (imposing limitations on rights of nonclinicians in obtaining or disclosing individually identifiable health information . . .

In deciding whether a special relationship and accompanying duty exists between a university and a student in regard to suicide prevention, and whether a breach of such a duty has occurred, we must therefore take into account a complex mix of competing considerations. Students are adults but often young and vulnerable; their right to privacy and their desire for independence may conflict with their immaturity and need for protection. As for the universities, their primary mission is to educate and they no longer are acting in loco parentis, but they still have a wide-ranging involvement in the lives of their students . . .

d. *A university's duty regarding suicide prevention*. In analyzing whether a duty to prevent suicide falls within the scope of the complex relationship that universities have with their students, we consider a number of factors used to delineate duties in tort law. *Irwin* v. *Ware*, 392 Mass. 745, 756, 467 N.E.2d 1292 (1984). . . . "Foremost among these is whether a defendant reasonably could foresee that he [or she] would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Irwin, supra*. A related factor is "reasonable reliance by the plaintiff [on the defendant], impeding other persons who might seek to render aid." *Id.* Other factors that have been considered relevant to special relationships and the creation of a duty in the university context are the "degree of certainty of harm to the plaintiff; burden upon the defendant to take reasonable steps to prevent the injury; some kind of mutual dependence of plaintiff and defendant upon each other, frequently … involving financial benefit to the defendant arising from the relationship; moral blameworthiness of defendant's conduct in failing to act; and social policy considerations involved in placing the

economic burden of the loss on the defendant." Suicide on Campus, *supra*. . . . See also Lake, Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis, 34 J.C. & U.L. 253, 257-277 (2008) (Still Waiting) (catalog of key cases and factors used by courts to determine duty); *Regents*, slip op. at 18 ("Students are comparatively vulnerable and dependent on their colleges for a safe environment. Colleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control").

With these considerations in mind, we conclude that a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances. Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm. See . . . Restatement (Third) of Torts § 40(b)(5); Suicide on Campus, 91 Marq. L. Rev. at 631 ("where college or university personnel are aware that a student has made serious suicidal threats or attempts, they have a duty to take reasonable steps to protect the student's safety"). See also Pavela, Questions and Answers on College Student Suicide: A Law and Policy Perspective 8-9 (2006) ("[I]nstitutions of higher education face heightened risk of liability for suicide when they ignore or mishandle *known suicide threats or attempts*. … The main obstacle to better suicide prevention on campus is *underreaction*, especially the failure to provide [perhaps even require] prompt professional evaluation and treatment for any student who threatens or attempts suicide" [emphasis in original]). We have sought to define here the circumstances creating the special relationship and the duty realistically recognizing the scope of the suicide problem on university campuses, the capacities of nonclinicians, and the nature of the modern university-student relationship.

It is important to understand the limited circumstances creating the duty. It is definitely not a generalized duty to prevent suicide. Nonclinicians are also not expected to discern suicidal tendencies where the student has not stated his or her plans or intentions to commit suicide. Even a student's generalized statements about suicidal thoughts or ideation are not enough, given their prevalence in the university community. The duty is not triggered merely by a university's

knowledge of a student's suicidal ideation without any stated plans or intentions to act on such thoughts.

As previously explained, this duty hinges on foreseeability. . . . Where a student has attempted suicide while enrolled at the university or recently before matriculation, or has stated plans or intentions to commit suicide, suicide is sufficiently foreseeable as the law has defined the term, even for university nonclinicians without medical training. Reliance of the student on the university for assistance, at least for students living in dormitories or away from their parents or guardians, is also foreseeable. Universities are in the best, if not the only, position to assist. . . . They have also "fostered" expectations, at least for their residential students, that reasonable care will be exercised to protect them from harm.

The probability of the harm must of course be considered along with its gravity, including the death of the student. . . . Thus, where a student has attempted to commit suicide [*456] while enrolled at the university or recently before matriculation or stated plans or intentions to commit suicide, that probability is sufficient to justify imposition of a duty on the university. The burden on the university is not insubstantial, but so is the financial benefit received from student tuition. . . . Moral blameworthiness on the part of a university in failing to act to intervene to save a young person's life, when it was within the university's knowledge and power to do so, is understood and accepted by our society. . . .

Reasonable measures by the university to satisfy a triggered duty will include initiating its suicide prevention protocol if the university has developed such a protocol.[18] In the absence of such a protocol, reasonable measures will require the university employee who learns of the student's suicide attempt or stated plans or intentions to commit suicide to contact the appropriate

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[18] One resource that provides universities with guidance for drafting is Jed Foundation's Framework for Developing Institutional Protocols for the Acutely Distressed or Suicidal College Student. See Jed Framework, *supra* at 2-3, 10-16.

officials at the university empowered to assist the student in obtaining clinical care from medical professionals or, if the student refuses such care, to notify the student's emergency contact.

In emergency situations, reasonable measures obviously would include contacting police, fire, or emergency medical personnel. By taking the reasonable measures under the circumstances presented, a university satisfies its duty.

We stress that the duty here, at least for nonclinicians, is limited. It is created only by actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide. It also is limited to initiating the university's suicide prevention protocol, and if the school has no such protocol, arranging for clinical care by trained medical professionals or, if such care is refused, alerting the student's emergency contact. Finally, the duty is time-bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counselling is required.

This limited duty takes a number of the complex and competing considerations discussed above into account. First, it respects the privacy and autonomy of adult students in most circumstances, relying in all but emergency situations on the student's own capacity and desire to seek professional help to address his or her mental health issues. Second, it recognizes that nonclinicians cannot be expected to probe or discern suicidal intentions that are not expressly evident. It also acknowledges the scope of the suicide risk on campus and seeks to impose realistic duties and responsibilities on the universities, allowing them to respond with their own suicide prevention protocols if such protocols have been developed. Finally, this limited duty is consistent with the modern university relationship with its students, which is no longer in loco parentis but rather provides for the students' independence and self-determination.

e. *Whether a duty was created in this case and, if so, whether a breach of that duty occurred.* For reasons that will be explained in detail below, we conclude that there was no duty created in the instant case, and if there arguably was such a duty two years before Nguyen's death, the defendants did not commit a breach of it as a matter of law. In sum, Nguyen never communicated by words or actions to any MIT employee that he had stated plans or intentions to commit suicide, and any prior suicide attempts occurred well over a year before matriculation. He also was a twenty-five year old adult graduate student living off campus, not a young student living in a campus dormitory under daily observation. Nguyen repeatedly made clear that he

wanted to keep his mental health issues separate from his academic performance problems and that he was seeking professional help from psychiatrists and psychologists outside the MIT Mental Health system.

i. *The relationship with Randall in 2007*. In the instant case, the question whether Randall, and therefore MIT, had a special relationship with Nguyen to take reasonable measures to prevent suicide in 2007 requires consideration of Randall's knowledge of Nguyen's prior suicide attempts and Nguyen's statements about present suicidal thoughts. First, Nguyen's prior suicide attempts in December, 2002, and April, 2005, were as an undergraduate student at a different university and preceded his September, 2006, enrollment as an MIT graduate student. Additionally, although Nguyen had frequent suicidal thoughts, which, in the light most favorable to the plaintiff, can be read as present not past suicidal thoughts, Nguyen denied suicidal ideation in 2007. Thus, Randall had no actual knowledge of Nguyen having attempted suicide while enrolled at or recently before matriculating to MIT, or whether Nguyen had stated plans or intentions to commit suicide. Consequently, Randall had no special relationship with Nguyen and thus no duty to take reasonable measures to prevent Nguyen's suicide two years before his death. Nonetheless, Randall properly encouraged Nguyen to seek professional help at MIT, which Nguyen, as was his right, refused. Nguyen also informed Randall that he was seeking professional help elsewhere, and Randall sought permission to communicate with that psychiatrist, which Nguyen allowed and then promptly revoked.

Finally, Randall invited further conversations with Nguyen, which he declined. That being said, Randall left Nguyen in the care of competent outside professionals as Nguyen demanded. In these circumstances, as a matter of law, a twenty-five year old graduate student's rights to privacy, autonomy, and self-determination were properly respected.

ii. *The relationship with Wernerfelt and Prelec*. In contrast to Randall's circumstances, no such special relationship was even arguably created between Nguyen and the defendants Wernerfelt and Prelec. There was no evidence that Wernerfelt and Prelec had actual knowledge of Nguyen's plans or intentions to commit suicide. Both were academics; neither [***39] was a trained clinician. Nguyen's communications to them about his mental health problems related to insomnia and test-taking, not to suicidal thoughts. There was also no evidence that Wernerfelt or

Prelec was informed by MIT Mental Health, the student support office, or Randall about Nguyen's two suicide attempts in 2002 and 2005. Even if Wernerfelt or Prelec had such knowledge, the prior attempts were not close in time to Nguyen's enrollment at MIT. Given Nguyen's express request that his academic issues be kept separate from his mental health issues and his assurances that he was being treated elsewhere, there also was no duty to communicate this information to either Wernerfelt or Prelec. Finally, even though Wernerfelt commented about possible "blood on their hands," it was stated metaphorically in the entirely different context of persuading his colleagues to allow Nguyen to pass his examinations. We note that Wernerfelt's expressed anxieties at the time of the general examinations that Nguyen might harm himself were not based on express statements or actions by Nguyen or information from trained clinicians and were more than five months before the time of the suicide. As none [***40] of the medical professionals treating Nguyen considered him "imminently suicidal," this was certainly not something Wernerfelt could have intuited on his own.[21] Because the circumstances at hand did not trigger a special relationship, we need not consider the duty of reasonable care and whether a breach of such a duty occurred.

f. *Voluntary assumption of a duty of care*. The plaintiff also claims the defendants had a duty stemming from their voluntary assumption of a duty of care. "[A] duty voluntarily assumed must be performed with due care." *Mullins*, 389 Mass. at 52. This duty, however, can lead to liability only where a "failure to exercise such care increases the risk of such harm, or "the harm is suffered because of the other's reliance upon the undertaking." *Id.* at 53. Although MIT voluntarily offers mental health student support services, there is no evidence that these services increased Nguyen's risk of suicide. Additionally, there was no evidence that Nguyen relied on MIT's mental health services. The facts bear out Nguyen's rejection of such services. Nguyen briefly consulted with MIT Mental Health and the student support office for only a few months in 2007, nearly two years before his death. Nguyen wanted assistance from MIT only as it pertained to test-taking and wanted to keep his mental health treatment separate. Nguyen declined further MIT services and instead engaged with nine off-campus mental health professionals while remaining enrolled as an MIT graduate student. Accordingly, the plaintiff cannot succeed on a "voluntarily assumed duty" theory.

3. *Punitive damages for wrongful death, conscious pain and suffering, and breach of contract*. The plaintiff asserts that he is entitled to punitive and emotional distress damages because the defendants' reckless or grossly negligent conduct was the proximate cause of Nguyen's death. As we concluded above, there was no evidence of the defendants' negligence and consequently the plaintiff cannot succeed on such claims. The plaintiff also cannot succeed on his breach of contract claim, as references to MIT Mental Health and the student support office's coordination of services are merely generalized and not sufficient to form an enforceable contract. . . . Further, even if such a contract existed, the claim would still fail, as Nguyen rejected assistance from both MIT Mental Health and the student support office.

* * * * *

Conclusion. For the foregoing reasons, we conclude that summary judgment was properly granted for the defendants on the tort claims as a matter of law. We further conclude that the Superior Court judge properly denied summary judgment on the workers' compensation issue, as there are material disputed facts.

Notes and Questions

1. Note that the student was 25 years old, living off campus, and enrolled in a PhD program. Did these facts weigh in favor of the defense? Why or why not?

2. The plaintiff, the student's father, claimed that the student's faculty advisors were responsible for his death. The court rejected that assertion. What do you think are the responsibilities of a faculty advisor toward a graduate student?

3. The court says that the existence of a special relationship between the institution and the student turns on the foreseeability of the harm that the student encounters. In practical terms, what does this mean for faculty? For student affairs professionals? For mental health counselors?

4. Compare the court’s analysis in this case with the analysis of the court in the next case. Given the difference in the facts of each case, are the courts’ analyses consistent with each other?

Regents of Univ. of California v. Rosen

413 P.3d 656 (Cal. 2018)

OPINION BY: CORRIGAN, J.

After he enrolled in the University of California at Los Angeles (UCLA), Damon Thompson experienced auditory hallucinations. He believed other students in the classroom and dormitory were criticizing him. School administrators eventually learned of Thompson's delusions and attempted to provide mental health treatment. However, one morning Thompson stabbed fellow student Katherine Rosen during a chemistry lab. Rosen sued the university and several of its employees for negligence, arguing they failed to protect her from Thompson's foreseeable violent conduct.

This case involves whether, and under what circumstances, a college or university owes a duty of care to protect students like Rosen from harm. Considering the unique features of the collegiate environment, we hold that universities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities. Because the Court of Appeal reached a different conclusion, we reverse its decision and remand for further proceedings.

I. BACKGROUND

A. *Thompson's Behavior Preceding the Assault*

Damon Thompson transferred to UCLA in the fall of 2008. He soon began experiencing problems with other students in both classroom and residence hall settings.

[The opinion recounted a lengthy series of events involving Thompson in the residence hall and in classes. University officials, including campus police and mental health professionals, were aware of these events and efforts were made to assist Thompson throughout his tenure as a student. Thompson was expelled from student housing but was permitted to continue enrollment in courses.]

* * * *

B. *The Assault*

On October 6th, teaching assistant Adam Goetz e-mailed Professor Bacher describing "another incident" with Thompson in that day's chemistry lab. Shortly after the professor left the room, Thompson accused another student of calling him stupid. He insisted on learning the student's name. After Goetz gave him the name, Thompson "calmed down" and "seemed fine."

But Goetz remained worried that Thompson's behavior was becoming a weekly "routine." Goetz later testified that Thompson frequently identified Katherine Rosen, who worked "right next to" Thompson in the lab, as one of the students calling him stupid.

The following day, another teaching assistant told Professor Bacher that Thompson had come into his chemistry lab from a different section and accused students of verbally harassing him. Although Thompson did not know the students' names, he did identify a specific student, other than Rosen, as one of his tormentors. The teaching assistant saw no harassment and was skeptical of Thompson's claims.

Bacher forwarded Goetz's e-mail to Dean Porter on the morning of October 7th, seeking advice on how to handle the situation. Porter contacted Karen Minero of the Response Team, who expressed concern that Thompson had identified a specific student. Minero forwarded Porter's e-mail to other Response Team members and CAPS personnel. The CAPS director contacted Green, suggesting Thompson "may need urgent outreach," and members of the Response Team tried to schedule a meeting to discuss Thompson. Thompson did not appear for a scheduled session with Green that afternoon. The next morning, Porter and Minero discussed Thompson and decided to investigate whether he was having similar difficulties in other classes.

Around noon on October 8th, Thompson was doing classwork in Professor Bacher's chemistry laboratory. Suddenly, without warning or provocation, he stabbed fellow student Katherine Rosen in the chest and neck with a kitchen knife. Rosen had been kneeling down, placing items in her lab drawer, when Thompson attacked her from behind. She was taken to the hospital with life-threatening injuries but ultimately survived. When campus police arrived, Thompson admitted he had stabbed someone and explained that the other students had been teasing him. Thompson ultimately pleaded not guilty by reason of insanity to a charge of attempted murder. (Pen. Code, §§ 187, subd. (a), 664, 1026.) He was admitted to Patton State Hospital and diagnosed with paranoid schizophrenia.

C. *Procedural History*

Rosen sued Thompson, the Regents of the University of California, and several UCLA employees, including Alfred Bacher, Cary Porter, Robert Naples, and CAPS psychologist Nicole Green. The complaint alleged a single cause of action against the UCLA defendants for negligence. Rosen alleged UCLA had a special relationship with her as an enrolled student, which entailed a duty "to take reasonable protective measures to ensure her safety against violent attacks and otherwise protect her from reasonabl[y] foreseeable criminal conduct, to warn her as to such reasonabl[y] foreseeable criminal conduct on its campus and in its buildings, and/or to control the reasonably foreseeable wrongful acts of third parties/other students." She alleged UCLA breached this duty because, although aware of Thompson's "dangerous propensities," it

failed to warn or protect her or to control Thompson's foreseeably violent conduct.

UCLA moved for summary judgment on three alternative grounds: (1) colleges have no duty to protect their adult students from criminal acts; (2) if a duty does exist, UCLA did not breach it in this case; and (3) UCLA and Green were immune from liability under certain Government Code provisions. In opposing the motion, Rosen argued UCLA owed her a duty of care because colleges have a special relationship with students in the classroom, based on their supervisory duties and the students' status as business invitees. Rosen also claimed UCLA assumed a duty of care by undertaking to provide campuswide security.

The trial court denied the motion. The court concluded a duty could exist under each of the grounds Rosen identified, triable issues of fact remained as to breach of duty, and the immunity statutes did not apply.

UCLA challenged this order in a petition for writ of mandate. A divided panel of the Court of Appeal granted the petition. The majority held that UCLA owed no duty to protect Rosen based on her status as a student or business invitee, or based on the negligent undertaking doctrine. . . . We granted review.

II. DISCUSSION

A. *Standard of Review*

* * * *

. . . The Court of Appeal determined summary judgment should have been granted because Rosen could not establish duty. . . . Contrary to the Court of Appeal, however, we conclude universities *do* have a legal duty, under certain circumstances, to protect or warn[3] their students from foreseeable violence in the classroom or during curricular activities. The trial court properly denied summary judgment on this ground.

B. *A College's Duty To Protect Students from Foreseeable Harm*

Because UCLA is a public entity, its exposure to tort liability is nominally defined by statute. . . . However, the Government Claims Act provides that public employees are liable for their acts and omissions "to the same extent as a private person" (Gov. Code, § 820, subd. (a)),

[3] We speak here of a university's duty "to protect" its students from foreseeable harm. However, in an appropriate case, this duty may be fully discharged if adequate *warnings* are conveyed to the students at risk. . . .

and public entity employers are vicariously liable for employees' negligent acts within the scope of their employment to the same extent as private employers (Gov. Code, § 815.2, subd. (a); *William S. Hart*, at p. 868, 138 Cal.Rptr.3d 1, 270 P.3d 699). . . .

*** * * ***

A duty to control, warn, or protect may be based on the defendant's relationship with "either the person whose conduct needs to be controlled or [with] ... the foreseeable victim of that conduct." (*Tarasoff, supra*, 17 Cal.3d at p. 435, 131 Cal.Rptr. 14, 551 P.2d 334; see *Davidson, supra*, 32 Cal.3d at p. 203, 185 Cal.Rptr. 252, 649 P.2d 894.) . . . The parent-child relationship is an example of a special relationship giving rise to a duty to control. (See *id*., § 41, subd. (b)(1); *Smith v. Freund* (2011) 192 Cal.App.4th 466, 473, 121 Cal.Rptr.3d 427.) Similarly, a duty to warn or protect may be found if the defendant has a special relationship with the potential victim that gives the victim a right to expect protection. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129, 119 Cal.Rptr.2d 709, 45 P.3d 1171; *Davidson*, at p. 203, 185 Cal.Rptr. 252, 649 P.2d 894.) The relationships between common carriers and their passengers, or innkeepers and their guests, are classic examples of this type of special relationship. (See Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b)(1)-(2).)

Rosen's complaint alleges UCLA had separate duties to protect her *and* to "control the reasonably foreseeable wrongful acts of third parties/other students." Here, we have focused on the university's duty to protect students from foreseeable violence. Having concluded UCLA had a duty to protect Rosen under the circumstances alleged, we need not decide whether the school had a separate duty to control Thompson's behavior to prevent the harm.

1. *College-student Special Relationship Supports a Limited Duty*

Whether UCLA was negligent in failing to prevent Thompson's attack depends first on whether a university has a special relationship with its students that supports a duty to warn or protect them from foreseeable harm. The determination whether a particular relationship supports a duty of care rests on policy and is a question of law. (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, coms. e & h, pp. 41-42.)

a. *Features of a Special Relationship*

The Restatement Third of Torts identifies several special relationships that may support a duty to protect against foreseeable risks. In addition to the common carrier and innkeeper relationships previously mentioned, the list includes a business or landowner with invited guests,

a landlord with tenants, a guard with those in custody, an employer with its employees, and "a school with its students." (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b).) The Restatement does not exclude colleges from the school-student special relationship. However, the drafters observe that reasonable care varies in different school environments, with substantially different supervision being appropriate in elementary schools as opposed to colleges. (*Id.*, § 40, com. *l*, p. 45.) State courts have reached different conclusions about whether colleges owe a special relationship-based duty to their students. (*Id.*, § 40, com. *l*, reporter's notes, p. 57.) We have not previously addressed the question.

Relationships that have been recognized as "special" share a few common features. Generally, the relationship has an aspect of dependency in which one party relies to some degree on the other for protection. (See *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 283, 176 Cal.Rptr. 809 (*Baldwin*); *Mann v. State of California* (1977) 70 Cal.App.3d 773, 779-780, 139 Cal.Rptr. 82.) The Restatement authors observed over 50 years ago that the law has been "working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." (Rest.2d Torts, § 314A, com. b, p. 119.)

The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection. . . .

Special relationships also have defined boundaries. They create a duty of care owed to a limited community, not the public at large. We have held that police officers are not in a special relationship with the citizens in their jurisdiction (see *Williams v. State of California*, *supra*, 34 Cal.3d at pp. 27-28, 192 Cal.Rptr. 233, 664 P.2d 137), even when officers are aware of risks to a specific potential victim (see *Davidson*, *supra*, 32 Cal.3d at pp. 208-209, 185 Cal.Rptr. 252, 649 P.2d 894). Nor is a government entity in a special relationship with all citizens who use its facilities. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1130, 119 Cal.Rptr.2d 709, 45 P.3d 1171.) . . .

* * * *

b. *The College Environment*

The legal significance of the college-student relationship has changed with shifting cultural attitudes. Before the 1960s, colleges stood in loco parentis to students, who were viewed as being under their custody and institutional control. (Sokolow et al., *College and University Liability for Violent Campus Attacks* (2008) 34 J.C. & U.L. 319, 321 (hereafter Sokolow).) Although the role of parental stand-in may have given colleges some obligation to protect students (see *Bradshaw v. Rawlings* (3d Cir. 1979) 612 F.2d 135, 139 (*Bradshaw*)), the era also recognized parental immunity. Parents were largely immune from suit by their children, and colleges often enjoyed the same immunity, at least with respect to disciplining or regulating

student conduct. (Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law* (1999) 64 Mo. L.Rev. 1, 5 (hereafter Lake).)

When rigid immunity defenses gave way to more flexible doctrines during the 1970s and 1980s, the view that colleges stood in loco parentis shifted to what Professor Peter Lake calls the "bystander" era in university liability. (See Lake, *supra*, 64 Mo. L.Rev. at pp. 11, 16.) Dramatic social changes of that time expanded the privacy and autonomy rights of adult students and, correspondingly, reduced the authority of college administrators to control student behavior. (*Bradshaw*, *supra*, 612 F.2d at p. 140.) Courts generally reacted to these changes by treating colleges like businesses. (Lake, at p. 12.) While the university might owe a duty as a landowner to maintain a safe premises, courts typically resisted finding a broader duty based on a special relationship with students. (See, e.g., *Nero v. Kansas State University* (1993) 253 Kan. 567, 580, 583-584 [861 P.2d 768, 778-780].) This was particularly so when injuries resulted from alcohol consumption or fraternity activity. (See Lake, at p. 12.)

California appellate decisions followed this trend. In *Baldwin*, *supra*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809, a student sued the California State University system after she was injured in a drunken, highway drag racing contest. Citing secondary school cases, the court assumed colleges "owe a duty to students *who are on school grounds* to supervise them and to enforce rules and regulations necessary for their protection." (*Id*. at p. 281, 176 Cal.Rptr. 809, italics added.) However, the more "difficult question" was whether colleges have a special relationship-based duty to protect students in other environments. (*Id*. at p. 283, 176 Cal.Rptr. 809.) The court examined relevant policy factors and concluded the demise of colleges' in loco parentis role weighed against finding a duty of care. (*Id*. at p. 287, 176 Cal.Rptr. 809.) Distinguishing special relationships recognized in other contexts, the court concluded the university lacked sufficient control over student behavior to justify imposing a duty to prevent on-campus drinking. (*Id*. at pp. 285-287, 290-291, 176 Cal.Rptr. 809.)

Another California State student sued the university after a fellow student assaulted him at a dormitory "keg party." (*Crow v. State of California* (1990) 222 Cal.App.3d 192, 197, 271 Cal.Rptr. 349.) Under the facts of the case, the Court of Appeal rejected the argument that plaintiff's student status put him in a special relationship with the university. (*Id*. at p. 208, 271 Cal.Rptr. 349.) The court had previously held that high schools have a duty to protect students from assault on campus. (See *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 249 Cal.Rptr. 688.) However, it distinguished that case because high school attendance is mandatory, high schools "are directly in charge" of students on campus, and the attack in the *Leger* case was foreseeable. (*Crow*, at p. 208, 271 Cal.Rptr. 349.) . . .

In a third case from this era, a University of California student was raped by fellow students after a dormitory party. (*Tanja H. v. Regents of University of California* (1991) 228

Cal.App.3d 434, 278 Cal.Rptr. 918.) The court relied on *Baldwin* and *Crow* to reject her claim against the school. Sensitive to the fact that both the plaintiff and her attackers had ingested significant amounts of alcohol, the court stressed that a duty to prevent alcohol-related crimes would require colleges to "impose onerous conditions on the freedom and privacy of resident students," contrary to the modern view that adult students are generally responsible for their own welfare. (*Tanja H.*, at p. 438, 278 Cal.Rptr. 918.) Such a duty could not be recognized without resurrecting the university's former in loco parentis role. (*Id*. at pp. 438-439, 278 Cal.Rptr. 918; see *id*. at p. 446, 278 Cal.Rptr. 918 (conc. opn. of Kline, P. J.).)

When the particular problem of alcohol-related injuries is not involved, our cases have taken a somewhat broader view of a university's duties toward its students. *Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 804, 205 Cal.Rptr. 842, 685 P.2d 1193 (*Peterson*), considered "whether a community college district and its agents have a duty to exercise due care to protect students from reasonably foreseeable assaults on the campus." There, a student was injured during an attempted rape in a parking structure's stairway. (*Id*. at pp. 804-805, 205 Cal.Rptr. 842, 685 P.2d 1193.) The defendants were aware of similar assaults in the same area. (*Id*. at p. 805, 205 Cal.Rptr. 842, 685 P.2d 1193.) We held that, while the community college district was immune from liability for failing to provide adequate police protection, it did have a duty "to warn its students of known dangers posed by criminals on the campus." (*Id*. at p. 804, 205 Cal.Rptr. 842, 685 P.2d 1193.) This holding was based on the district's status as a landowner, however. We discussed the general principle that a duty to warn or protect does not exist absent a special relationship (*id*. at p. 806, 205 Cal.Rptr. 842, 685 P.2d 1193) but ultimately concluded the district owed plaintiff a duty because she was on the premises as a business invitee (*id*. at pp. 808-809, 205 Cal.Rptr. 842, 685 P.2d 1193). . . .

In *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 41 Cal.Rptr.3d 299, 131 P.3d 383 (*Avila*), a college baseball player was injured by a pitch to the head, and we examined a university's duty to students participating in intercollegiate sports. We noted that athletic competition is often an important part of the college environment, benefiting both the students who participate and the schools they represent. (*Id*. at p. 162, 41 Cal.Rptr.3d 299, 131 P.3d 383.) Given these benefits, we held that a school hosting an athletic event owes a duty to student-players "to, at a minimum, not increase the risks inherent in the sport." (*Ibid*.) . . .

This court has not addressed the college-student relationship since *Avila*. However, we recently discussed the relationship between students and a high school in *William S. Hart*, *supra*, 53 Cal.4th 861, 138 Cal.Rptr.3d 1, 270 P.3d 699, where the plaintiff alleged sexual harassment by a high school guidance counselor. We explained that a school district has a special relationship with students "arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel, 'analogous in many ways to

the relationship between parents and their children.' " (*Id*. at p. 869, 138 Cal.Rptr.3d 1, 270 P.3d 699.) . . .

We must now decide whether a similar special relationship should be recognized in the college setting. Considering the unique features of the college environment, we conclude postsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services.

Although comparisons can be made, the college environment is unlike any other. Colleges provide academic courses in exchange for a fee, but a college is far more to its students than a business. Residential colleges provide living spaces, but they are more than mere landlords. Along with educational services, colleges provide students social, athletic, and cultural opportunities. Regardless of the campus layout, colleges provide a discrete *community* for their students. For many students, college is the first time they have lived away from home. Although college students may no longer be minors under the law, they may still be learning how to navigate the world as adults. They are dependent on their college communities to provide structure, guidance, and a safe learning environment. "In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime." (*Peterson*, *supra*, 36 Cal.3d at p. 813, 205 Cal.Rptr. 842, 685 P.2d 1193.)

Colleges, in turn, have superior control over the environment and the ability to protect students. Colleges impose a variety of rules and restrictions, both in the classroom and across campus, to maintain a safe and orderly environment. They often employ resident advisers, mental health counselors, and campus police. They can monitor and discipline students when necessary. "While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of student life. Through its providing of food, housing, security, and a range of extracurricular activities the modern university provides a setting in which every aspect of student life is, to some degree, university guided." (*Furek v. University of Delaware* (Del. 1991) 594 A.2d 506, 516.) . . .

The college-student relationship thus fits within the paradigm of a special relationship. Students are comparatively vulnerable and dependent on their colleges for a safe environment. Colleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control. Moreover, this relationship is bounded by the student's enrollment status. Colleges do not have a special relationship with the world at large, but only with their enrolled students. The population is limited, as is the relationship's duration.

Of course, many aspects of a modern college student's life are, quite properly, beyond the institution's control. Colleges generally have little say in how students behave off campus, or in their social activities unrelated to school. It would be unrealistic for students to rely on their college for protection in these settings, and the college would often be unable to provide it. This is another appropriate boundary of the college-student relationship: Colleges are in a special relationship with their enrolled students only in the context of school-sponsored activities over which the college has some measure of control. . . .

Our recognition of a special relationship is consistent with decisions from other states. The Supreme Judicial Court of Massachusetts was one of the first to hold that colleges have a duty to protect their students against criminal attacks. In *Mullins v. Pine Manor College* (1983) 389 Mass. 47, 49-50 [449 N.E.2d 331, 334], a student was raped by an intruder to her dorm room. The court observed that colleges customarily take steps to protect their students from crime on campus, recognizing they had some obligation to do so. (*Id.* at p. 335.) . . . Similarly, Florida's Supreme Court observed that the recognition of a special relationship between schools and minor students, based on in loco parentis principles, does not preclude finding that a *different* special relationship also exists between universities and their adult students. (*Nova Southeastern University v. Gross* (Fla. 2000) 758 So.2d 86, 89.) The Florida high court reasoned that a duty to protect arises from the relationship but is limited by the university's degree of control over student conduct in a given setting. (*Ibid*.) In addressing a university's liability for injuries arising from a fraternity hazing incident, the Supreme Court of Delaware also rejected the university-as-bystander rationale of cases like *Baldwin* and focused instead on "the uniqueness of the student-university relationship." (*Furek v. University of Delaware*, *supra*, 594 A.2d at p. 518.) . . . [5]

The special relationship we now recognize is similarly limited. It extends to activities that are tied to the school's curriculum but not to student behavior over which the university has no significant degree of control. The incident here occurred in a chemistry laboratory while class was in session. Education is at the core of a college's mission, and the classroom is the quintessential setting for curricular activities. Perhaps more than any other place on campus, colleges can be expected to retain a measure of control over the classroom environment. Although collegiate class attendance may not be as strictly monitored as in secondary school, this distinction is not especially significant. All college students who hope to obtain a degree

[5] Some state courts, unwilling to recognize a special relationship between colleges and their adult students, have nevertheless imposed a duty to protect under landlord-invitee principles. (See, e.g., *Nero v. Kansas State University*, *supra*, 861 P.2d at p. 780; *Johnson v. State* (1995) 77 Wn.App. 934, 941 [894 P.2d 1366, 1370].)

must attend classes and required laboratory sessions. It is reasonable for them to expect that their schools will provide some measure of safety in the classroom.

2. *Policy Considerations Support Recognizing a Limited Duty*

As discussed, there is generally no duty to protect others from the conduct of third parties. The "special relationship" doctrine is an exception to this general rule. . . . Accordingly, as a consequence of the special relationship recognized here, colleges generally owe a duty to use reasonable care to protect their students from foreseeable acts of violence in the classroom or during curricular activities.

Whether a new duty should be imposed in any particular context is essentially a question of public policy. . . .[6]

The court may depart from the general rule of duty, however, if other policy considerations clearly require an exception. . . . We have identified several factors that may, on balance, justify excusing or limiting a defendant's duty of care. These include: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561 (*Rowland*).) . . .

* * * *

a. *Foreseeability Factors*

(1) "The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care ... is whether the injury in question was *foreseeable*." (*Kesner*, *supra*, 1 Cal.5th at p. 1145, 210 Cal.Rptr.3d 283, 384 P.3d 283, italics added; see *Tarasoff*, *supra*, 17 Cal.3d at p. 434, 131 Cal.Rptr. 14, 551 P.2d 334.) In examining foreseeability, "the court's task ... 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed ....' ". . . .

Phrased at the appropriate level of generality, then, the question here is not whether UCLA could predict that Damon Thompson would stab Katherine Rosen in the chemistry lab. It is whether a reasonable university could foresee that its negligent failure to control a potentially

violent student, or to warn students who were foreseeable targets of his ire, could result in harm to one of those students. Violent unprovoked attacks by and against college students, while still relatively uncommon, are happening more frequently. (See de Haven, *supra*, 35 J.C. & U.L. at p. 510.) One example occurred on April 16, 2007 at Virginia Polytechnic Institute and State University (Virginia Tech), when an emotionally disturbed underclassman barred the doors to a classroom building, then walked the halls shooting people, killing five professors and 24 students. (See *id*. at pp. 554-566.) He left over a dozen more wounded before taking his own life. (*Id*. at p. 566.) Although mass shootings on college campuses had occurred before, the record demonstrates that the Virginia Tech tragedy prompted schools to reexamine their campus security policies. A January 2008 report of the University of California Campus Security Task Force recommended several improvements in student mental health services, emergency communications, preparedness, and hazard mitigation across all campuses. In April 2008, almost exactly one year after the Virginia Tech shootings, a special review task force of the International Association of Campus Law Enforcement Administrators published a "Blueprint for Safer Campuses," with several recommendations for assessing and responding to potential threats. Colleges across the country, including the public universities of California, created threat assessment protocols and multidisciplinary teams to identify and prevent campus violence. Thus, particularly after the Virginia Tech shootings focused national attention on the issue, colleges have been alert to the possibility that students, particularly those with mental health issues, may lash out violently against those around them. Even a comparatively rare classroom attack is a foreseeable occurrence that colleges have been equipping themselves to address for at least the past decade.

Whether a university was, or should have been, on notice that a *particular* student posed a foreseeable risk of violence is a case-specific question, to be examined in light of all the surrounding circumstances. Any prior threats or acts of violence by the student would be relevant, particularly if targeted at an identifiable victim. (See *Mullins v. Pine Manor College*, *supra*, 449 N.E.2d at p. 337.) Other relevant facts could include the opinions of examining mental health professionals, or observations of students, faculty, family members, and others in the university community. Such case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case. They do not, however, inform our threshold determination that a duty exists.

(2) The second factor, "the degree of *certainty* that the plaintiff suffered injury" (*Rowland*, *supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561, italics added), may come into play when the plaintiff's claim involves intangible harm, such as emotional distress. (*Kesner*, *supra*, 1 Cal.5th at p. 1148, 210 Cal.Rptr.3d 283, 384 P.3d 283.) Here, however, we are addressing claims for physical injuries that are capable of identification. (See *ibid*.)

(3) The third factor is "the *closeness of the connection* between the defendant's conduct and the injury suffered." (*Rowland, supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561, italics added.) "Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable. Conversely, a closely connected type of injury is likely to be deemed foreseeable." (*Cabral, supra*, 51 Cal.4th at p. 779, 122 Cal.Rptr.3d 313, 248 P.3d 1170.) The negligence alleged here is the failure to prevent a classroom assault, either by controlling the perpetrator or warning the potential victim. Although the immediate cause of injury in such cases will be the perpetrator's violent outburst, we have explained that the existence of an intervening act does not necessarily attenuate a defendant's negligence. . . . When circumstances put a school on notice that a student is at risk to commit violence against other students, the school's failure to take appropriate steps to warn or protect foreseeable victims can be causally connected to injuries the victims suffer as a result of that violence. Although a criminal act is always shocking to some degree, it is not completely unpredictable if a defendant is aware of the risk. . . .

b. *Policy Factors*

Although *Rowland* 's foreseeability factors weigh in favor of recognizing a duty of care, we must also consider whether public policy requires a different result. . . .

(1) Some measure of *moral blame* does attach to a university's negligent failure to prevent violence against its students. . . . Most often the proper student/college relationship is one of *shared* responsibility." (Lake, *supra*, 64 Mo. L.Rev. at p. 26.) Nevertheless, compared to students, colleges will typically have access to more information about potential threats and a superior ability to control the environment and prevent harm. This disparity in knowledge and control tips the balance slightly in favor of duty.

(2) "The overall *policy of preventing future harm* is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. The policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Cabral, supra*, 51 Cal.4th at pp. 781-782, 122 Cal.Rptr.3d 313, 248 P.3d 1170, italics added.) UCLA argues imposing a duty of care would discourage colleges from offering comprehensive mental health and crisis management services. Rather than become engaged in the treatment of their mentally ill students, colleges would have an incentive to expel anyone who might pose a remote threat to others. We understand that the recognition of a duty of care will force schools to balance competing goals and make sometimes difficult decisions. The existence of a duty may give some schools a marginal incentive to suspend or expel students who

display a potential for violence. It might make schools reluctant to admit certain students, or to offer mental health treatment. But colleges' decisions in this area are restricted to some extent by laws such as the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). In addition, the market forces that drove colleges across the country to adopt sophisticated violence prevention protocols in the wake of the Virginia Tech incident would likely weigh against the dismantling of these protections. Colleges and universities also may have options short of expelling or denying admission to deal with potentially violent students. What constitutes reasonable care will vary with the circumstances of each case. On the whole, however, if such steps can avert violent episodes like the one that occurred here, recognizing a duty serves the policy of preventing future harm.

UCLA also predicts that legal recognition of a duty might deter students from seeking mental health treatment, or being candid with treatment providers, for fear that their confidences would be disclosed. To a large extent, however, the conditions that might influence student perceptions about confidentiality already exist. Psychotherapists' duty to warn about patient threats is well established in California. Indeed, despite fears that this duty would deter people from seeking treatment and irreparably damage the psychotherapist-patient relationship (see, e.g., *Tarasoff*, *supra*, 17 Cal.3d at pp. 458-460, 131 Cal.Rptr. 14, 551 P.2d 334 (dis. opn. of Clark, J.)), empirical studies have produced "no evidence thus far that patients have been discouraged from coming to therapy, or discouraged from speaking freely once there, for fear that their confidentiality will be breached" (Buckner & Firestone, "*Where the Public Peril Begins" 25 Years After Tarasoff*, 21 J. Legal Med. 187, 221). Moreover, as the record in this case demonstrates, threat assessment and violence prevention protocols are already prevalent on university campuses. Recognizing that the university owes its students a duty of care under certain circumstances is unlikely to appreciably change this landscape.

(3) Which leads to the next policy factor: the *burden* that recognizing a tort duty would impose on the defendant and the community. (See *Rowland*, *supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561.) UCLA and some amici curiae place considerable weight on this factor, arguing it would be prohibitively expensive and impractical to make university professors and administrators the "insurers" of student safety. But the record shows that UCLA, like other colleges across the country, has *already* developed sophisticated strategies for identifying and defusing potential threats to student safety. The school created multidisciplinary teams of trained staff members and professionals for this very purpose. Indeed, one of these teams was closely monitoring Thompson's behavior. UCLA also expressly marketed itself to prospective students, and their parents, as "one of the safest campuses in the country." These enhanced safety measures came at a price, but students paid the bill. In 2007, schools in the University of California system raised mandatory registration fees 3 percent to improve student mental health

services, and they planned further increases to implement all of the violence prevention measures recommended by the Campus Security Task Force. . . .

The duty we recognize here is owed not to the public at large but is limited to enrolled students who are at foreseeable risk of being harmed in a violent attack while participating in curricular activities at the school. Moreover, universities are not charged with a broad duty to prevent violence against their students. Such a duty could be impossible to discharge in many circumstances. Rather, the school's duty is to take *reasonable* steps to protect students when it becomes aware of a *foreseeable* threat to their safety. The reasonableness of a school's actions in response to a potential threat is a question of breach.

(4) The final policy factor in a duty analysis is the *availability of insurance* for the risk involved. (*Rowland, supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561.) While not addressing this issue specifically, UCLA has offered no reason to doubt colleges' ability to obtain coverage for the negligence liability under consideration.

Accordingly, an examination of the *Rowland* factors does not persuade us to depart from our decision to recognize a tort duty arising from the special relationship between colleges and their enrolled students. Specifically, we hold that colleges have a duty to use reasonable care to protect their students from foreseeable violence during curricular activities.[7]

We emphasize that a duty of care is not the equivalent of liability. Nor should our holding be read to create an impossible requirement that colleges prevent violence on their campuses. Colleges are not the ultimate insurers of all student safety. We simply hold that they have a duty to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting. Reasonable care will vary under the circumstances of each case. Moreover, some assaults may be unavoidable despite a college's best efforts to prevent them. Courts and juries should be cautioned to avoid judging liability based on hindsight.

Our conclusion that universities owe a duty to protect students from foreseeable violence during curricular activities does not end the matter, however.[8] UCLA's petition for writ of

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[7] To the extent they are inconsistent with our holdings regarding the special relationship between colleges and students, or colleges' duty of care, we disapprove *Baldwin v. Zoradi*, *supra*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809, *Crow v. State of California*, *supra*, 222 Cal.App.3d 192, 271 Cal.Rptr. 349, *Tanja H. v. Regents of University of California*, *supra*, 228 Cal.App.3d 434, 278 Cal.Rptr. 918, *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 85 Cal.Rptr.2d 768, and *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 4 Cal.Rptr.3d 385.

[8] Because we decide the university had a duty arising out of its special relationship with Rosen, we do not address Rosen's alternate theories of duty based on an implied-in-fact contract or the negligent undertaking doctrine.

mandate argued summary judgment should have been granted for three reasons. First, UCLA claimed it owed Rosen no duty of care; second, it did not negligently breach any duty to Rosen; and third, various immunity statutes shielded the school and individual defendants from liability. The Court of Appeal majority agreed that UCLA owed no duty of care and did not reach the other arguments. Thus, while we conclude UCLA did owe a duty to protect Rosen, we will remand for the Court of Appeal to decide whether triable issues of material fact remain on the questions of breach and immunity. In regard to breach, we note that the appropriate *standard of care* for judging the reasonableness of the university's actions remains an open question, which the parties are free to litigate on remand. UCLA's argument that there was little more it reasonably could have done to prevent the assault may be relevant to this determination.

* * * *

III. DISPOSITION

The decision of the Court of Appeal is reversed. The case is remanded for further proceedings consistent with this opinion.

Notes and Questions

1. In a concurring opinion, Justice Chin wrote that he would not have extended the special relationship duty between a college and its students beyond the classroom, stating

> ". . . the extent of a university's control over the environment and student behavior is likely to be considerably less outside of the classroom. Indeed, the extent of a university's control in a nonclassroom setting varies considerably depending on the particular activity and the particular setting. It may be that, as to any given nonclassroom activity, a university's control is sufficient, from a public policy perspective, to impose a duty to protect or warn. But I would leave that question for a case that presents the issue on concrete facts, rather than broadly conclude, in a case involving *classroom* activity, that a university's control in nonclassroom settings is sufficient to impose a duty to protect or to warn." (*Rosen*, 413 P.3d at 675)

A. To what types of non-classroom activities should the duty placed on colleges and universities in *Rosen* be applied? Using the language from the majority opinion, when is a non-classroom activity "closely related to its delivery of educational services"?

1. The court made an important distinction between "school-sponsored activities over which the college has some measure of control" and activities not school-sponsored or under institutional control (413 P.3d at 668). Is this necessarily a meaningful distinction, especially in relation to issues of foreseeability? What if the student had been attacked at a nearby off-campus social event attended by students following class?

2. One potential prong of the duty imposed in the case is to warn students of foreseeable harm. Keeping in mind laws in place that protect student privacy (see, e.g., Text Sec. 7.8), under what circumstances might colleges and universities be able to issue some type of warning?

2. In its opinion, the Supreme Court of California acknowledged, but rejected, arguments that the standard it imposed could make institutions less likely to provide as extensive an array of mental health services to students or to be less likely to enroll students with mental health concerns or to let them remain enrolled. Is the court correct or not? In what ways, if any, might institutions alter the mental health services provided or treatment of students with mental health concerns based on the duty applied in *Rosen*?

4. Outside of actions such as suspension or expulsion, what actions, if any, could the university have taken toward the student in *Rosen* who attacked another student?

SEC. 3.2.2.4. Liability for Injuries in Off-Campus Instruction

Nova Southeastern University, Inc. v. Gross
758 So. 2d 86 (Fla. 2000)

QUINCE, J.

We have for review a decision on the following question certified by the Fourth District Court of Appeal in *Gross v. Family Services Agency, Inc*., 716 So. 2d 337 (Fla. 4th DCA 1998), to be of great public importance:

> WHETHER A UNIVERSITY MAY BE FOUND LIABLE IN TORT WHERE IT ASSIGNS A STUDENT TO AN INTERNSHIP SITE WHICH IT KNOWS TO BE UNREASONABLY DANGEROUS BUT GIVES NO WARNING, OR INADEQUATE WARNING, TO THE STUDENT, AND THE STUDENT IS SUBSEQUENTLY INJURED WHILE PARTICIPATING IN THE INTERNSHIP?

We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. We answer the certified question in the affirmative and approve the Fourth District's decision.

Facts

The pertinent facts are taken from the Fourth District's opinion and are as follows: Bethany Jill Gross, a twenty-three year old graduate student attending Nova Southeastern University, was criminally assaulted while leaving an off-campus internship site. Gross filed a negligence action against Nova based on Nova's alleged negligence in assigning her to perform an internship at a facility, which Nova knew was unreasonably dangerous and presented an unreasonable risk of harm. The trial court granted summary judgment for Nova, finding that there was no duty. . . .

The facts, as alleged in the sworn affidavits and other record evidence, and presented in the light most favorable to [Gross], the non-moving party, are briefly summarized as follows. [Gross] moved to Fort Lauderdale from North Carolina to study at Nova Southeastern University in the doctorate psychology program. As part of the curriculum, she was required to complete an eleven-month internship, called a "practicum." Nova provides each student with a listing of the approved practicum sites, complete with a description of the type of experience offered at each site. Each student selects six internships from the list and is placed, by Nova, at one of the

selected sites. [Gross] submitted her six selections and was assigned, by Nova, to Family Services Agency, Inc. ("FSA").

FSA is located about fifteen minutes away from Nova. One evening, when leaving FSA, [Gross] was accosted by a man in the parking lot. She had just started her car when he tapped on her window with a gun. Pointing the weapon at her head, the assailant had [Gross] roll down the window. [She] was subsequently abducted from the parking lot, robbed and sexually assaulted. There was evidence that, prior to [Gross's] attack, Nova had been made aware of a number of other criminal incidents that had occurred at or near the FSA parking lot. *Gross*, 716 So. 2d at 338.[1] The Fourth District reversed the trial court's summary judgment in favor of Nova, stating:

> This case involves an adult student injured during an off-campus, but school related activity, i.e., a university-mandated internship program at a site specifically approved and suggested by the university. The relationship between Nova and Gross can be characterized in various ways, but it is essentially the relationship between an adult who pays a fee for services, the student, and the provider of those services, the private university. The service rendered is the provision of an educational experience designed to lead to a college degree. A student can certainly be said to be within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatory and approved internship programs. *See McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla.1992). We need not go so far as to impose a general duty of supervision, as is common in the school-minor student context, to find that Nova had a duty, in this limited context, to use ordinary care in providing educational services and programs to one of its adult students. The "special relationship" analysis is necessary in this case only because the injury was caused by the allegedly "foreseeable" acts of a third party. *Id.* at 339.

Nova seeks discretionary review based on the question certified by the district court, and Gross seeks review of a portion of the district court's opinion, which she interprets to mean that Nova's sole duty to her was a duty to warn. Nova argues the certified question should be answered in the negative. In addition Nova opines the trial court's summary judgment was proper for three reasons: (1) Nova did not owe Gross any duty because she was an adult and Nova did not have

[1] Gross settled her claim against Family Services Agency for $900,000.

control over her actions; (2) Nova did not owe Gross a duty to warn her of the dangers because Gross had equivalent or superior knowledge of the dangers; and (3) even if Nova owed Gross a duty to warn her of the dangers associated with the parking lot at Family Services Agency, Inc. (FSA), the failure to warn did not cause her injury because FSA had already warned her. In her cross-petition, Gross argues the Fourth District defined the duty owed by Nova too narrowly. She opines the Fourth District's opinion may be narrowly interpreted as only requiring Nova to warn students, but that the proper duty owed by a university in this situation is a duty to protect or to make students safe from foreseeable, unreasonable dangers.

Nova's Petition

Nova argues it did not owe Gross a duty because she was an adult student, and therefore not within the ambit of a special relationship between a school and a minor student. The special relationship doctrine creates a duty between parties, which would not exist but for their relationship. Nova points out that in *Rupp v. Bryan*, 417 So. 2d 658 (Fla. 1982), the Court stated:

> The genesis of this supervisory duty is based on the *school employee standing partially in place of the student's parents*. Mandatory schooling has forced parents into relying on teachers to protect children during school activity. But our problem is complicated by the fact that the injury did not occur during the school day or on school premises. As such, we must define the scope of the school's and employee's duty to supervise. *Id*. at 666 (emphasis added).

Thus, Nova argues it is inappropriate for the Fourth District to find there is a special relationship between a university, where attendance is not mandatory, and an adult student because the university is not standing in loco parentis to an adult student. While the Fourth District discussed the special relationship doctrine, the court did not base Nova's duty to Gross on the type of relationship that exists between a minor child and public school officials.

Although Nova is correct that the school-minor student special relationship evolved from the *in loco parentis doctrine*, the district court recognized that any duty owed by Nova to Gross was not the same duty a school and its employees owe to a minor student. The district court further recognized a different relationship existed between the university and its adult students, a relationship that does not necessarily preclude the university from owing a duty to students

assigned to mandatory and approved internship programs.[2] In *Rupp*, we said the extent of the duty a school owes to its students should be limited by the amount of control the school has over the student's conduct. Here, the practicums were a mandatory part of the curriculum that the students were required to complete in order to graduate. Nova also had the final say in assigning students to the locations where they were to do their practicums.

As Nova had control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty[3] of acting reasonably in making those assignments. In a case such as this one, where the university had knowledge that the internship location was unreasonably dangerous, it should be up to the jury to determine whether the university acted reasonably in assigning students to do internships at that location.

Moreover, the Fourth District's analysis is supported by fundamental principles of tort law. In *Union Park Memorial Chapel v. Hutt*, 670 So. 2d 64, 66-67 (Fla. 1996), we stated: It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care. *See Slemp v. City of North Miami*, 545 So.2d 256 (Fla.1989) (holding that even if city had no general duty to protect property owners from flooding due to natural causes, once city has undertaken to provide such protection, it assumes the responsibility to do so with reasonable care); *Banfield v. Addington*, 104 Fla. 661, 667, 140 So. 893, 896 (1932) (holding that one who undertakes to act is under an implied legal duty to act with reasonable care to ensure that the person or property of others will not be injured as a result of the undertaking); *Kowkabany v. Home Depot, Inc.*, 606 So.2d 716, 721 (Fla. 1st DCA 1992) (holding that by undertaking to safely load landscaping timbers into vehicle, defendant owed duty of reasonable care to bicyclist who was struck by timbers protruding from vehicle window); *Garrison Retirement Home v. Hancock*, 484 So.2d 1257, 1262 (Fla. 4th DCA 1985) (holding that retirement home that assumed and undertook care and supervision of retirement home resident owed duty to third party to exercise reasonable care in supervision of resident's activities). As this Court recognized over sixty years ago in *Banfield v. Addington*, "[i]n every situation where a man undertakes to act, . . . he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured." *Id.*; see also *Pate v. Threlkel*, 661 So. 2d 278, 280 (Fla. 1995)("A duty is thus established when the acts of a defendant in a particular case create a foreseeable zone of risk.").

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[2] *See* Robert D. Bickel & Peter F. Lake, "The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator," 23 *J.C. & U.L.* 755 (1997).

[3] *See* Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale L. J.* 16 (1913).

We find this fundamental principle of tort law is equally applicable in this case. There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.

Nova also argues it did not owe Gross a duty because she knew FSA was in a dangerous location, and Nova's knowledge of the dangerous location was not superior to Gross's knowledge. While this is a correct statement of the law with regard to negligence actions based upon premises liability, this is not a premises liability case. Gross is suing Nova under a common law negligence theory based upon Nova assigning her to do her mandatory practicum at an unreasonably dangerous location. Issues of Gross's knowledge should be considered when determining the issues of breach of duty and proximate cause of her injury and in attributing proportional fault. However, it does not eliminate the university's duty to use reasonable care in assigning students to practicum locations.

Lastly, Nova argues even if it had a duty to warn Gross, the failure to warn her did not cause her injury. This argument is one that this Court need not reach but is better left to the trier of fact. In this case, the motion for summary judgment was based solely upon Nova's lack of duty. Therefore, this Court will not consider whether Nova's failure to warn Gross caused her injuries. *See Ferber v. Orange Blossom Ctr., Inc.*, 388 So. 2d 1074 (Fla. 5th DCA 1980) (issues of causation should be left to the jury).

Gross' Cross-Petition

Gross cross-petitions for review claiming the Fourth District's emphasis on Nova's failure to warn implies Nova only had a duty to warn. We do not read the Fourth District's opinion so narrowly. The court stated, "We need not go so far as to impose a general duty of supervision, as is common in the school-minor student context, to find that Nova had a duty, in this limited context, to use ordinary care in providing educational services and programs to one of its adult students." *Gross*, 716 So. 2d at 339. We read this statement broadly as an indication that the duty, one of ordinary care under the circumstances, could include but is not necessarily limited to warning of the known dangers at this particular practicum site.

We do not make any specific findings as to what duty Nova owed Gross, other than to hold a jury should determine whether Nova acted reasonably in light of all of the circumstances surrounding the case. *See Hutt*, 670 So. 2d at 66-67. As the court said in *Silvers v. Associated Technical Institute, Inc.*, No. 93-4253, 1994 WL 879600 at *3 (Mass. Super. Ct. Oct. 12, 1994), "students . . . could reasonably expect that the school's placement office would make some effort

to avoid placing [students] with an employer likely to harm them." This is the type of duty owed under the circumstances of this case.

Accordingly, we answer the certified question in the affirmative and approve the decision of the Fourth District.

It is so ordered.

Notes and Questions

1. What is the institution's legal duty with respect to a student for whom it arranges an off-campus internship or practicum?

2. If the institution required the student to arrange her own internship or practicum, what would the institution's legal duty be?

3. Is there any other way, in addition to warning students about any known dangers, that the institution could protect itself from liability (for example, having the student sign a waiver)?

4. If the internship were a noncredit activity that was recommended but not required by the institution, would this change the legal standard of duty?

5. Change the facts and assume that the plaintiff is a nonstudent who was injured by the actions of a student working in a required internship (for example, a student injured by the actions of a student teacher). What institutional liability, if any, might attach?

6. For a thoughtful analysis of the "special relationship" doctrine, see *Webb v. the University of Utah*, 125 P.3d 906 (Utah 2005), in which the court rejected the plaintiff's assertion that being required during a field trip to walk on an icy sidewalk by a faculty member, with an ensuing fall and injury, created a "special relationship" such that the institution was liable for his injury. The court concluded:

> It is certainly possible that a directive inducing detrimental reliance may be one that creates an unreasonable risk of harm to the people expected to

follow it. Viewed objectively, we conclude that the directive to occupy and traverse the condominium sidewalk does not meet this standard. We reach this conclusion for several reasons. First, the directive given Mr. Webb's class did not relate directly to the academic enterprise of the class. By this we mean tht it is not reasonable to believe that any student would understand that his academic success, measured either by the degree of knowledge acquired or by the positive impression made on the instructor, turned on whether they abandoned all internal signals of peril to take a particular potentially hazardous route to view fault lines. . . . [T]he directive's tangential relationship to the field trip's academic mission leaves us with the firm conviction that it would not be reasonable for a student to rely on it. The instructor did not, therefore, exert the control which might be present in an academic setting to create a special relationship. 125 P.3d at 913.

SEC. 3.2.3. Educational Malpractice

Hendricks v. Clemson University
578 S.E. 2d 711 (S.C. 2003)

OPINION BY: TOAL, C.J.

Petitioner, Clemson University ("Clemson"), appeals from the Court of Appeals' reversal of summary judgment for Clemson.

FACTUAL/PROCEDURAL BACKGROUND

Respondent, R.J. Hendricks II ("Hendricks") was recruited out of high school by several colleges to play baseball. He received a scholarship from St. Leo College, a Division II school in Florida, and chose to attend St. Leo because it was closest to home. In his junior year at St. Leo, Hendricks received permission to talk with Division I schools about transferring in order to play baseball for a Division I team in his final year of eligibility. Hendricks's father contacted Tim Corbin ("Corbin"), assistant coach at Clemson, to inquire about a transfer for his son. Clemson pursued a one-time transfer exception for Hendricks from the NCAA, and Hendricks applied for admission and was accepted by Clemson.[1] Hendricks received a book scholarship for approximately $ 200 to $ 250, but no other scholarship, athletic or otherwise, from Clemson.

At the time of his transfer, Hendricks had earned 80 of the 130 credit hours required for the degree he was pursuing at St. Leo in Business Administration, with a cluster in Restaurant and Hotel Management. Clemson did not offer the same major. When Hendricks decided to transfer to Clemson, he knew he would have to return to St. Leo for a final semester (in essence, for an extra semester) in order to graduate from St. Leo with his original major.

Sometime in August, prior to registration, Hendricks met with the athletic academic advisor assigned to him by Clemson's Student-Athlete Enrichment Program, Barbara Kennedy-Dixon ("Kennedy-Dixon"). As Clemson did not offer Hendricks's major, Kennedy-Dixon advised Hendricks to declare himself a Speech and Communications major. Pursuant to her advice, Hendricks enrolled in fifteen hours for the fall semester. A week and one-half into the semester, however, Kennedy-Dixon realized she had not evaluated whether Hendricks was in compliance with the NCAA's fifty-percent rule, which required a student athlete to complete at least fifty percent of the course requirements toward his major to be eligible to compete during

[1] The NCAA has a one-time transfer rule that permits students to transfer one time during their college career to another school without having to sit out for a year after being released from the previous school.

his fourth year of college enrollment. Recognizing her mistake, Kennedy-Dixon advised Hendricks to drop one class and add two speech classes, increasing his credit hours from fifteen to eighteen. Hendricks changed his classes as advised. Kennedy-Dixon discussed the mistake with her graduate assistant, but did not report it to the director of the program. A few days before the end of the semester, Kennedy-Dixon realized that she had miscalculated the total number of electives Hendricks could take and, consequently, that he would not comply with the NCAA's fifty percent rule.[2]

Upon discovering her mistake, Kennedy-Dixon filed a waiver application with the NCAA in which she claimed responsibility for Hendricks's failure to satisfy the rule, and requested that the NCAA waive the rule to allow Hendricks to play baseball. The NCAA denied the appeal. Hendricks passed all of his fall course hours and remained at Clemson for the spring semester, but was not allowed to play baseball. He returned to St. Leo the next fall without a scholarship as planned. Hendricks graduated on schedule in December, but stayed on at St. Leo for the spring semester to play baseball because he had not used his final year of eligibility.

Clemson won the NCAA regional title that spring and went to the College World Series. In his deposition, Clemson's head coach, Coach Leggett, stated there was no limit on the number of players allowed on the non-traveling team, but that the traveling team was limited to 25 players. Based on Hendricks's performance in fall practice, Coach Leggett testified it would have been very hard for Hendricks to make the traveling team. Coach Leggett met with Hendricks at the end of the fall semester (before he was aware Hendricks was ineligible) and explained to him that there were 3 players ahead of him in the line-up for both of the positions Hendricks played, catcher and first base.

In her deposition, Kennedy-Dixon admitted her mistakes were likely caused by personal stress she was experiencing at the time. She gave birth to a premature baby in June (before advising Hendricks in August), and was traveling to Greenville daily to visit her baby who remained in neonatal intensive care until October of Hendricks's first semester at Clemson. Kennedy- Dixon described the purpose of her job as follows: "We have a two-fold purpose . . . . We try to help our students maintain academic excellence and certainly to make sure that they remain academically eligible according to the NCAA and graduate."

Hendricks sued Clemson for negligence, breach of fiduciary duty, and breach of contract for Kennedy-Dixon's mistakes that made him ineligible to play baseball at Clemson. The trial court granted Clemson's motion for summary judgment on all causes of action. The Court of

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[2] Hendricks had only twenty-one hours of electives available, rather than the thirty-two calculated by Kennedy-Dixon, due to certain foreign language requirements that Hendricks had not met. Accordingly, six of Hendricks' eighteen hours were excess electives, and he did not meet the fifty percent rule. To comply with the fifty percent rule, Hendricks needed to take twenty hours toward his Speech and Communications major in the fall semester.

Appeals reversed summary judgment, finding that genuine issues of material fact existed regarding the viability of each of Hendricks's causes of action. *Hendricks v. Clemson Univ.*, 529 S.E.2d 293 (S.C. Ct. App. 2000).

Clemson raises the following issues on appeal:

I. Did the Court of Appeals err in finding there was a genuine issue of material fact regarding the existence of a duty to support Hendricks's negligence claim?

II. Did the Court of Appeals err in finding there was a genuine issue of material fact regarding the existence of a fiduciary duty between Kennedy-Dixon and Hendricks, as advisor and student?

III. Did the Court of Appeals err in finding a genuine issue of fact regarding the existence of a contract between Hendricks and Clemson?

IV. Did the Court of Appeals err in partially reversing the trial court's holding that Hendricks suffered no measurable damages?

LAW/ANALYSIS

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Hamiter v. Retirement Div. of South Carolina Budget and Control Bd.*, 484 S.E.2d 586 (S.C. 1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party.

I. Negligence

Clemson argues the Court of Appeals erred when it found Kennedy-Dixon's actions did not amount to gross negligence as a matter of law, and reversed summary judgment for Clemson. We agree that the Court of Appeals erred in reversing summary judgment on this issue, and find that summary judgment was appropriate on the additional ground that Clemson owed no duty to Hendricks.

Both the trial court and Court of Appeals agree that the South Carolina Tort Claims Act shields Clemson, as a state-supported university, from liability for loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student . . . except when the responsibility or duty is exercised in a *grossly*

negligent manner."[4] The Court of Appeals discussed gross negligence at length and then addressed Clemson's claim that it had no duty to ensure students' athletic eligibility. Citing Kennedy-Dixon's description of her *job* duties and the proposition that if an act is voluntarily undertaken, the actor assumes the duty to use slight care, the Court of Appeals found there was at least a factual dispute as to whether Clemson undertook the duty to advise Hendricks concerning compliance with NCAA eligibility standards. . . .

Whether the law recognizes a particular duty is an issue of law to be decided by the Court. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care.

Hendricks's argument that Clemson affirmatively assumed a duty of care when it advised him on which courses to take in order to obtain NCAA eligibility does not fit into any of the causes of action previously recognized in South Carolina. Under these circumstances, the Court must determine whether the law will recognize a new duty of care between advisor and student.

In considering the same question, a California court found the issue of duty to be close, but leaned toward finding no duty due to significant policy concerns. *Brown v. Compton Unified Sch. Dist.*, 80 Cal.Rptr. 2d. 171 (Cal. App. 1998). California represents the position of the majority of states in refusing to recognize the tort of "educational malpractice" in claims brought by students alleging they received an inadequate education. *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal.Rptr. 854 (Cal. App. 1976) (seminal case); *Ross v. Creighton Univ.*, 957 F.2d 410 (1992) (considering Illinois state law and citing cases from eleven other states that have considered and rejected educational malpractice claims). Courts addressing inadequate education claims, identify several policy concerns with recognizing an actionable duty of care owed from educators to students: (1) the lack of a satisfactory standard of care by which to evaluate educators; (2) the inherent uncertainties of the cause and nature of damages; and (3) the potential for a flood of litigation against already beleaguered schools. *Peter W.; Ross.*

Although Hendricks is not alleging he received an inadequate education while at Clemson, his claim regarding his advisor's negligence should fail for the same reasons courts have refused to recognize a duty in inadequate education cases. In *Brown v. Compton Unified Sch. Dist.*, a high school student sued his school for negligently advising him on which classes to take, resulting in his being ineligible to play basketball at the University of Southern California, and, consequently, in him losing his basketball scholarship from that university. 80 Cal.Rptr.2d at 172. Although the court recognized his damages (the loss of the scholarship) were more

[4] S.C. Code Ann. § 15-78-60(25) (Supp. 2002) (emphasis added).

readily identifiable than in the normal educational malpractice claim, the court gave great weight to the policy considerations discussed above. Ultimately, the court found the school immune based on a statute granting immunity to public employees for negligent misrepresentations, but its analysis, recognizing the dangers of imposing a duty on student advisors, is instructive in this case. 80 Cal.Rptr. 2d. at 173.

We believe recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create. Further, the Court of Appeals citation to *Miller*, indicating a duty may have been created by Clemson's voluntary undertaking to advise Hendricks to ensure NCAA eligibility, is inapposite. 329 S.C. 310, 494 S.E.2d 813. The line of cases *Miller* discusses has thus far been limited to situations in which a party has voluntarily undertaken to prevent physical harm, not economic injury.

Because we find Clemson did not owe a duty to Hendricks, it is unnecessary to discuss whether Kennedy-Dixon's mistakes *could* amount to gross negligence as required for recovery under the Tort Claims Act.

II. Fiduciary Duty

Hendricks argues there is a genuine issue of material fact regarding whether Clemson owed him a fiduciary duty. We disagree.

Whether there is a fiduciary relationship between two people is an equitable issue. *Island Car Wash, Inc. v. Norris,* S.E.2d 150 (S.C. Ct. App. 1987). Generally, legal issues are for the determination of the jury and equitable issues are for the determination of the court. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *O'Shea v. Lesser,* 416 S.E.2d 629, 631 (S.C. 1992) (citing *Island Car Wash,* 358 S.E.2d at 152). This Court has recognized certain relationships are by nature fiduciary, such as the attorney client relationship. The relationship between advisor and student has not been so recognized thus far.

Although whether a fiduciary relationship has been breached can be a question for the jury, the question of whether one should be imposed between two classes of people is a question for the court. . . . Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters. We decline to recognize the relationship between advisor and student as a fiduciary one.

III. Breach of Contract

Hendricks argues there is at least a genuine issue of material fact regarding the existence of a contract between him and Clemson. We disagree.

A contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act. *Benya v. Gamble*, 321 S.E.2d 57 (S.C. Ct. App. 1984). Offer and acceptance are essential to the formation of a contract. . . . If the evidence is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury.

For support, Hendricks and the Court of Appeals cite cases from several jurisdictions that have acknowledged the possibility that "the relationship between a student and a university is at least in part contractual." *Carr v. St. John's University*, 231 N.Y.S.2d 410 (N.Y.A.D. 1962), *affirmed without opinion*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (N.Y. 1962). Many of these cases involve disputes between student athletes and their schools. *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. App. 1972). Other cases involve claims related to the quality of the education received by the student. *Cencor, Inc. v. Tolman*, 868 P.2d 396 (Colo. 1994); *Wickstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986).

All of these cases, however, recognize that not all aspects of the student/university relationship are subject to a contract remedy. Just as courts have prohibited recovery in tort for educational malpractice claims, courts have been equally reluctant to permit claims relating to academic qualifications of students or to the quality of education received when they are brought in contract. In barring contract actions for educational malpractice claims, courts have noted that the policy concerns that preclude those claims in tort apply with equal force when the claim is brought in contract. In *Ross*, a student athlete sued the university alleging that the university accepted him knowing he was not qualified academically to participate in its curriculum, and made a specific promise to provide certain services to him to enable him to participate meaningfully in the academic curriculum. The court allowed the claim to proceed as a breach of contract action, but made clear that the lower court would not reach the question of whether the university had provided *deficient* academic services. The court limited the inquiry to a determination of whether the university had provided *any* real access to its academic curriculum at all.

In *Cencor*, the court adhered to the same distinction, delineating between subjective and objective claims. In that case, the plaintiffs asserted that certain provisions of their enrollment agreements and the school's catalog constituted express contract terms. The court allowed plaintiffs' breach of contract claims to go forward to the extent it referenced "specific services

for which the [plaintiffs] allegedly paid and which Cencor allegedly failed to provide." The court placed no value on the plaintiffs' general allegations that they had not received the education they had been promised, and instead made clear that the claim was proceeding based on the plaintiffs' allegations that Cencor had obligated itself to provide such tangible things as modern equipment and computer training for all students.

Clemson admits that some aspects of the student/university relationship are indeed contractual, but argues Hendricks has not pointed to an identifiable contractual promise that Clemson failed to honor in this case. We agree. Hendricks fails to point to any written promise from Clemson to ensure his athletic eligibility, and submits no real evidence to support his claim that such a promise was implied. He did not discuss NCAA academic eligibility until he was already enrolled at Clemson. His conversations with Kennedy-Dixon in June, according to both his deposition and Kennedy-Dixon's deposition, were limited to what major would most easily transfer back to St. Leo.

Hendricks's claim calls for an adjudication of the *deficiency* of Clemson's services. As such, allowing Hendricks's claim to proceed would invite courts to engage in just the type of subjective analysis that courts prohibiting educational malpractice claims in tort and contract have avoided.

IV. Damages

As discussed, we find no actionable duty or contract existed under the circumstances presented. Accordingly, it is unnecessary to address Hendricks' claim for damages.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Appeals and reinstate the trial court's grant of summary judgment in favor of Clemson on all causes of action.

Notes and Questions

1. Note that Hendricks' first claim is for negligence; in order to maintain this claim, Hendricks must convince the court that Clemson had a duty to advise him correctly. Why does the court refuse to recognize such a duty?

2. Note the court's reliance on previous cases in which other courts rejected students' claims of educational malpractice, criticizing the quality of education that they received. How does this case differ, and do you think the court's reliance on the policy arguments used by earlier cases to reject educational malpractice claims are on all fours with the facts of this case? Why or why not?

3. Compare this court's treatment of Hendricks' breach of fiduciary duty claim with the approach of the federal trial court in *Johnson v. Schmitz*, discussed in the Text Section 3.2.3, p. 125-126.

4. The court also rejected Hendricks' breach of contract claim, noting that he had not relied on the advisor's advice in making his decision to attend Clemson. Had the advisor's representations been made prior to his arrival at Clemson, would his argument have been more convincing to the court? For a case with somewhat similar, but more dramatic facts, see *NCAA v. Yeo*, discussed in the Text Section 10.4.2.

SEC. 3.2.4. Defamation

164 Mulberry Street Corp. v. Columbia University
771 N.Y.S.2d 16 (N.Y.App.Div. 2004)

Opinion by**:** Peter Tom

We are asked to decide whether an academic research project that allegedly caused havoc at several New York City restaurants can form the basis of a lawsuit sounding in various tort causes of action against the academic institution and the researcher. Defendant Flynn, a Columbia Business School professor, designed and implemented a study that sought to elicit responses from restaurants in New York City to complaints from putative customers. As part of the project, professor Flynn sent letters to plaintiffs' restaurants, as well as many other New York City restaurants, including, inter alia, The Box Tree, Bordi Restaurant, Jezebel, The Herbal Kitchen, March, Bellini, La Grenouille, Sparks Steakhouse, Aquagrill, Aureole, Dawat, Le Bernadin and Capsuto Freres.

Plaintiffs in these two companion actions are the various restaurants and restaurateurs, along with their employees, who were the subjects of the professor's novel experiment, and who allege damages as a result. They asserted in these actions various negligence theories, but also sued for libel and libel per se arising from publication of defamatory information regarding the restaurants' hygienic safety.

In the Da Nico action, plaintiff 164 Mulberry Street Corp. is a restaurant known as Da Nico. Nicholas Criscitelli is the owner, president and manager of the restaurant. His mother Annette Sabatino helps manage it. They are individual plaintiffs. In the related Chez Josephine action, the lead restaurant plaintiff is Chez Josephine. Numerous other plaintiffs are noted in the caption and identified in the amended complaint as owners, managers, and employees of New York City restaurants.

Turning first to the Da Nico complaint, plaintiffs allege that on or about August 14, 2001, defendant Flynn wrote a letter to Criscitelli in which he falsely accused the restaurant and Criscitelli of serving food to Flynn's wife that resulted in her suffering from food poisoning, with severe gastric consequences that putatively ruined their anniversary. The letter's narrative departed somewhat from the narrative provided in the complaint in that Flynn, identifying himself as a manager at The Gap, stated that he and not his wife had suffered the mishap. The letter disclaimed any intention of the complainant of contacting regulatory agencies, and stated that the only intent was to convey to the owner what had occurred "in anticipation that you will respond accordingly." Apparently, the point of the study was to see how the various restaurants

"respond[ed] accordingly." In any event, the complaint correctly focuses on the general falsity of the letter, that no food poisoning had occurred, and that, in fact, the letter was only a ruse that was part of an academic exercise wherein Flynn sought to elicit and evaluate plaintiffs' responses. Subsequently, Flynn admitted the falsehood in a September 4, 2001 letter of apology, in which he explained in cursory fashion that "the letter was fabricated to help collect data for a research study that I designed concerning vendor response to consumer complaints," and that none of the data thereby collected would be used for publication. The Dean of the Columbia Business School, professor Meyer Feldberg, also wrote a letter, dated September 5, 2001, apologizing for Flynn's conduct. He promised "to put into place procedures and guidelines for empirical research projects so that this will never happen again." This latter assurance has been converted by the pleadings into an admission that no such safeguards were in place. The complaint alleges that in the interim between the original letter and the apologies, though, Flynn had repeated the false statement regarding putative food poisoning in a telephone call to Criscitelli's mother, plaintiff Sabatino, during which he provided a false address. These individual plaintiffs allege that they were extremely upset by the claim of food poisoning, especially in view of the extraordinarily competitive nature of the restaurant business and the critical importance of reputation. They tried, unsuccessfully, to send flowers to the fictitious address. Subsequently, the New York City Department of Health conducted an investigation into the claim of food poisoning, during which restaurant employees were required to submit to stool analysis. Plaintiffs fault the institutional university defendants for allegedly failing to have and to enforce appropriate guidelines and protocols regarding ethical and acceptable research practices by Flynn, thereby allowing this kind of research project to be conducted. The Da Nico complaint then sets forth 24 causes of action sounding generally in intentional and negligent infliction of emotional distress by the various defendants against the various plaintiffs, libel and libel per se, and negligent misrepresentation. Plaintiffs also seek punitive damages.

In the Chez Josephine action, the amended complaint also alleged the need for the restaurant to maintain the highest credibility in the extremely competitive New York City dining market. The complaint alleged that on August 14, 2001, "defendants" wrote "letters" to plaintiffs that falsely accused them of having caused severe food poisoning. Parenthetically, the complaint fails to identify who suffered food poisoning, or how many letters were sent, and to whom exactly the letters were sent, except that they were sent to "plaintiffs." The complaint alleges that the letters were prepared and sent as part of a research project "to determine how the plaintiffs would react to such vicious and serious accusations," that the project was unethical and malicious, and that defendants "failed to have appropriate guidelines and protocols regarding acceptable and ethical research." Plaintiffs allege that as a result of the letters being sent, "plaintiffs suffered enormous emotional distress, guilt, fear of loss of individual jobs and

business, and fear of loss of reputation." The complaint also, in conclusory terms, alleges the existence of purported damages that are not further itemized with respect to particular plaintiffs or with specific allegations regarding monetary losses. Individual plaintiffs Jean Claude Baker, the owner of Chez Josephine, and Frank Valenza, the owner of Restaurant 222, augment the pleadings with affidavits in which they claim that a charge of food poisoning could ruin their businesses, that they believed such a result would occur as a consequence of the original letter, and that Valenza claimed to have suffered heart problems and agitation as a result. Four causes of action in the Chez Josephine action, sounding in negligent and intentional infliction of emotional distress, libel and libel per se, are set forth. Punitive and compensatory damages are demanded.

Defendants moved to dismiss the complaints for failure to state a cause of action and on documentary evidence, and the Da Nico plaintiffs cross-moved for summary judgment. In addressing the dismissal motions, the motion court issued two separate decisions. After noting the essential generality of the causes of action, the court dismissed most of the claims. With regard to the negligent infliction of emotional distress claims by the individual plaintiffs in both actions, the court found no allegation of a breach of duty owed directly to the various plaintiffs which either endangered, or caused them to fear for, their physical safety. Regarding intentional infliction of emotional distress, a personal claim of harm, all such claims in the Chez Josephine action against restaurant entities were dismissed as nonviable claims. The court found that the complaints failed to establish which individuals, other than Baker and Valenza, actually received the letters on behalf of the restaurants. Hence, the second cause of action for intentional infliction of emotional distress was dismissed except as to Baker and Valenza, who also claimed physical and psychological injuries as a result of Flynn's letter.

In the Da Nico action, the court dismissed the intentional infliction of emotional distress causes of action in the third, fourth, thirteenth, and fourteenth causes of action as being duplicative of the libel claims in that action. As to those libel claims, the court in the Da Nico action found issues of fact whether there was a publication of the charge of food poisoning that went beyond the self-publication by Flynn in his letters to the restaurant staff. In this regard, the court noted that the Department of Health (DOH) allegedly conducted an investigation, and it remained factually unclear who had contacted the Department. However, insofar as the Da Nico complaint contained no actual allegation that the individual plaintiffs had suffered actual damage to their reputation, and no special damages were pleaded that are required for a cause of action for libel, the libel claims in the fifth, fifteenth, and twentieth causes of action were dismissed. However, insofar as plaintiffs alleged that a false claim of food poisoning was made in a phone call and that a DOH investigation was triggered by the claim, and that the allegations sufficiently made out harm to plaintiffs in their business, the libel per se claims, which do not normally

require that special damages be pleaded, were not dismissed. Claims for punitive damages arising out of libel per se were also dismissed insofar as they were being applied to private wrongs.

* * * *

Defendants, arguing that the facts as alleged do not establish conduct that as a matter of law was outrageous and beyond all bounds of decency . . .

Turning first to the emotional distress claims, most of which were dismissed in any event, and from which dismissal no cross appeal is taken, we find no basis to disturb the motion court's conclusions as to those claims that were sustained in the Chez Josephine action. Generally, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (Restatement [Second] of Torts § 46 [1]). In order to survive a motion to dismiss, a cause of action for intentional infliction of emotional distress must allege conduct that is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*Murphy v American Home Prods. Corp.*, 58 N.Y.2d 293, 303 [1983], quoting Restatement [Second] of Torts § 46, Comment *d*; *Harville v Lowville Cent. School Dist.*, 667 N.Y.S.2d 175 [1997], *lv denied* 92 N.Y.2d 808 [1998]). Claims typically fail because the challenged conduct is not sufficiently outrageous (*Howell v New York Post Co.*, 596 N.Y.S.2d 350 [1993]), or because a statement is privileged, a factor not present in this case. The conduct must consist of more than mere insults, indignities,and annoyances. Further, the emotional distress claim is dismissible unless the claim arises as a result of a "campaign of harassment or intimidation" (*Nader v General Motors Corp.*, 307 N.Y.S.2d 647 [1970]). Notably, these several letters could be construed in the aggregate as presenting a campaign of harassment, albeit directed against distinct individuals, so it cannot be said as a matter of law that the fact of individual impacts vitiates what seems to have been serial acts perpetrated by a single source. While defendant Flynn in his academic research did not intend to harass plaintiffs, his ill-conceived mode of gathering data for the project may have resulted in a campaign of harassment of the individual restaurant owners. Whether or not the requisite outrageousness of the conduct has been satisfied by the allegations is, in the first instance, an issue of law for judicial determination. Although vested with the power to do so, the motion court declined at this pre-answer stage of the proceedings to find that the concededly general allegations in this case were inadequate as a matter of law. Rather, the court found the issue of outrageousness more appropriately to be decided by a jury. Although there may be some inconsistency in that formulation, in that the court's phrasing implies a willingness to

revisit the matter as a law issue at another stage of the proceedings, we do not find legal error in the court's decision to defer decision on the matter.

Our review of the record and pleadings indicates an adequate factual basis for potential findings that the conduct was sufficiently outrageous so as to support the claim. Although, as noted, Flynn might not have intended harassment, he intended to elicit a response and in doing so may have recklessly disregarded the potential consequences of that conduct. Parenthetically, making a claim of food poisoning could conceivably impact on the success of the enterprise and perhaps even destroy its viability as a business in such a highly competitive trade. Once a restaurant's reputation is tainted, it is hard to undo the damage. The possibility of a forced closing of a restaurant could very likely affect the physical and emotional well-being of the restaurateurs involved, especially those who may have invested all their savings and energy into the business. After receiving the professor's letter, Jean Claude Baker averred, that, in view of professor Flynn's "high status," the letter "was like getting a death warrant from the White House... The Restaurant was turned upside down to try and find out how this could have happened. Much food on hand in our kitchen was destroyed, at a cost of thousands of dollars. Vendors were notified and told to check their entire inventory. Staff members were all put on notice that if this were ever to be traced to a particular person, that individual would not only be fined, but would, probably never work in this field again." Mr. Baker further stated that "my life's work, Chez Josephine, would go out of business, or be reduced in its reputation to a second rate establishment." Frank Valenza, owner of Restaurant 222, stated that he "was certain that word of this terrible food poisoning would spread ... I had no idea what type of response he wanted ... This type of damage can never be undone in the restaurant business ... I had lost all of my money on what was one of the finest restaurants in the world, The Palace. My wife had put all of her money into 222. Now 222 was about to be destroyed also, and this time it would be our fault." Thus, there may be numerous indirect effects on health caused by the resultant stress. Mr. Baker stated that he "sought psychiatric care, and went into a serious depression." Mr. Valenza stated, "I suffered heart problems and agitation and this was an extremely difficult period for us." Although it is beyond the present record, one cannot help but note the recent publicity regarding the apparent suicide of a famous French chef whose restaurant was downgraded by food critics in restaurant guidebooks. While I am not correlating an individual tragedy with the present case, nevertheless, it illustrates the point that alleged outrageous conduct directed at unknown targets and without consideration of the consequences might lead to unpredictable results, especially involving New York City's highly competitive restaurant business. In any event, there is a sufficient basis to allow a jury to decide whether the conceded conduct in this case was outrageous so as to satisfy the requisite standard.

* * * *

We also agree with the motion court to the extent that causes of action sounding in negligent and fraudulent misrepresentation appeared to be supported by the pleadings and related documentation in the Chez Josephine action. As to the fraud theory, a plaintiff must prove a misrepresentation that was false and known to be false by the defendant, made for the purpose of inducing the other party to rely on it, and justifiable reliance of the other party on the misrepresentation and injury . . . [T]he Court of Appeals enunciated three criteria before liability for a claim of negligent misrepresentation may be attached. Plaintiff must demonstrate by proof: (1) an awareness by the declarant that the statement would be used for a particular purpose; (2) reliance by the recipient of the statement; and (3) some conduct by the declarant linking the statement to the recipient and evincing an understanding of that reliance. However, at this pleading stage of the proceedings, the facts and allegations thus far presented appear to make out these claims.

Flynn was aware that his letter was being used for the purpose of eliciting a response from the recipients. He admittedly sent the false letters stating that he had eaten at the restaurant with his wife, that he had anticipated celebrating his anniversary, thus investing greater emotional resonance in the occasion, and further stated in graphic terms how illness had consumed him only a few hours later. Although Flynn further stated that he did not intend to contact regulatory authorities, one might note at least the implied threat to do so unless the letter's recipient "respond[ed] accordingly." There is a basis to find reliance by the recipients of the letters. These letters potentially pose the risk of a public health crisis, and a financial crisis for the letter recipients, with the consequence that in reliance on the information communicated, the recipients allegedly expended considerable sums of money to rectify a nonexistent problem, as well as forced employees through arduous and uncomfortable testing. The fact that Flynn sent a letter with serious connotations directly to the various entities and demanded an immediate response appeared to satisfy the third criterion concerning conduct evincing an understanding by Flynn of the reliance by the recipients. Finally, arguably, Flynn himself, by thrusting himself into the business affairs of the recipients solely to elicit an undefined appropriate response, potentially created the basis for the requisite privity, in that the nature of the response, crafted in justifiable reliance on these letters, created a relationship, albeit an uninvited one. . . .

Finally, compensatory damages are limited to provable pecuniary losses . . . With regard to punitive damages, it has long been recognized that the goal is one of deterrence, and that among torts, the deterent value of punitive damages is most effective against frauds, and is especially appropriate when the fraud is aimed at the public generally and involves "high moral culpability" . . . . Notwithstanding Flynn's complete failure to foresee the likely consequences of

his actions, we must recognize that this was, fundamentally, just a research project even though ill-considered, directed at private parties, and there is no suggestion that Flynn was seeking to maliciously hurt the targets of his study. He was seeking to elicit a response, which would then be tabulated in data, rather than to wantonly inflict pain with the intent of injuring the various plaintiffs. As such, punitive damages are not available under the facts alleged.

Accordingly, the orders of the Supreme Court, New York County (Ira Gammerman, J.), entered on or about November 29, 2002, which, in two separate actions, insofar as appealed from, denied defendants' motions to dismiss the actions for failure to state a cause of action, should be modified, on the law, to dismiss the claims for punitive damages, and otherwise affirmed, without costs.

Notes and Questions

1. The court appears to struggle with the notion of how the plaintiffs have actually been harmed. Are their alleged damages speculative, or do they have a reasonable chance of convincing a jury that they deserve compensatory damages?

2. Did Professor Flynn actually defame the restaurants? What evidence would the plaintiffs have to produce to meet the legal test for defamation (either slander or libel)?

3. Note that the business school dean promised to put in place "procedures and guidelines for empirical research projects so that this will never happen again." Is this research subject to human subjects review policies (see *LHE* 6th Section 14.2.3.2.)? If the professor were disciplined by the university, would the lack of such procedures serve as a ground for challenging his discipline?

4. Assume that you are (or your client is) the vice president for academic affairs. What advice would you give him or her to avoid situations like this one in the future?

5. Assume that Professor Flynn wrote up the results of his research and submitted a manuscript to a scholarly journal. What potential legal exposure, if any, do the university, the professor, and the journal have if the article is published?

SECS. 3.2.2.4. and *4.4. Institutional Liability for Off-Campus Instruction* and *Personal Liability of Employees.*

Problem 1

Mary Jones attends New State University (NU). She was attracted to NU primarily because of its extensive junior year abroad program, which it advertised as a "distinctive program designed for socially conscious individuals who want to change the world." The university offers semester and full-year programs in a variety of locations in Africa, Asia, South America, and the Middle East.

Mary decided that she would like to spend the first semester of her junior year in Malawi because she had heard vaguely that women are "oppressed" there and she believed she could teach them to be more assertive and independent. She talked with her academic advisor (a faculty member in the anthropology department) about this plan, and the faculty member was enthusiastic and supportive of Mary's plans. NU's program brochure was very general and didn't give information about housing, living conditions, or what living in Malawi will be like for a U.S. student. Mary asked her advisor for information about the program and about the particular site that she had chosen. The advisor said that she had traveled to Malawi several times and promised to send Mary "lots of information" after the end of the semester.

In mid-August, Mary attempted to contact her advisor again, as she was about to make her travel plans and needed to plan her semester in Malawi. She had not received any information from the faculty member. Unfortunately, the faculty member was herself out of the country, and no one at the university seemed to have much information about the Malawi site, except that several other students had been placed there several years ago. Mary asked to speak with the Director of Overseas Programs, who said he thought there might have been some difficulties for students who went to Malawi, but they were before his time and he couldn't be sure it was Malawi where they occurred. He told Mary that if she was concerned about her safety then maybe she shouldn't go.

Mary decided that she would go to Malawi, since she hadn't heard anything to suggest that she should not. The first four weeks were fine, although Mary did not seem to be making as much headway in her mission to help women as she had hoped to. During the fifth week of her stay in Malawi, she received two messages warning her to "get out of town and stop meddling in things that aren't your concern." Mary tried to contact the university representative who was responsible for all student placements in Africa (approximately 25 students, placed in 6 African

countries). That individual was traveling and unavailable for a week. During the sixth week, a torch was thrown into Mary's cabin, and she was badly burned.

Mary's parents have called the vice president for student affairs at NU to tell her about Mary's injuries. They want the university to pay for Mary's medical treatment, for her transportation home, and for the "years of psychotherapy" they say she will require as a result of the violence she has sustained.

1. What legal exposure, if any, does the university have in this situation?

2. Would your answer to question 1 be different if no one at the university had known that Mary planned to engage in political and social activism during her time in Africa?

3. How would you evaluate the adequacy of the university's practices with respect to planning and implementing student study abroad programs? What changes would you suggest in these practices, and would you suggest these changes for legal reasons or for policy reasons?

SECS. 3.2.4 and *4.4.2. Personal Liability for Defamation*

Problem 2

Margaret Moore is dean of the School of Nursing at New Brunswick State University (NBSU). She routinely is asked by students to provide letters of recommendation for potential employers, and she does so because she believes it is part of her professional responsibility to do so.

Last year, a former student, Hilary Hall, withdrew voluntarily from the NBSU School of Nursing. Although Hilary was one of the top students in the nursing class, she dropped out of the nursing program after being accused by a fellow student of attempting to "pull the plug" of a respirator keeping alive a patient who, in Hilary's opinion, was "brain dead." No criminal charges were brought by the county prosecutor. Hilary also was suspected of slipping painkilling drugs to a terminally ill patient. Recently, Hilary has written to Dean Moore, advising her that she plans to apply to the school of nursing at a neighboring state's university and asking Dean Moore to provide her with a letter of recommendation.

Dean Moore isn't sure whether she should write the letter, or what she should say in it if she does.

1. What are the legal issues that Dean Moore should consider?

2. What professional responsibility or policy issues are involved, and how do they affect her decision?

3. Would the student have any legal claim of discriminatory treatment if Dean Moore refuses to write the letter for her, but has written such letters for many other students applying to nursing programs at other schools?

SECS. 3.2. and *4.4. Institutional Tort Liability*
and
Personal Liability of Employees,

Problem 3*

The Student Government Association (S.G.A.) is a recognized student organization at Anonymous University. It receives an allotment of money from the University to fund other student organizations on campus.

In recent years, the S.G.A. has operated various businesses in the University Student Center, all of which are student-managed and student-funded. The S.G.A. runs a Snack Shop, a Convenience Store, and a Used Book Store. All three businesses utilize the University Purchasing Office and Payroll Office and pay rent to the University for use of Student Center space.

Since the student body enjoys traveling, but is not affluent, students are constantly looking for travel bargains and charters. The S.G.A. President decided that a travel agency business should be started on campus to fill this need. He requested and received written permission from the Dean of Students and the S.G.A. Board of Directors to rent space in the Student Center for this purpose. Because of the need for computer tie-ins with airlines and other services, as well as the need to have various licenses and permits from government agencies, the S.G.A. President decided to contract with an existing travel agency to establish a campus branch, instead of having a student-run travel service. The S.G.A. President entered into a contract with Travel-Cade, a travel agency based in the same city as the University. Travel-Cade agreed to pay the S.G.A. a percentage of its gross sales and hold all licenses and permits required by law.

Two weeks later, the University Chancellor learned of the agreement and was furious. She called the S.G.A. President to her office and stated that the S.G.A. had no business entering into an agreement with an outside company, particularly since Frank Cade, President of Travel-Cade, had ties to organized crime. The Chancellor sent a letter to Mr. Cade stating that the University could not honor the agreement because the S.G.A. President was not authorized to sign a contract as an agent of the University.

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* With thanks to Dr. James Brooks, former Dean of Students at William Mitchell College of Law, who drafted the original problem upon which this problem is based.

The S.G.A. President, upset by the whole incident, talked to a campus newspaper reporter and described his meeting with the Chancellor. The next edition of the campus newspaper carried a banner headline:

TRAVEL AGENCY CLOSED BY CHANCELLOR:
CADE IS A CROOK

The story detailed the meeting and the statements made by the Chancellor. A few weeks later, Mr. Cade filed suit against the University, the Chancellor, the Student Government Association President, and the Editor of the campus newspaper. He alleged both breach of contract and defamation.

1. If this is a private university, what legal issues would likely arise in the course of this lawsuit, and what facts would you need to have in order to resolve these issues?

2. If this were a public university, what new or different legal issues would likely arise in the course of this lawsuit that would not likely arise, or would not arise in the same way, if the university were private?

3. What preventive law measures, if any, would you suggest in order to prevent this type of problem from arising again?

D.

CHAPTER IV: THE COLLEGE AND ITS EMPLOYEES

SEC. 4.4.4. Personal Liability for Violations of Federal Constitutional Rights

Burnham v. Ianni,
in his official capacity as Chancellor of the University of
Minnesota at Duluth and in his individual capacity

119 F.3d 668 (8th Cir. 1997)

BEAM, Circuit Judge.

In this section 1983 action, Chancellor Lawrence Ianni appeals from the district court's denial of his motion for summary judgment based on qualified immunity. A panel of this court reversed. Our decision to grant *en banc* review vacated that decision. See *Burnham v. Ianni*, 98 F.3d 1007 (8th Cir.1996). We now affirm.

I. BACKGROUND

Because discovery has not been conducted in this case, the facts are derived from the plaintiffs' pleadings and the affidavits submitted by the parties. Plaintiff Albert Burnham has been a part-time professor in the history department at the University of Minnesota-Duluth (UMD) since 1986. Plaintiff Ronald Marchese is a tenured professor in the University of Minnesota System. He is a professor of humanities, classics, and history at UM-D and a professor of ancient history and archaeology in the Center for Ancient Studies at the University of Minnesota-Minneapolis. The History Club, active for a number of years on campus, operates under the auspices of the UM-D history department. At all relevant times, Professor Burnham was the faculty advisor to the Club. During the fall quarter of 1991, two student members of the History Club, plaintiffs Michael and Louise Kohn, conceived an idea for a project that was intended to publicize some of the areas of expertise and interest of the history department's faculty, while at the same time portraying the instructors in an informal, somewhat humorous way. The Kohns approached Professors Burnham and Marchese, as well as other members of the department, all of whom agreed to participate. They agreed to pose for a picture with a "prop" that related to their areas of interest. They also supplied information about their fields of

expertise, academic background, and historical heroes, as well as a quotation to be used along with the above information and their photographs.

For his photograph, Professor Burnham posed with a .45 caliber military pistol, wearing a coonskin cap. His special interest in American history includes military history in particular. He listed John Adams and Davy Crockett among his historical heroes. Consistent with his professional interests, Professor Marchese elected to hold an ancient Roman short sword while wearing a cardboard laurel wreath. He listed his specialties as "Ancient Greece and Rome, Homeric Literature" and identified Homer and Alexander the Great as his historical heroes.

A total of eleven professors posed for or supplied pictures. The Kohns assembled an exhibit that incorporated these photographs along with the written comments submitted by each faculty member. The photographs and the accompanying written material were thought to communicate matters of public interest. The exhibit was intended to be viewed by students and prospective students, as well as any members of the public who might be on the premises. It was designed to impart information about the professors and their attitudes toward history – as reflected, for example, in their choices of historical heroes.

The exhibit was put up in the history department's display case, located in the public corridor next to the classrooms used by the department, on March 27, 1992. The case and its contents are seen by students taking classes nearby, faculty members, and members of the general public. The display case is reserved for the use of the history department. It has contained, for a number of years, an exhibit on Roman siege warfare equipment that was assembled by Professor Marchese. The device has been used by members of the History Club, as well as by the history department faculty. The case is used only to communicate matters that are considered to be of general interest. It is not used for private communications, like a mailbox or a message system.

The exhibit was, in fact, observed by hundreds, if not thousands, of people. Members of the department received many compliments on the presentation, as did the students who assembled it. For two weeks, no one expressed any criticism about the exhibit. To the contrary, the display appeared to contribute to morale and good relations within the department.

On April 10, 1992, Judith Karon, who was then UM-D's affirmative action officer, and UM-D Police Captain Harry Michalicek came to the history department and viewed the exhibit. This was in response to a complaint by Charlotte Macleod, an assistant professor who was the head of the UM-D Commission on Women. Karon went to the departmental secretary, Elizabeth Kwapick, and demanded that the pictures of Professors Burnham and Marchese be removed. The department denied this demand.

Upon hearing of this attempt to remove the pictures, Professor Burnham called a lawyer in the University of Minnesota's Legal Department, who told him that she could find nothing

wrong with the display as described. The history department agreed that the department should resist any attempt by the administration to censor the photographs, and the department declined to remove them.

On April 27, 1992, Karon sent a memorandum to the Dean of the College of Liberal Arts, John Red Horse, stating that she expected the pictures to be removed immediately because she found them to be "totally inappropriate." Dean Red Horse apparently refused to act on Karon's request. On April 30, 1992, Karon sent Professor Burnham a memorandum explaining her reasons for wanting to remove the photographs of Professors Burnham and Marchese. In her memorandum, Karon again stated that she ordered the exhibit taken down because she found the photographs "insensitive" and "inappropriate."

On the morning of April 29, 1992, Louise Kohn, Michael Kohn, Elizabeth Kwapick and Professor Burnham met with Chancellor Ianni to explain the display and protest Karon's attempted censorship of the pictures and the students' work. During that meeting, Ianni said that he personally found nothing wrong with the photographs. On the afternoon of the same day, the history department held a meeting on this issue, which was also attended by Ianni, Karon, and Red Horse. During that meeting, Chancellor Ianni again stated that he personally saw nothing wrong with the photographs, but hinted that he might nevertheless support their removal.

When asked to explain why she wanted the photographs removed, Karon tried to connect them to a written threat against Professor Judith Trolander which had been found on March 16, 1992.[1] Members of the department told Karon that they thought her attempt to link the pictures to this deranged message was absurd. Karon also stated that she considered the photographs to constitute sexual harassment. She was unable to explain what she meant by this. She also was unable to state by what authority she could order the removal of a student departmental display.

On May 4, 1992, Chancellor Ianni ordered UM-D Plant Services Director Kirk Johnson to remove the pictures of Professors Burnham and Marchese. Because Johnson was unable to obtain access to the pictures at that time, Ianni ordered the UM-D police to remove the photos. The next day, UM-D Police Captain Michalicek removed the photographs from the display. Only the two photographs with weapons were removed. The other nine photographs remained on display. Professors Burnham and Marchese then removed the balance of their contributions to the exhibit. Following the removal of the photographs, Ianni explained that he removed them because Karon had claimed that she had received anonymous complaints about the display that objected to the depiction of faculty members with weapons. Karon also claimed that Professor Trolander had contacted her about the display's upsetting effect on her. Ianni expressed his

[1] Apparently, Professor Trolander had not initially been offended in any way by the pictures; in fact, she participated in the project by posing for a photograph and specifying her specialties. On the day the display was put up, Trolander said that she thought the display was "very nice."

belief that the campus was enshrouded in an atmosphere of anxiety due to the earlier threats against Trolander and others.[2] He further explained that his removal of the photographs was an attempt to stop the disruption caused by the display and to prevent aggravation of the atmosphere of fear. Plaintiffs dispute that any milieu of concern existed and contend that the campus atmosphere, whatever it may have been, was not aggravated or affected by the two photographs.

Copies of the photographs were later posted at the student center by a group of students protesting the administration's actions. The student center display advanced the subject of censorship and was entitled "The Administration Does Not Want You to See These." The students used the incidents surrounding the removal of the photographs as an example of impermissible actions under the First Amendment. Apparently, no complaints were lodged about the student center exhibit, nor was there any evidence of an institutional breakdown upon the showing of the photographs.

Plaintiffs, alleging First Amendment violations, filed this 42 U.S.C. sec. 1983 action against Chancellor Ianni and the University of Minnesota. Defendants moved for summary judgment, which the district court granted in part and denied in part. The court dismissed, with prejudice, all plaintiffs' claims against the University of Minnesota, all plaintiffs' claims for money damages against Ianni in his official capacity as Chancellor of UM-D, and the Kohns' claims against Ianni for injunctive relief. The district court denied summary judgment on the remaining contentions, including the issue of qualified immunity for Chancellor Ianni. The district court found that Chancellor Ianni's actions violated the plaintiffs' clearly established First Amendment rights, in a way that an objective university chancellor would have known. *Burnham v. Ianni*, 899 F. Supp. 395, 400 (D.Minn.1995). Ianni appeals the denial of summary judgment on this ground, contending that the plaintiffs' First Amendment rights were not clearly established, thereby rendering his actions protected by qualified immunity. We review the district court's conclusion on the qualified immunity issue de novo. *White v. Holmes*, 21 F.3d 277, 279 (8th Cir.1994).

[2] The threats to others to which Ianni referred had occurred during the previous year. In June 1991, Sandra Featherman was appointed UM-D Vice Chancellor. She later began receiving anonymous threats warning her to stay away from Duluth, or face the possibility of kidnapping or even death. In March 1992, Professor Trolander became the target of similar threats. Both Featherman and Trolander had been involved in a campus-wide campaign to promote diversity in the UM-D community. In response to these threats, Chancellor Ianni distributed a campus memorandum dated March 16, 1992, assuring the UM-D community that the matter was being investigated by local and federal authorities and stating that the school was still committed to improving the conditions for women and minorities on campus.

II. DISCUSSION

Since this matter is before the court on a motion for summary judgment based on qualified immunity, the court "ordinarily must look at the record in the light most favorable to the party [plaintiffs/appellees] opposing the motion, drawing all inferences most favorable to that party." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n. 26 (1982). Qualified immunity shields government officials from suit unless their conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. *Id*. at 818; *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir.1996).

Chancellor Ianni's assertion that he is protected by qualified immunity triggers a three-pronged inquiry: (1) whether the plaintiffs have asserted a violation of a constitutional or statutory right; (2) if so, whether that right was clearly established at the time of the violation; and (3) whether, given the facts most favorable to the plaintiffs, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right. *Yowell*, 89 F.3d at 544. Ianni focuses on the second prong of this analysis. He argues that the plaintiffs' rights were not clearly established at the time of the removal of the photographs. Whether a legally protected interest is clearly established turns on the "objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Harlow*, 457 U.S. at 819.

Ianni bears the burden of proving that the plaintiffs' First Amendment rights were not clearly established. See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 231 (1991).... In an attempt to shoulder this burden, Ianni argues that: (1) some restrictions on speech in nonpublic forums are constitutionally acceptable and, thus, which restrictions are acceptable in a given situation is never "clearly established;" and (2) the professors were public employees and their First Amendment rights were subject to the fact-intensive Pickering balancing test, thus, precluding the rights from being "clearly established." These arguments will be addressed in turn.

First, however, we note that the expressive behavior at issue here, i.e., the posting of the photographs within the history department display, qualifies as constitutionally protected speech. See, e.g., *Spence v. Washington*, 418 U.S. 405, 410 (1974); *Tinker v. Des Moines Indep. Community Sch. Dist*., 393 U.S. 503, 505-06 (1969)....

* * * *

Burnham and Marchese, through their photographs, were attempting, at least in part, to convey and advocate their scholarly and professorial interests in military history and in military weaponry's part in their vocation.

* * * *

Because this case involves Ianni's suppression of plaintiffs' protected speech, plaintiffs have (at least for purposes of summary adjudication) sufficiently established a violation of a constitutional right – unless limitations indigenous to the forum lawfully permit restrictions on plaintiffs' First Amendment privileges. We turn to that inquiry.

A. The Forum

Access to and the character of speech on government-controlled areas may be limited depending upon the type of property at issue. Courts recognize three categories of property on which the government may, in greatly varying degrees, restrict speech: (1) public forums, places which by tradition have been devoted to assembly or debate; (2) limited public forums, properties which the state has opened for use by the public as places for expressive activity; and (3) nonpublic forums, places which are not by tradition or designation forums for public communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

* * * *

Ianni argues, and the district court found, that the history department display case is a nonpublic forum. Ianni further claims that because the expression occurred in a nonpublic forum, speech restrictions were permissible or, at least, the extent of any permissible restriction was unclear. Thus, Ianni states, plaintiffs' First Amendment rights were extinguished, limited or at a minimum, not clearly established. Therefore, Ianni says, the district court's denial of qualified immunity was error. We disagree.

In this case, the nature of the forum makes little difference. Even if the display case was a nonpublic forum, Ianni is not entitled to qualified immunity. The Supreme Court has declared that "the State may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46;

see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993) (stating control over access to nonpublic forum can be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral). Here, we find that the suppression was unreasonable both in light of the purpose served by the forum and because of its viewpoint-based discrimination.

* * * *

B. Reasonable Public Official

Ianni further claims that at the time the photographs were suppressed, a reasonably objective chancellor of a large public university would not have known that the conduct violated the plaintiffs' constitutional rights. We again disagree.

As a basic matter, the Supreme Court stated in 1969 "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Indeed, a year earlier, the idea that a faculty member could be compelled to relinquish First Amendment rights in connection with employment at a public school was "unequivocally rejected" by the Supreme Court. *Pickering v. Board of Educ*., 391 U.S. 563, 568 (1968).

Applying these long established tenets to this case, we note that *Rosenberger* [*v. Rectors and Visitors*], 515 U.S. at 829, 115 S.Ct. at 2517, links its observations on viewpoint discrimination within a nonpublic forum to *Perry*, 460 U.S. at 46, a teacher speech case decided by the Supreme Court in 1983. Similarly, the language proscribing viewpoint discrimination found in *Lamb's Chapel* [*v. Center Moriches*]. 508 U.S. at 394, quotes directly from *Cornelius* [*v. NCAA Legal Defense Fund*, 473 U.S. at 806, 105 S.Ct. at 3451, a 1985 decision. In addition, Widmar 's holding prohibiting unreasonable discrimination among "types of expression" within a specific forum, clearly made in the context of an analysis of the purpose of the particular forum, was available as early as 1981. *Widmar* [*v. Vincent*], 454 U.S. at 265-67, 277 (1981).

Judge Heaney, writing for a panel of this court, recently noted that once a controlling opinion has been decided, a constitutional right has been clearly established. See *Waddell v. Forney*, 108 F.3d 889, 893 (8th Cir.1997). And, admittedly, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). But, as noted by Judge McMillian in his opinion for the court in *Hayes v. Long*, 72 F.3d 70, 73 (8th Cir.1995), "[t]his court has taken a broad view of what constitutes 'clearly established law' for the purposes of a qualified immunity inquiry." More particularly, he stated, with regard to "clearly established" law, that:

> "In order to determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts...." *Id*. at 73-74 (quoting *Norfleet v. Arkansas Dep't of Human Servs*., 989 F.2d 289, 291 (8th Cir.1993)). Here, of course, we have long established, binding precedent totally supportive of plaintiffs' claims. The Supreme Court and this court have both clearly and directly spoken on the subject on numerous occasions and in years long prior to the 1992 censorship by Ianni. Accordingly, Chancellor Ianni's "not clearly established" claim must be rejected.[3]

C. *Pickering* Balancing Argument

* * * *

Ianni contends that the plaintiffs' rights to express this particular speech must additionally be balanced against UM-D's right to suppress it in the name of workplace efficiency and harmony. He urges this court to invoke a line of employee discipline and termination cases to summarily dispose of any violation of constitutional rights. See, e.g., *Pickering*, 391 U.S. 563 (teacher discharged for writing letter to newspaper criticizing school board and school superintendent); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (assistant district attorney discharged for distributing questionnaire concerning office morale, policy and confidence in supervisors). We decline to do so here.

The Supreme Court, in *Pickering*, held that, in an employee discipline case, a court must determine whether the employee's speech was on a matter of public concern, and if so, whether the employee's interest in that speech is outweighed by the governmental employer's interest in promoting the efficiency and effectiveness of the services it performs. *Pickering*, 391 U.S. at 568. In conjunction with his argument in favor of this balancing requirement, Ianni also advances the theory that government employers must always be granted qualified immunity

[3] The record establishes, as noted, that the history department contacted the law department of the University for an opinion on the propriety of the display. One may only presume that Chancellor Ianni had equal or superior resources at his disposal if he had questions about the contours of these well-defined constitutional rights.

under such circumstances. We not only find that the Pickering balancing test is inapposite under these facts, but we also disagree with Ianni's analysis of qualified immunity law.

* * * *

As in our *Kincade* decision [*Kincade v. City of Blue Springs*, 64 F. 3d 389 (8th Cir. 1995)], we find that Ianni has failed to carry his burden on [the work-place disruption] prong of the *Pickering* rationale. Ianni has made no factual showing that the suppressed conduct "substantially" interfered with the efficiency of the workplace or UM-D's educational mission. *Kincade*, 64 F.3d at 398. "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. It is simply unreasonable, as a matter of law, to assert that a photograph of a cardboard laurel-wreath bedecked faculty member holding a Roman short sword, as part of an eleven-person faculty display, somehow exacerbated an unestablished ambiance of fear on the UM-D campus.

* * * *

Even if we were to attempt to balance the plaintiffs' free speech rights against the purported disruption of the pedagogical tasks of UM-D, it is clear that the impact of the speech on UM-D's mission is totally unproven and unaddressed except in the most conclusory fashion. There simply is no evidence that establishes a nexus between the two photographs and an exacerbated climate of fear on the campus or, more importantly, that establishes a relationship between the photographs and a decrease in the efficiency and effectiveness of UM-D's educational mission.

In sum, then, upholding Ianni's approach to the First Amendment would permit the suppression of too much speech on arbitrary and capricious grounds. Such a holding would presumably permit the suppression of Ms. Featherman's advocacy of gender and cultural diversity at UM-D if Ianni felt that such speech contributed to an inefficient and negative working and learning environment on the campus because of unlawful or vehement opposition to Featherman's views.[4]

[4] Underlying our holding today, in some respect, is the recognition of the professors' academic freedom – "a special concern of the First Amendment." *University of California Regents v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759-60, 57 L.Ed.2d 750 (1978). The content-based censorship which occurred here could easily have a stifling effect on the "'free play of the spirit which all teachers ought especially to cultivate and practice.'" *Keyishian v. Board of Regents.*

* * * *

Finally, we hold that Ianni's failure to establish workplace disruption, or at least to make a connection between the plaintiffs' speech and the workplace atmosphere, is fatal to his claim of qualified immunity under a *Pickering* analysis. *Kincade* is both directly on point and directly contradictory to Ianni's position. Kincade was discharged by Blue Springs for exercising his free speech rights. Because Kincade's speech, as here, touched on a matter of public concern, the *Pickering* balancing test was employed to review the district court's denial of a motion for summary judgment on qualified immunity grounds. After noting that the only evidence of workplace disruption was conclusory statements to that effect by the mayor and other city officials, Judge Hansen stated:

> the Appellants [city officials] have merely asserted that Kincade's speech adversely affected the efficiency of the City's operations and substantially disrupted the work environment without presenting any specific evidence to support this assertion.
>
> They therefore have not put the *Pickering* balancing test at issue, and accordingly, we reject their claim that they are entitled to qualified immunity because free speech questions for public employees, as a matter of law, cannot be "clearly established." *Kincade*, 64 F.3d at 398-99.

This is precisely the factual and legal situation we have in this case.

III. CONCLUSION

The district court correctly found that Ianni is not entitled to qualified immunity from a suit seeking money damages for the violation of plaintiffs' First Amendment rights. Accordingly, we affirm.

Notes and Questions

1. Notice the interrelationship in this case between the qualified immunity issue and the First Amendment issues. A court cannot undertake the qualified immunity analysis without at the same time analyzing the constitutional issues that are raised by the plaintiff's claim on the merits. Another illustration of this point is in *Hosty v. Carter*, set out in Sec. 10.3 of this volume of materials. The particular constitutional (First Amendment) issues in *Burnham* are discussed in the Text Section 9.4.2.

2. What is the test for determining whether the court will grant qualified immunity to an individual defendant in a Section 1983 case? Exactly how does the *Burnham* court articulate this test? Is it an objective test, or a subjective test, or both – and do the majority and dissent give the same answer to this question? Qualified immunity is discussed in the Text Section 4.4.4.1.

3. Both the majority and the dissent in *Burnham* make reference to the academic freedom of faculty members. How are academic freedom concerns relevant to the majority's reasoning, and how are they relevant *in a different way* to the dissent's reasoning? See generally the Text Section 6.1.3.

4. Courts have expressed difficulty in applying the qualified immunity test in circumstances where the plaintiff's rights depend on a fact-sensitive balancing test. A plaintiff's free speech rights under *Pickering/Connick/Waters* may be dependent on such a test. How did the defendant in *Burnham* seek to use this point in his favor? How did the majority respond to this point, and how does the dissent's response differ from the majority's?

SEC. 4.4.4. Constitutional Liability
Issues on the Merits: State Created Dangers

Scanlan v. Texas A&M University
343 F.3d 533 (5th Cir. 2003)

PRADO, Circuit Judge.

The above numbered and styled appeals arise from six lawsuits filed in the Southern District of Texas by, and on behalf of, those injured and killed during the Texas A&M University bonfire disaster that occurred on November 18, 1999. The district court dismissed all of the plaintiffs' claims and entered a final judgment in each lawsuit. The plaintiffs appealed to challenge the dismissal orders. After considering the parties' arguments on appeal, this Court reverses the district court's judgments.

Background Facts

On November 18, 1999, the Texas A&M University bonfire stack collapsed, killing 12 students and injuring another 27. After the accident, the president of Texas A&M University (the University) convened a special commission to investigate the collapse. The investigating commission documented its findings and conclusions in the *Final Report of the Special Commission on the 1999 Texas A&M Bonfire* (Final Report). Subsequently, the appellants filed six lawsuits. In the lawsuits, the plaintiffs alleged section 1983 claims under the state-created danger theory and various state law claims against the University and various University officials (the University Officials) whom the plaintiffs hold responsible for their injuries.
. . . . The district court . . . set the deadline for dispositive motions . . . . Eight weeks after the deadline, the district court issued the orders challenged in these appeals, dismissing all of the plaintiffs' claims. The court issued the same order in each case. The district court's orders were quite clear. The court first dismissed the plaintiffs' claims against the University as a state entity on Eleventh Amendment immunity grounds. No plaintiff appeals that action. Next, the district court adopted the Final Report and determined that the actions of the University Officials did not, as a matter of law, rise to the level of deliberate indifference. Based on that determination, the district court dismissed the plaintiffs' section 1983 claims against the University Officials for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Each plaintiff challenges that action. The district court then declined to exercise supplemental

jurisdiction over the plaintiffs' state law claims and dismissed those claims without prejudice. No plaintiff appeals that action.

* * * *

Construing the Allegations in the Plaintiffs' Favor

Although this Court has never explicitly adopted the state-created danger theory, the Court set out the elements of a state-created danger cause of action in *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir.1994). In *Johnson*, the Court explained that a plaintiff must show that the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. *See Johnson*, 38 F.3d at 201. Later, the Court explained what is required to establish deliberate indifference. In *Piotrowski v. City of Houston*, the Court explained that, to establish deliberate indifference, the plaintiff must show the "environment created by the state actors must be dangerous; they must know it is dangerous; and they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Piotrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir.2001) (quoting *Johnson v. Dallas Indep. Sch. Dist.*). Even a cursory review of the complaints shows the plaintiffs pleaded facts to establish deliberate indifference.

The plaintiffs filed a very similar complaint in each of the underlying lawsuits. In the complaints, the plaintiffs discussed how the bonfire grew over the years from a pile of burning trash to a structure weighing over 3 million pounds. The plaintiffs asserted that the defendants were well aware of the dangers posed by the construction of the bonfire stack and that it had been characterized by one of the University Officials as the "most serious risk management activity at the University." The plaintiffs further asserted that: The Defendants however, did not use their control to see that the Bonfire stack was built in a safe manner. Instead, they allowed the Bonfire to grow into a massive, complex and dangerous structure. The Defendants, through their action and inaction, created a terrible peril that clearly could not, and should not, have been designated and built solely by students.

The plaintiffs claimed that the University Officials "created this dangerous condition. They knew it was dangerous. Despite that, they like ostriches, put their heads in the sand and pretended the peril did not exist."

The plaintiffs explained that the defendant had a vested interest in keeping their heads in the sand and not exercising supervision over the bonfire because they "used the Bonfire experience and tradition as a huge marketing tool to lure prospective students to A&M as well as

to secure millions of dollars in donations from alumni." The plaintiffs went on to claim that the University Officials "actively encouraged and enticed students and alumni to work on the Bonfire stack while they turned a blind eye to the peril."

In stating their section 1983 claims, the plaintiffs included the language "deliberate indifference" to describe a particular University Official's conduct. Although the plaintiffs relied on the Final Report for their characterization of the danger posed by the bonfire, the introductory paragraph of five of the complaints makes it clear that the plaintiffs rely on more than the Final Report. In that paragraph, the plaintiffs allege that "despite clear and overwhelming evidence of their culpability, including, *but not limited to*, the independent Bonfire Commission's ('Commission') Report, the Defendants have failed to take or accept any responsibility whatsoever." (Emphasis added.)

If these allegations were construed in the light most favorable to the plaintiff, the district court should have determined the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur. As a result, the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory.

* * * *

By simply adopting the Final Report as the basis for determining that the University Officials did not act with deliberate indifference, the district court deferred to a defendant-created commission rather than presenting the questions of material fact to a trier of fact. Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students in building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact. Oddly, the district court acknowledged in a footnote that the existence of deliberate indifference is often a factual determination, but stated, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

* * * *

Certainly, reasonable minds could differ about the Final Report's conclusions about the University Officials' roles in the collapse of the bonfire stack. If *all* of the summary judgment evidence presents genuine issues of material fact, those roles should be decided by a trier of fact, not the defendants themselves. Consequently, the district court erred because it went outside the complaints and did not construe the plaintiffs' allegations in favor of the plaintiffs.

Conclusion

Because the district court erred in dismissing the plaintiffs' claims against the University Officials, the Court REVERSES the district court's judgments and REMANDS the cases to the district court for further proceedings consistent with this opinion.

Notes and Questions

1. The *Scanlan* case is discussed in Section 4.4.4.2.

2. The claims that the plaintiffs asserted in *Scanlan* are "Section 1983" claims. This civil rights statute is quoted and described in the Text Section 3.4. Study the wording of the statute. How is it that this statute applies to the circumstances of the *Scanlan* case? In other words, how would you fit the facts of this case into the language of this statute? For pertinent discussion, see the Text Section 4.4.4.2.

3. The basis for the plaintiffs' Section 1983 claims is the "state-created danger theory." How would you describe and explain this theory? Although the Fifth Circuit's opinion in *Scanlan* notes that "this court has never explicitly adopted the state-created danger theory," the court nevertheless appears to accept and rely on this theory. In a later case, however, another panel of Fifth Circuit judges cast doubt on whether *Scanlan* (or any other Fifth Circuit opinion) had embraced the state-created danger theory. See *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422-23 (5th Cir. 2006).

4. Note that the court in *Scanlan* remands the case to the district court for further proceedings. What issues would you expect to arise in these further proceedings? For discussion of the district court's decision on remand, see the Text Section 4.4.4.2.

5. If you had been the Vice-President for Student Affairs at the time of the bonfire collapse, what steps would you have taken in the following days and weeks to manage the crisis and to ameliorate the harm to the injured students and to the families of the students who were killed or injured? What steps would you have taken to help ensure that similar tragedies and problems regarding extracurricular activities would not arise again in the future? If you had been university legal counsel at the time of the bonfire collapse, what concerns about liability would you have had, and how would you have sought to manage them?

   Might the university have avoided this tragedy? What steps might have been helpful in this regard? If you had been the university's legal counsel or risk manager *before* any tragedy had occurred, would you or should you have taken steps to minimize or control the university's liability for any injuries or deaths that might occur from the bonfire? What steps? Would it be good *policy* to take such steps?

SEC. 4.2. Employment Contracts

Problem 4

You are the general counsel of Upright State University (USU), which has approximately 1,000 staff employees. This afternoon, the Director of Human Resources asked to see you, and told you this story:

> Karen Cook works full-time as a cashier at the university bookstore, working five days per week, Tuesday through Saturday. Other full-time employees work a Monday-Friday schedule, and when the university offices are closed on Monday holidays**,** those employees are given a paid holiday. Karen, who does not work on Mondays, does not get pay for those holidays, but is paid for holidays that fall on Tuesday-Saturday (as are other full-time employees).
>
> Karen complained to the bookstore manager, asking either for a paid day off during the week when a Monday holiday occurs, or else pay for one additional day during that week. The manager came to the HR Director, who was unsure of the university's legal obligations in this situation. Shortly after the manager talked with the HR Director, Karen sent an email "survey" to staff members in other university departments, such as the library, dining services, and public safety, where staff work one or more weekend days, stating that she was "very upset" about the "deliberate unfairness" of the university and saying that her boss is "a cheapskate and a jerk" (also in the email). The bookstore manager then called the HR Director a second time, asking if he could fire Karen for insubordination.

The HR Director needs your advice on how to proceed and how to respond to the bookstore manager.

1. Does the university have a legal obligation to pay Karen for an extra day of work (or give her paid time off) during weeks when there is a Monday holiday and university offices are closed?

2. Can the bookstore manager discharge Karen for insubordination without risking legal liability?

3. Apart from the legal considerations, should Karen be discharged? What information would you like to have in order to answer this question?

4. Assume that you decide to discipline, but not discharge, Karen. She responds by filing an unfair labor practice with the National Labor Relations Board, stating that she was engaging in "concerted activity" on behalf of all of the staff at USU, and thus cannot be disciplined. How would you respond to that charge?

Sec. 4.5.2. Sources of Law

Vance v. Ball State University
570 U.S. 421 (2013)

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Justice ALITO delivered the opinion of the Court.

In this case, we decide a question left open in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), namely, who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?

Under Title VII, an employer's liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Id.*, at 807, 118 S.Ct. 2275; *Ellerth, supra,* at 765, 118 S.Ct. 2257. Under this framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker.

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, and we therefore affirm the judgment of the Seventh Circuit.

I

Maetta Vance, an African–American woman, began working for Ball State University (BSU) in 1989 as a substitute server in the University Banquet and Catering division of Dining Services. In 1991, BSU promoted Vance to a part-time catering assistant position, and in 2007 she applied and was selected for a position as a full-time catering assistant.

Over the course of her employment with BSU, Vance lodged numerous complaints of racial discrimination and retaliation, but most of those incidents are not at issue here. For present purposes, the only relevant incidents concern Vance's interactions with a fellow BSU employee, Saundra Davis.

During the time in question, Davis, a white woman, was employed as a catering specialist in the Banquet and Catering division. The parties vigorously dispute the precise nature and scope of Davis' duties, but they agree that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. See No. 1:06–cv–1452–SEB–JMS, 2008 WL 4247836, at *12 (S.D.Ind., Sept. 10, 2008) ("Vance makes no allegations that Ms. Davis possessed any such power"); Brief for Petitioner 9–11 (describing Davis' authority over Vance); Brief for Respondent 39 ("[A]ll agree that Davis lacked the authority to take tangible employments [*sic*] actions against petitioner").

In late 2005 and early 2006, Vance filed internal complaints with BSU and charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination, and many of these complaints and charges pertained to Davis. 646 F.3d 461, 467 (C.A.7 2011). Vance complained that Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." *Ibid.* She alleged that she was "left alone in the kitchen with Davis, who smiled at her"; that Davis "blocked" her on an elevator and "stood there with her cart smiling"; and that Davis often gave her "weird" looks. *Ibid.* (internal quotation marks omitted).

Vance's workplace strife persisted despite BSU's attempts to address the problem. As a result, Vance filed this lawsuit in 2006 in the United States District Court for the Southern District of Indiana, claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII. In her complaint, she alleged that Davis was her supervisor and that BSU was liable for Davis' creation of a racially hostile work environment. Complaint in No. 1:06–cv–01452–SEB–TAB (SD Ind., Oct. 3, 2006), Dkt. No. 1, pp. 5–6.

Both parties moved for summary judgment, and the District Court entered summary judgment in favor of BSU. 2008 WL 4247836, at *1. The court explained that BSU could not be held vicariously liable for Davis' alleged racial harassment because Davis could not " 'hire, fire, demote, promote, transfer, or discipline' " Vance and, as a result, was not Vance's supervisor under the Seventh Circuit's interpretation of that concept. See *id.*, at *12 (quoting *Hall v. Bodine Elect. Co.*, 276 F.3d 345, 355 (C.A.7 2002)). The court further held that BSU could not be liable in negligence because it responded reasonably to the incidents of which it was aware. 2008 WL 4247836, *15.

The Seventh Circuit affirmed. 646 F.3d 461. It explained that, under its settled precedent, supervisor status requires " 'the power to hire, fire, demote, promote, transfer, or discipline an

employee.' " *Id.,* at 470 (quoting *Hall, supra,* at 355). The court concluded that Davis was not Vance's supervisor and thus that Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis' conduct, the court affirmed. 646 F.3d, at 470–473.

II

A

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts. But not long after Title VII was enacted, the lower courts held that Title VII also reaches the creation or perpetuation of a discriminatory work environment.

In the leading case of *Rogers v. EEOC,* 454 F.2d 234 (1971), the Fifth Circuit recognized a cause of action based on this theory. See *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65–66, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (describing development of hostile environment claims based on race). The *Rogers* court reasoned that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F.2d, at 238. The court observed that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Ibid.* Following this decision, the lower courts generally held that an employer was liable for a racially hostile work environment if the employer was negligent, *i.e.,* if the employer knew or reasonably should have known about the harassment but failed to take remedial action. See *Ellerth,* 524 U.S., at 768–769, 118 S.Ct. 2257 (THOMAS, J., dissenting) (citing cases).

When the issue eventually reached this Court, we agreed that Title VII prohibits the creation of a hostile work environment. See *Meritor, supra,* at 64–67, 106 S.Ct. 2399. In such cases, we have held, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. See, *e.g., Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

B

Consistent with *Rogers,* we have held that an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior. *Faragher,* 524 U.S., at 789, 118 S.Ct. 2275. Courts have generally applied this rule to evaluate employer liability when a co-worker harasses the plaintiff.[1]

In *Ellerth* and *Faragher,* however, we held that different rules apply where the harassing employee is the plaintiff's "supervisor." In those instances, an employer may be *vicariously* liable for its employees' creation of a hostile work environment. And in identifying the situations in which such vicarious liability is appropriate, we looked to the Restatement of Agency for guidance. See, *e.g.*, *Meritor, supra,* at 72, 106 S.Ct. 2399*; Ellerth, supra,* at 755, 118 S.Ct. 2257.

Under the Restatement, "masters" are generally not liable for the torts of their "servants" when the torts are committed outside the scope of the servants' employment. See 1 Restatement (Second) of Agency § 219(2), p. 481 (1957) (Restatement). And because racial and sexual harassment are unlikely to fall within the scope of a servant's duties, application of this rule would generally preclude employer liability for employee harassment. See *Faragher, supra,* at 793–796, 118 S.Ct. 2275; *Ellerth, supra,* at 757, 118 S.Ct. 2257. But in *Ellerth* and *Faragher,* we held that a provision of the Restatement provided the basis for an exception. Section 219(2)(d) of that Restatement recognizes an exception to the general rule just noted for situations in which the servant was "aided in accomplishing the tort by the existence of the agency relation." Restatement 481; see *Faragher, supra,* at 802–803, 118 S.Ct. 2275; *Ellerth, supra,* at 760–763, 118 S.Ct. 2257.

Adapting this concept to the Title VII context, *Ellerth* and *Faragher* identified two situations in which the aided-in-the-accomplishment rule warrants employer liability even in the absence of negligence, and both of these situations involve harassment by a "supervisor" as opposed to a co-worker. First, the Court held that an employer is vicariously liable "when a supervisor takes a tangible employment action," *Ellerth, supra,* at 762, 118 S.Ct. 2257; *Faragher, supra,* at 790, 118 S.Ct. 2275—*i.e.,* "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

[1] See, *e.g., Williams v. Waste Management of Ill.,* 361 F.3d 1021, 1029 (C.A.7 2004); *McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1119 (C.A.9 2004); *Joens v. John Morrell & Co.,* 354 F.3d 938, 940 (C.A.8 2004); *Noviello v. Boston,* 398 F.3d 76, 95 (C.A.1 2005); *Duch v. Jakubek,* 588 F.3d 757, 762 (C.A.2 2009); *Huston v. Procter & Gamble Paper Prods. Corp.,* 568 F.3d 100, 104–105 (C.A.3 2009).

decision causing a significant change in benefits." *Ellerth,* 524 U.S., at 761, 118 S.Ct. 2257. We explained the reason for this rule as follows: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.... A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Id.,* at 761–762, 118 S.Ct. 2257. In those circumstances, we said, it is appropriate to hold the employer strictly liable. See *Faragher, supra,* at 807, 118 S.Ct. 2275; *Ellerth, supra,* at 765, 118 S.Ct. 2257.

Second, *Ellerth* and *Faragher* held that, even when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense.[3] We began by noting that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth, supra,* at 763, 118 S.Ct. 2257; see *Faragher,* 524 U.S., at 803–805, 118 S.Ct. 2275. But it would go too far, we found, to make employers strictly liable whenever a "supervisor" engages in harassment that does not result in a tangible employment action, and we therefore held that in such cases the employer may raise an affirmative defense. Specifically, an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. *Faragher, supra,* at 807, 118 S.Ct. 2275; *Ellerth,* 524 U.S., at 765, 118 S.Ct. 2257. This compromise, we explained, "accommodate[s] the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic

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[3] *Faragher* and *Ellerth* involved hostile environment claims premised on sexual harassment. Several federal courts of appeals have held that *Faragher* and *Ellerth* apply to other types of hostile environment claims, including race-based claims. See *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 186, n. 9 (C.A.4 2001) (citing cases reflecting "the developing consensus ... that the holdings [in *Faragher* and *Ellerth*] apply with equal force to other types of harassment claims under Title VII"). But see *Ellerth,* 524 U.S., at 767, 118 S.Ct. 2257 (THOMAS, J., dissenting) (stating that, as a result of the Court's decision in *Ellerth,* "employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged"). Neither party in this case challenges the application of *Faragher* and *Ellerth* to race-based hostile environment claims, and we assume that the framework announced in *Faragher* and *Ellerth* applies to cases such as this one.

policies of encouraging forethought by employers and saving action by objecting employees." *Id.*, at 764, 118 S.Ct. 2257.

*** * * ***

C

Under *Ellerth* and *Faragher*, it is obviously important whether an alleged harasser is a "supervisor" or merely a co-worker, and the lower courts have disagreed about the meaning of the concept of a supervisor in this context. Some courts, including the Seventh Circuit below, have held that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim. *E.g.*, 646 F.3d, at 470; *Noviello v. Boston*, 398 F.3d 76, 96 (C.A.1 2005); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (C.A.8 2004). Other courts have substantially followed the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work. See, *e.g.*, *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126–127 (C.A.2 2003); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 245–247 (C.A.4 2010); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, at *3 (hereinafter EEOC Guidance).

We granted certiorari to resolve this conflict. 567 U.S. ——, 133 S.Ct. 23, 183 L.Ed.2d 673 (2012).

III

We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth, supra*, at 761, 118 S.Ct. 2257. We reject the nebulous definition of a "supervisor" advocated in the EEOC Guidance[4] and

[4] The United States urges us to defer to the EEOC Guidance. Brief for United States as *Amicus Curiae* 26–29 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). But to do so would be proper only if the EEOC Guidance has the power to persuade, which "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.*, at 140, 65 S.Ct. 161. For the reasons explained below, we do not find the EEOC Guidance persuasive.

substantially adopted by several courts of appeals. Petitioner's reliance on colloquial uses of the term " supervisor" is misplaced, and her contention that our cases require the EEOC's abstract definition is simply wrong.

* * * *

A

Petitioner contends that her expansive understanding of the concept of a "supervisor" is supported by the meaning of the word in general usage and in other legal contexts, see Brief for Petitioner 25–28, but this argument is both incorrect on its own terms and, in any event, misguided.

In general usage, the term "supervisor" lacks a sufficiently specific meaning to be helpful for present purposes. Petitioner is certainly right that the term is often used to refer to a person who has the authority to direct another's work. See, *e.g.*, 17 Oxford English Dictionary 245 (2d ed. 1989) (defining the term as applying to "one who inspects and directs the work of others"). But the term is also often closely tied to the authority to take what *Ellerth* and *Faragher* referred to as a "tangible employment action." See, *e.g.*, Webster's Third New International Dictionary 2296, def. 1(a) (1976) ("a person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action").

A comparison of the definitions provided by two colloquial business authorities illustrates the term's imprecision in general usage. One says that "[s]upervisors are usually authorized to recommend and/or effect hiring, disciplining, promoting, punishing, rewarding, and other associated activities regarding the employees in their departments."[5] Another says exactly the opposite: "A supervisor generally does not have the power to hire or fire employees or to promote them."[6] Compare *Ellerth*, 524 U.S., at 762, 118 S.Ct. 2257 ("Tangible employment actions fall within the special province of the supervisor").

If we look beyond general usage to the meaning of the term in other legal contexts, we find much the same situation. Sometimes the term is reserved for those in the upper echelons of the management hierarchy. See, *e.g.*, 25 U.S.C. § 2021(18) (defining the "supervisor" of a school within the jurisdiction of the Bureau of Indian Affairs as "the individual in the position of

[5] http://www.businessdictionary.com/definition/supervisor.html (all Internet materials as visited June 21, 2013, and available in Clerk of Court's case file).

[6] http://management.about.com/od/policiesand procedures/g/supervisor1.html

ultimate authority at a Bureau school"). But sometimes the term is used to refer to lower ranking individuals. See, *e.g.*, 29 U.S.C. § 152(11) (defining a supervisor to include "any individual having authority ... to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"); 42 U.S.C. § 1396n(j)(4)(A) (providing that an eligible Medicaid beneficiary who receives care through an approved self-directed services plan may "hire, fire, supervise, and manage the individuals providing such services").

Although the meaning of the concept of a supervisor varies from one legal context to another, the law often contemplates that the ability to supervise includes the ability to take tangible employment actions. See, *e.g.*, 5 CFR §§ 9701.511(a)(2), (3) (2012) (referring to a supervisor's authority to "hire, assign, and direct employees ... and [t]o lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source"); § 9701.212(b)(4) (defining "supervisory work" as that which "may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties").

In sum, the term "supervisor" has varying meanings both in colloquial usage and in the law. And for this reason, petitioner's argument, taken on its own terms, is unsuccessful.

More important, petitioner is misguided in suggesting that we should approach the question presented here as if "supervisor" were a statutory term. "Supervisor" is not a term used by Congress in Title VII. Rather, the term was adopted by this Court in *Ellerth* and *Faragher* as a label for the class of employees whose misconduct may give rise to vicarious employer liability. Accordingly, the way to understand the meaning of the term "supervisor" for present purposes is to consider the interpretation that best fits within the highly structured framework that those cases adopted.

B

In considering *Ellerth* and *Faragher*, we are met at the outset with petitioner's contention that at least some of the alleged harassers in those cases, whom we treated as supervisors, lacked the authority that the Seventh Circuit's definition demands. This argument misreads our decisions.

* * * *

C

Although our holdings in *Faragher* and *Ellerth* do not resolve the question now before us, we believe that the answer to that question is implicit in the characteristics of the framework that we adopted.

To begin, there is no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim's terms or conditions of employment. The *Ellerth/Faragher* framework draws a sharp line between co-workers and supervisors. Co-workers, the Court noted, "can inflict psychological injuries" by creating a hostile work environment, but they "cannot dock another's pay, nor can one co-worker demote another." *Ellerth*, 524 U.S., at 762, 118 S.Ct. 2257. Only a supervisor has the power to cause "direct economic harm" by taking a tangible employment action. *Ibid*. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control.... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid*. (emphasis added). The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors.

* * * *

Under the definition of "supervisor" that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/ Faragher* affirmative defense. Perhaps even more important, the work of the jury, which is inevitably complicated in employment discrimination cases, will be simplified. The jurors can be given preliminary instructions that allow them to understand, as the evidence comes in, how each item of proof fits into the framework that they will ultimately be required to apply. And even where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is

relatively straightforward.

The alternative approach advocated by petitioner and the United States would make matters far more complicated and difficult. The complexity of the standard they favor would impede the resolution of the issue before trial. With the issue still open when trial commences, the parties would be compelled to present evidence and argument on supervisor status, the affirmative defense, and the question of negligence, and the jury would have to grapple with all those issues as well. In addition, it would often be necessary for the jury to be instructed about two very different paths of analysis, *i.e.*, what to do if the alleged harasser was found to be a supervisor and what to do if the alleged harasser was found to be merely a co-worker.

* * * *

D

The dissent argues that the definition of a supervisor that we now adopt is out of touch with the realities of the workplace, where individuals with the power to assign daily tasks are often regarded by other employees as supervisors. See *post,* at 2456 – 2457, 2458 – 2461. But in reality it is the alternative that is out of touch. Particularly in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks. Members of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility.

* * * *

IV

* * * *

The standard we adopt is not untested. It has been the law for quite some time in the First, Seventh, and Eighth Circuits, see, *e.g., Noviello v. Boston,* 398 F.3d 76, 96 (C.A.1 2005); *Weyers v. Lear Operations Corp.,* 359 F.3d 1049, 1057 (C.A.8 2004); *Parkins v. Civil Constructors of Ill., Inc.,* 163 F.3d 1027, 1033–1034, and n. 1 (C.A.7 1998)—*i.e.,* in Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wisconsin. We are aware of no evidence that this rule has produced dire consequences in these 14 jurisdictions.

Despite its rhetoric, the dissent acknowledges that Davis, the alleged harasser in this case,

would probably not qualify as a supervisor even under the dissent's preferred approach. See *post*, at 2465 ("[T]here is cause to anticipate that Davis would not qualify as Vance's supervisor"). On that point, we agree. Petitioner did refer to Davis as a "supervisor" in some of the complaints that she filed, App. 28; *id.*, at 45, and Davis' job description does state that she supervises Kitchen Assistants and Substitutes and "[l]ead[s] and direct[s]" certain other employees, *id.*, at 12 – 13. But under the dissent's preferred approach, supervisor status hinges not on formal job titles or "paper descriptions" but on "specific facts about the working relationship." *Post*, at 2465 (internal quotation marks omitted).

Turning to the "specific facts" of petitioner's and Davis' working relationship, there is simply no evidence that Davis directed petitioner's day-to-day activities. The record indicates that Bill Kimes (the general manager of the Catering Division) and the chef assigned petitioner's daily tasks, which were given to her on "prep lists." No. 1:06–cv–1452–SEB–JMS, 2008 WL 4247836, at *7 (S.D.Ind., Sept. 10, 2008); App. 430, 431. The fact that Davis sometimes may have handed prep lists to petitioner, see *id.*, at 74, is insufficient to confer supervisor status, see App. to Pet. for Cert. 92a (EEOC Guidance). And Kimes—*not* Davis—set petitioner's work schedule. See App. 431. See also *id.*, at 212.

Because the dissent concedes that our approach in this case deprives petitioner of none of the protections that Title VII offers, the dissent's critique is based on nothing more than a hypothesis as to how our approach might affect the outcomes of *other* cases—cases where an employee who cannot take tangible employment actions, but who does direct the victim's daily work activities in a meaningful way, creates an unlawful hostile environment, and yet does not wield authority of such a degree and nature that the employer can be deemed negligent with respect to the harassment. We are skeptical that there are a great number of such cases. However, we are confident that, in every case, the approach we take today will be more easily administrable than the approach advocated by the dissent.

* * * *

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. Because there is no evidence that BSU empowered Davis to take any tangible employment actions against Vance, the judgment of the Seventh Circuit is affirmed.

It is so ordered.

* * * *

Notes and Questions

1. Under *Vance*, when does an employee qualify as a "supervisor" for purposes of assessing a workplace harassment claim under Title VII?

2. What kinds of actions qualify as tangible employment actions for purposes of Title VII?

3. Even when a supervisor's harassment of an employee has not resulted in a tangible employment action, under what circumstances can an employer still be held vicariously liable for the harassment?

4. In a dissenting opinion—one joined by Justices Breyer, Sotomayor, and Kagan—Justice Ginsburg criticized the majority's approach for when individuals could qualify as a "supervisor" for purposes of Title VII and vicarious liability, stating:

> That the Court has adopted a standard, rather than a clear rule, is not surprising, for no crisp definition of supervisor could supply the unwavering line the Court desires. Supervisors, like the workplaces they manage, come in all shapes and sizes. Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim. That is why *Faragher* and *Ellerth* crafted an employer liability standard embracive of all whose authority significantly aids in the creation and perpetuation of harassment. *Vance v. Ball State Univ.*, 570 U.S. at 465.

Is this critique from Justice Ginsburg well founded? Or, is the majority more persuasive with its arguments that, in actuality, the standard adopted by it would provide more clarity and often permit questions of whether an employee qualified as a "supervisor" under Title VII to be settled as a matter of law before trial started?

1. SEC. 4.5.2.1. Title VII

Problem 5

You are the vice president for student affairs at a public college. Six months ago you hired an administrative assistant (AA) who works for you and another student affairs staff member, Gene. There have been tensions between your AA and the other staff member. Yesterday, your AA came into your office, closed the door, and said:

> I need to talk with you about a problem I'm having, but you have to promise not to say anything to Gene. He is making me really uncomfortable. He is always trying to get me to go to lunch or dinner with him, and every morning he asks me what I did the previous night. I've told him that I have a boyfriend and that I need to spend my free time studying. Gene is a nice guy but I'm not interested in dating him. He's begun following me to my car after work, and I'm beginning to be afraid of him. He has also called me at home several times. I just want this to stop.

1. What actions should you take?

2. Do you have any legal responsibility to "make this stop?"

3. If litigation were to arise, does the U.S. Supreme Court's decision in *Vance v. Ball State University* potentially have relevance for this set of circumstances (see Text, pp. 172-173, and CPM, p. 168)? What facts would you need to know to answer this question?

4. Do you have any other potential legal liability if Gene responds negatively to your AA's concerns?

SEC. 4.5.2.1. Sex Discrimination and Sexual Harassment

Gawley v. Indiana University
276 F.3d 301 (7th Cir. 2001)

Opinion by**:** Rovner, Circuit Judge.

Janice Gawley sued her employer for sexual harassment, hostile work environment, retaliation, and the Indiana tort of spoliation of evidence. The district court first denied summary judgment, then changed course after the Supreme Court issued two key decisions, and granted summary judgment in favor of the employer. We affirm.

We credit Gawley's version of the facts and draw all reasonable inferences in her favor because she is the party opposing summary judgment. . . . Gawley worked as a police officer for the Indiana University Police Department from 1983 until 1996. Her immediate supervisors were Sergeant McClain and Lieutenant Shutte, who in turn reported to Captain Wilken. Captain Wilken reported to Chief Norris. In the absence of her regular shift commanders, other persons ranking above her in the police department's paramilitary structure directed her work assignments. Jerry Minger was a lieutenant in the department's Uniform Division, and his main responsibilities involved uniforms and equipment. As the department quartermaster, he felt responsible for pointing out elements of behavior or appearance that required correction. Some department records referred to Minger as a department supervisor, and his job description specified that he had command responsibilities over subordinate personnel in emergency situations. At times, Minger filled in as Gawley's shift commander and, on one occasion, initiated a disciplinary procedure against her. He also supervised Gawley when she performed public relations duties. According to other department personnel, Minger had some supervisory authority over all officers who ranked below him in the department's paramilitary organization. And, he had some disciplinary authority over lower ranking officers, such as Gawley, although that authority was limited in certain areas. For example, while Minger had authority over uniforms, weapons, and equipment, he did not have final authority to hire or fire employees. He was, however, authorized to initiate disciplinary proceedings against junior officers relating to any aspect of the officer's conduct.

Apparently in his role as quartermaster, Minger began commenting to Gawley in November 1994 about the fit of her pants. In particular, he remarked in an offensive manner on a number of occasions that Gawley's pants were too tight, and that she was overweight. He made these comments in a demeaning manner in front of other department personnel. At times, he made up to three comments a day. For example, in front of other personnel, Minger told

Gawley she was "getting bigger than a barge," and in front of visiting government personnel, he yelled across a street "Hey, Gawley, pants are too tight" or "Pants seem awfully tight" while laughing. When fitting Gawley for a bullet-proof vest, he remarked about her breast size, saying "a D cup, that's big wow." He continued to remark about her breast size at two other fitting sessions and finally groped her breast while adjusting a bullet-proof vest on her. Two other officers witnessed the groping incident, and one commented that if Minger had done this to her, she would have punched him. Gawley estimated that she asked Minger to stop making the offensive comments at least ten times. On two occasions when she asked Minger to stop, other officers were present, including a sergeant and a fellow officer who later became a sergeant. Gawley also produced evidence that the department had a history of sexual harassment of its female employees dating back to the early 1980s. Other female employees related a number of incidents over the years involving Minger and other male employees who made offensive gestures and comments to female employees.

On June 14, 1995, Gawley lodged her first formal complaint about Minger through internal department procedures. She did not mention Minger's breast groping in that complaint because she was embarrassed by the incident, and believed she would have an opportunity to bring it to light during the investigative process. Captains Wilken and Poliskie investigated Gawley's complaint. They interviewed Minger several times, but did not question Gawley at that time. They did not contact Deborah Delay, an employee who wrote a memorandum corroborating Gawley's version of events. In the meantime, on June 22, Gawley went to the university's Office of Women's Affairs ("OWA") to discuss her complaint. She told the intake counselor about the groping incident, and the counselor led her to believe there was nothing OWA could do about the incident. Gawley next approached the Office of Affirmative Action ("OAA"), where she did not mention the groping incident to investigator Tammy Chappell because she was angry and believed she would get the same response as was given by the OWA. The next day, Gawley met with Wilken, Poliskie and Lieutenant Timothy Lewis.

Wilken spoke with Chappell that day as well, and Wilken then decided to issue a counseling memorandum to Minger based on the comments about Gawley's pants, weight, and breast size. The memorandum did not address the groping incident, which Gawley had not yet mentioned to Wilken. According to Gawley, Wilken had accepted at face value Minger's claim that he had not intended to offend Gawley when he made these various comments, in spite of the fact that the university's sexual harassment policy provided that a claim that the harassment was unintentional is disallowed as a defense. Minger's harassment of Gawley ceased as of June 1995, after he received the counseling memorandum.

Although the counseling memorandum was issued and the harassment stopped, the investigation continued through the other procedures that Gawley initiated. Chappell drafted a

report as a result of OAA's investigation, and on August 30, 1995, faxed the draft to Chief Norris, stating that she did not anticipate any major changes to the draft. Chief Norris reacted with anger upon reviewing the draft. He did not attend a meeting scheduled to discuss the draft, and Chappell later apologized to Norris for any misunderstandings about the report. Although Gawley never saw any reports (or drafts) issued by OAA, Norris shared the report with Minger and other personnel. Ultimately, the report was changed to remove many of the conclusions Chappell reached that were critical of Minger and the department. The recommendations in the watered-down report were never implemented. The university never issued a final report, and Norris refused to meet with Gawley during this time period.

Gawley believed that some of the actions taken during the investigation were retaliation for her complaints of sexual harassment. For example, Norris released a copy of the OAA report to Lieutenant Butler, a department officer not in Gawley's chain of command. Butler then wrote a memo highly critical of the report. Gawley also complained that Schutte ordered her to lie on a case report, that her case reports were subject to greater scrutiny than other officers' reports, that she was subjected to silent treatment by department administrators, and that the department's open-door policy was closed to her. Sergeant McClain told her she would be demoted if she did not renew her "IDACS" certification, even though three other officers in the same grade as Gawley did not renew their certification and none were threatened with demotion. McClain also ordered her to learn the new "CADS" system, telling her she would be tested on it, even though all the other officers in her shift were told the training would be voluntary. Finally, she was the last officer to receive a bullet-proof vest, for which Minger had procurement responsibility. As a result of all of these events, Gawley resigned on January 3, 1996, characterizing her departure as constructive discharge.

She had filed her first charge of discrimination with the EEOC on December 5, 1995. In that charge, she alleged that Minger subjected her to pervasive sexual harassment by commenting inappropriately about the fit of her pants, by commenting inappropriately about her breast size, and by inappropriately touching her breast under the guise of adjusting her bullet-proof vest during a fitting session. She alleged that the internal procedures for reporting this harassment had proved ineffectual, and that Minger had not been appropriately disciplined. She filed a second charge on December 19, 1995, which she concedes does not allege retaliation. On February 15, 1996, she filed an amendment to her first charge. That amendment alleged that since December 5, 1995, and unknown to her at that time, Chief Norris waged a campaign of retaliation against her for having filed complaints of sexual harassment against Minger. She pointed to Norris' disclosure of the OAA report to Butler as evidence of this retaliation. She did not specifically allege any other incidents as evidence of retaliation. She explains that she did not allege retaliation in her first two EEOC charges because it was not until she learned of the

disclosure to Butler that she realized the problems she had faced in her final days at the university were the result of retaliation for charging Minger with sexual harassment. After filing her formal complaint, Gawley became aware that OAA investigator Chappell had destroyed a number of documents, drafts, and notes on the instructions of the director of the OAA, who told Chappell to use her judgment in deciding what to keep and what to discard, a comment that Chappell took as a directive to destroy drafts.

The university moved for summary judgment in the district court, and the court initially denied the motion. As the parties prepared for trial, the university successfully moved to exclude evidence from Gawley's expert, a psychologist who planned to testify about patterns of behavior and organizational structure. In the meantime, as we will discuss below, the law of sexual harassment as it relates to supervisors was clarified by the Supreme Court in two major decisions, and the university decided to file new motions for summary judgment, first on the sexual harassment claim, and then on Gawley's claims for constructive discharge, retaliation, and the Indiana tort of spoliation of evidence. This time, the court granted summary judgment in favor of the university on all of Gawley's claims. Gawley appeals.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . We review the district court's summary judgment ruling *de novo,* construing the record in the light most favorable to the non-movant, Gawley. Gawley contends that the district court erred by: (1) finding that Minger was not Gawley's supervisor as a matter of law; (2) ruling that Gawley was not the victim of a hostile environment; (3) holding that evidence of harassment of other women and retaliation against other women should be excluded; (4) finding that Gawley failed to preserve her retaliation claim by not bringing it in her EEOC charge; (5) holding that Gawley could not establish a *prima facie* case of retaliation; (6) ruling that Gawley's constructive discharge claim failed as a matter of law; (7) excluding the testimony of Gawley's proposed expert; and (8) finding that Gawley's claim for spoliation of evidence failed because she could not prove damages.

We consider the supervisor issue first. Gawley maintains that even though Minger was not in her direct chain of command, he was her superior officer in the department's paramilitary hierarchy. As such, she was obliged to obey his orders in the field. At certain times such as special visits to the campus, and in certain areas such as uniforms and equipment, he held supervisory authority over her. She concedes he did not have the authority to hire or fire employees, but maintains that he was authorized to initiate disciplinary proceedings against her, and apparently did so on one occasion unrelated to any of these events. The university maintains that Minger was not Gawley's supervisor as a matter of law. He did not have immediately or successively higher authority over her because he could not hire or fire her, and did not have authority of substantial magnitude over her.

The parties are engaged in this battle over the meaning of "supervisor" because of the Supreme Court's holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998). In those cases, the Court defined the criteria for an employer's vicarious liability for sexual harassment committed by employees. Citing the Restatement (Second) of Agency, the Court noted that an employer is typically not liable for the torts of its employees acting outside the scope of their employment unless: (a) the employer intended the conduct or the consequences; (b) the employer was negligent or reckless; (c) the conduct violated a non-delegable duty of the employer; or (d) the employee purported to act or speak on behalf of the employer and there was reliance upon apparent authority, or the employee was aided in accomplishing the tort by the existence of the agency relationship. *Ellerth*, 524 U.S. at 758, citing Restatement 2nd of Agency § 219(2). As in the instant case, the Court was not faced with intentional conduct by the employer or a non-delegable duty, and so subsections (a) and (c) of Section 219, paraphrased above, were found inapplicable. Subsection (b) imposes liability on the employer who is negligent. Gawley seeks to impose the more stringent standard of vicarious liability detailed in subsection (d), but she also asks that if we find Minger to be a mere co-employee, we also find that she presents enough evidence to survive the university's motion for summary judgment under that standard as well. We will consider subsection (d) first.

In *Ellerth*, the Supreme Court divided subsection (d) into two parts. The first, dealing with apparent authority, was held inapplicable because the plaintiff was accusing her putative supervisor of the misuse of actual power. Apparent authority comes into play only when the offending employee creates a false impression of having the power to act on behalf of the employer. As in *Ellerth*, Gawley makes no such claim here and so we will not consider that provision further. The Court then considered the "aided in the agency relation" standard, which is the standard at issue in the instant case. The Court found that most workplace tort-feasors are aided in accomplishing their tortious conduct by the existence of the agency relationship. . . Indeed, "proximity and regular contact may afford a captive pool of potential victims." *Id.* However, this broad interpretation of the provision would subject employers to vicarious liability not only for supervisor harassment but for co-worker harassment as well. The Court found that the "aided in the agency relation" language required something more than the employment relationship itself. The Court found that, when a supervisor takes a tangible employment action against a subordinate, the standard will be met because the supervisor is clearly aided by the agency relationship in the commission of the harassment. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761. Gawley does not claim that she suffered a tangible

employment action, so we must consider the other circumstances under which the Court held that an employer might be vicariously liable.

The court noted that when the harassment does not culminate in a tangible employment action, whether the agency relationship aids in the supervisor's harassment is less obvious. In one sense, the Court noted, a supervisor is always aided by the agency relationship because the supervisor's power and authority "invests his or her harassing conduct with a particular threatening character." But there also are some acts a supervisor might commit that are identical to conduct in which a co-employee might engage, and the supervisor's status would make little difference. The Court declined to "render a definitive explanation of [its] understanding of the standard in an area where other important considerations must affect [the Court's] judgment" in this developing area of agency law. The Court instead adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. [524 U.S. at 765]

The Court further explained in *Faragher* that a victim of harassment "can walk away or tell the offender where to go" when the harasser is a fellow employee, but few are willing to accept the risks of blowing the whistle on a supervisor, who has the power to hire and fire and to set work schedules and pay rates. Moreover, an employer has greater opportunities to guard against misconduct by supervisors than by common workers. In particular, employers have greater opportunity and incentive to screen, train and monitor supervisors. The Court reiterated in *Faragher* that the employer could defend against a charge of harassment by a supervisor by demonstrating that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and by demonstrating that the complaining employee failed to take advantage of the employer's safeguards or otherwise avoid harm that could have been prevented.

With those standards in mind, we examine Gawley's claim against the university. It is undisputed that, in the normal course of business, Minger was not Gawley's immediate or successively higher supervisor. He was, however, her commanding officer on at least two occasions when he chose to harass her with inappropriate comments about the fit of her pants, during special visits to the campus by Janet Reno and Warren Christopher. He also was a supervisor in charge of uniforms and equipment, and in that capacity, he had special access to Gawley during the fitting of her bullet-proof vest, and used that access to grope her breast. He did not have the power to hire or fire her, but did have the ability to initiate disciplinary proceedings against her. He also had the ability to delay her receipt of a critical piece of equipment, namely her bullet-proof vest. The university makes much of the fact that the wearing of a bullet-proof vest was voluntary and officers had only recently negotiated through their union to require the university to provide vests to officers who requested them. The voluntary nature of wearing the vests is irrelevant here, however, because Gawley had requested a vest. Moreover, Minger's ability to delay distribution of equipment to a subordinate employee is relevant to the analysis of whether his position as a supervisor aided him in the commission of the harassment. If, as in *Ellerth* and *Faragher,* he was entrusted with powers that rendered subordinates less likely to blow the whistle on him, then he was aided by the agency relationship in harassing subordinate employees. Gawley also points out that the department operated in a paramilitary hierarchy, which meant that subordinate officers were obliged to obey the commands of all superior officers, not just those who were in their direct line of supervision. On the other hand, Gawley had access to department procedures to complain about Minger's conduct, and was able to complain to her direct superiors without having to proceed through Minger's chain of command at all. On summary judgment, we are reluctant under these unusual circumstances to find that Minger was not, as a matter of law, aided in the commission of the harassment by his supervisory position. . . . We need not definitively decide this question, however, because even if we assume Minger was a supervisor as defined in *Ellerth* and *Faragher,* the university was entitled to raise an affirmative defense.

We consider the issue of the university's affirmative defense because Minger's harassment did not involve a tangible employment action as the Supreme Court defined that term in *Ellerth* and *Faragher*. He did not fire Gawley, nor fail to promote her, nor reassign her to a post with significantly different responsibilities. He made harassing comments about her pants, her weight, and her breasts, and he touched her breast during a fitting. The university, therefore, may defend against Gawley's charges by demonstrating that: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) Gawley unreasonably failed to take advantage of any preventive or corrective opportunities provided by the university or to avoid harm otherwise. Gawley concedes the university had a system in place for

employees to report sexual harassment, and also concedes that as soon as she used the system, the university took action and the harassment stopped. Although she contends that the university conducted an inadequate investigation of the incidents, and that the warning issued to Minger was lacking, she agrees that the investigation and warning resulted in a cessation of Minger's offensive conduct. In the face of this evidence that the university had a procedure in place to handle harassment, Gawley has no evidence that the university failed to exercise reasonable care in preventing and correcting the harassing behavior.

We turn to the second part of the employer's defense, whether Gawley unreasonably failed to take advantage of any preventive or corrective opportunities provided by the university or to avoid harm otherwise. In *Faragher*, the Supreme Court explained the rationale for this second prong of the employer's defense:

> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. . . . An employer may, for example, provide a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided. [524 U.S. at 806-07]

The purpose of this requirement is tied to Title VII's primary objective, which is not meant to provide redress but rather to avoid harm. As an incentive to employers who implement reasonable procedures designed to prevent harassment of employees, there will be no liability if employees fail to take advantage of the procedures. On this second prong, the evidence also is undisputed. Minger harassed Gawley for a period of approximately seven months. At times, he made up to three inappropriate comments to her each day. During this time, she told Minger at least ten times to stop harassing her. Even though her informal approach was not working, she waited seven months before availing herself of the formal complaint procedures available through the university. As soon as she used the formal procedures, which did not require her to complain to the harasser but provided an alternate channel for her complaint, the university took

action and the harassment stopped. Gawley's neglect of the university's formal procedures during seven months of escalating harassment, in combination with the insufficiency of her repeated informal efforts to stop Minger constitute an unreasonable failure to take advantage of the university's corrective procedures. Given Gawley's concessions, and using the standard's set out in *Ellerth* and *Faragher,* the district court was therefore correct to grant summary judgment in favor of the university on this claim.

We turn then to Gawley's claims of retaliation. She filed two EEOC charges, one on December 5 and the other on December 19, 1995. Initially, she did not claim retaliation in either charge. On February 15, 1996, after she left her employment at the university, she amended the first charge to include a claim of retaliation. Specifically, she alleged that since December 5, 1995, and unknown to her at that time, Chief Norris waged a campaign of retaliation against her for having filed complaints of sexual harassment against Minger. She pointed to Norris' disclosure of the OAA report to Butler as evidence of this retaliation. She did not allege any other incidents as evidence of retaliation at that time. As we noted above, she explains that she did not allege retaliation in her first two EEOC charges because it was not until she learned of the disclosure to Butler that she realized the problems she had faced in her final days at the university were the result of retaliation for charging Minger with sexual harassment. In her complaint, Gawley alleged that after she reported Minger's harassment to the OWA and the OAA, Norris treated her complaints in a frivolous and disrespectful manner, and the university failed to take corrective action. According to Gawley, this retaliation caused her constructive discharge.

On appeal, Gawley concedes that even her amended EEOC charge did not allege she was ordered to lie on a case report, her case reports were subjected to greater scrutiny, she was threatened with demotion if she did not renew her IDACS certification, she was forced to complete CAD training, she was ostracized by the rest of the department, and she was the last officer to receive her bullet-proof vest. She maintains that her charge need not be so specific, that her claims are preserved as long as the claims in her charge are alike or reasonably related to the claims in her later lawsuit. Because she now believes Chief Norris was the driving force behind all of these allegedly retaliatory acts, she contends her claims should stand. The university counters with our opinion in *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473 (1996), asserting that Gawley is now confined to the four corners of her EEOC charge, which claimed only that the university mishandled her harassment claim.

We noted in *McKenzie* that, generally, a Title VII plaintiff may bring only those claims that were included in her original EEOC charge, or that are like or reasonably related to the allegations of the charge or growing out of the charge. . . . We explained that to meet this standard, the EEOC charge and the complaint must, at a minimum, describe the same conduct

and implicate the same individuals. The purpose of this requirement is to afford the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, and also to give the employer some notice of the conduct of which the employee is aggrieved.

Gawley's late claim that Chief Norris is somehow responsible for all of these acts committed by other members of the department fails for two reasons. First, she has produced no evidence that Norris was involved in any of these acts. . . . Second, in her own statement of facts, she attributes the order to lie on the case report to Lt. Schutte, she fails to identify who subjected her case reports to greater scrutiny or who would not speak to her, she attributes the delay in receiving the bullet-proof vest to Minger, and she notes that Sergeant McClain is the person who threatened her with demotion if she did not renew her IDACS certification and if she did not complete CAD training. Thus, her allegations involve different persons from those and different conduct from that asserted in her EEOC charge.

Under *McKenzie*, the only claim of retaliation that may stand is her claim that Norris treated her complaints of sexual harassment in a frivolous and disrespectful manner. In particular, he strongly criticized the report, which he distributed to Lt. Butler, Minger, and others. In order to state a claim for retaliation, however, Gawley must show more than this. . . . In particular, Gawley must show she has suffered some "materially adverse" action, i.e., more than a mere inconvenience or alteration of job responsibilities. Examples of conduct meeting the "materially adverse" standard include termination of employment, demotion, a decrease in wages, a less distinguished title, or a material loss of benefits. This list is not exhaustive, and we have acknowledged that the materially adverse action may be unique to the situation. . . . In any case, Gawley's claims that Norris criticized the OAA report and distributed it to personnel who had no right to receive it do not meet the standard for materiality. . . . Indeed, Gawley concedes in her brief on appeal that Norris' actions "may not have directly resulted in any material changes in the terms and conditions of Gawley's employment." Instead, Gawley points to Norris' anger with the OAA report as the cause of the other retaliatory actions she now alleges (e.g., the delay in receiving her vest, being ostracized in the department). Norris' criticism of and distribution of the report falls into the same class of acts as an unfavorable letter in the employee's file, and we therefore find that summary judgment in favor of the university was appropriate on this claim, as well.

Gawley next defends her claim of constructive discharge, stating that the totality of the circumstances to which she was subjected rendered her working conditions intolerable. We begin with Norris' actions after Gawley complained about Minger. Gawley concedes that she was not aware of Norris' distribution and criticism of the report until after she left her employment at the university. Therefore, these actions by Norris could not have been the cause

of her constructive discharge. That leaves her other charges, that she was subjected to harassing comments about her pants and breasts, that Minger sexually assaulted her with impunity when he groped her breast, she was the last officer to receive her vest, and that her reports were more severely scrutinized. Constructive discharge occurs when an employee's discriminatory working conditions become so intolerable that a reasonable person in her position would be compelled to resign. *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998). We held in *Sweeney* that an employee can be constructively discharged only if the underlying working conditions were themselves unlawful or discriminatory in some fashion. We also noted there that a constructive discharge claim requires evidence that quitting was the only way the plaintiff could extricate herself from the intolerable conditions. That requirement eliminates from consideration all of Minger's harassing comments about her pants and her breasts, as well as the groping of her breast because, as we found above, Gawley waited seven months before availing herself of the formal procedures the university established for victims of harassment even though her informal efforts to protect herself were unsuccessful on at least ten occasions by her own account. As soon as she complained, the university took action and Minger's objectionable conduct stopped. Nor did she formally complain about the delay in getting her bullet-proof vest. She remained on the job for two months after receiving the vest, as well, indicating that the delay had not caused her work conditions to become so intolerable as to cause her to leave her job. The other evidence of adverse working conditions is insufficiently severe to cause a reasonable person to quit the job. Finally, quitting was not the only option available to Gawley because of the university's procedures for victims of harassment.

Gawley complains that the university placed her in a "damned if you do, damned if you don't situation." She is being penalized, she alleges, for living with the conditions for seven months before resigning, while trying to seek redress. We disagree with this characterization. Gawley did try to use informal means to resolve the conditions she encountered on the job. But she did not use the formal complaint procedure at her disposal even when her informal efforts repeatedly failed. We might have a different case if the most egregious conduct occurred first, before Gawley had an opportunity to use the university's procedures, for example, if Minger began his harassing conduct by groping Gawley, conduct that would constitute a criminal act in many jurisdictions. But what we have instead is a steady escalation of harassing behavior, over many months, with the victim failing to use the procedures her employer put into place until especially egregious conduct occurred. And even then, Gawley did not initially disclose the worst of Minger's behavior. Nor did she use the system to complain that Minger was then delaying the issuance of her bullet-proof vest, presumably in retaliation for complaining about his harassing conduct. She did not complain to her employer about much of the harassment under the university's procedures, she did not include much of the offending conduct in her

EEOC charges, and, therefore, she cannot defeat the university's motion for summary judgment on this claim.

* * * *

For the reasons stated above, we affirm the district court's grant of summary judgment in favor of the university.

AFFIRMED.

Notes and Questions

1. There seems to be little doubt that the plaintiff, Gawley, was sexually harassed by a co-worker with some power over her terms and conditions of employment. What significant fact did the court's opinion rely on to deny her a remedy?

2. The facts suggest that the university's response was, in some respects, problematic, but that the filing of the complaint halted the alleged harassment. In retrospect, how would you advise the university to deal with harassment complaints in the future?

3. The court discusses the Supreme Court's opinions in *Faragher* and *Ellerth* with respect to the employer's affirmative defense in a sexual harassment complaint. What actions by the employer will enable it to mount a successful affirmative defense?

4. The plaintiff in this case also alleged retaliation. Although her retaliation claim was not successful, in many cases a plaintiff cannot prove discrimination (or harassment) but is successful on the retaliation claim. How can institutions reduce their legal exposure for retaliation claims?

5. The research literature suggests that women in nontraditional jobs, such as police officers, are more likely to encounter sexual harassment than those in more traditional occupations for women. In light of that research, how can colleges and universities

reduce their risk of harassment claims, and prevent women in nontraditional occupations from encountering sexual harassment?

SEC. 4.5.2.5. Disability Discrimination

Hatchett v. Philander Smith College
251 F.3d 670 (8th Cir. 2001)

OPINION BY: STROM

Minnie Hatchett ("Hatchett") appeals from the district court's grant of summary judgment in favor of Philander Smith College ("College") and Dr. Myer L. Titus, president of the College, and the district court's denial of her motion to alter or amend the judgment. We affirm.

Background

Hatchett was employed as the Business Manager for the College. In 1995, College President Myer L. Titus (Titus) decided to restructure the College's administrative staff. The Business Manager position eventually would be replaced with a Dean of Administrative Services. The College first advertised the Dean of Administrative Services position in 1995. Hatchett submitted an application in April 1995, but was not awarded the position. The Dean position was left vacant. Hatchett continued performing the Business Manager duties.

On January 8, 1996, Hatchett was injured while on College business in Washington, D.C. A skylight at the Sheraton Hotel broke, and Hatchett was struck in the head by falling debris. Following the accident she was confused and disorientated. Hatchett was taken to a hospital, treated, and released. Hatchett visited several doctors following her accident. Initially, she was under the care of Dr. Thomas Snider, a Neurologist. Dr. Snider retired, and Hatchett was referred to Dr. Reginald Rutherford, also a Neurologist. In March 1996, Hatchett began treatment with Dr. Judy White Johnson, a Psychologist.

Following the accident, Hatchett tried working. She could perform routine work tasks such as answering phones, signing checks, and processing mail. She could not, however, continue working as planned. In a letter to the College she stated her treating physician requested bed rest and indicated it would be six months to one year before she would be released for work. On February 8, 1996, College President Myer L. Titus informed Hatchett that she could not be treated differently from other employees. Titus told Hatchett she must go on full-time leave. Hatchett, however, wanted to continue working. She did not come in to work after this, but claims she continued working at home and alleges she was contacted by the College regarding work-related matters. According to an October 1, 1996 letter from Dr. Johnson to

UNUM Life Insurance Co. of America, Hatchett was previously scheduled to return to work on that day on a part-time schedule of four hours per day. However, the letter states that setbacks and added pressure interfered with Hatchett's steady recovery, and she was still unable to perform some of the functions of the Business Manager position. In addition, Hatchett stated in her complaint that she planned to return to work part-time in October.

Hatchett met with Dr. Titus on September 27, 1996, during which Titus informed Hatchett that the Business Manager position no longer existed. Titus offered her a choice of three part-time positions: Director of Office of Sponsored Programs, Director of Human Development, or Associate Director of Development. These positions would require Hatchett to return to work part-time on January 15, 1997, and would pay half of her salary at the time she took leave. Hatchett declined these positions. Her doctors advised her not to accept one of the three alternate positions. In a letter dated December 6, 1996, Titus again notified Hatchett that the Business Manager functions no longer existed. He again invited her to choose one of the three part-time positions.

On November 22, 1996, the College again advertised the Dean of Administrative Services position. Hatchett submitted her application for Dean of Administrative Services on December 18, 1996. She was interviewed for, but not offered, the Dean vacancy. The position was awarded to Mr. Bryant, an individual who worked for and was trained by Ms. Hatchett during her tenure as Business Manager. In their brief, the College and Titus state Hatchett was considered terminated in May 1997 when she was not hired as Dean of Administrative Services and had previously refused their offers of alternative employment.

On December 18, 1997, Hatchett filed a complaint alleging violations of the Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act, as well as state law claims. On January 26, 2000, the district court granted the defendants' motions for summary judgment. Hatchett responded with a motion to alter or amend the order granting defendants' motion for summary judgment. On February 16, 2000, the district court denied the motion to alter or amend. Hatchett is appealing the order granting defendants' motions for summary judgment and the denial of her motion to alter or amend.[2]

Discussion

We review a district court's grant of summary judgment *de novo*. . . . Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is

[2] Hatchett does not appeal the dismissal of her ADEA, Title VII or state law claims.

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In addition, we may affirm a judgment on any grounds supported by the record. . . . Based upon the undisputed material facts and applicable law, we find that the district court properly granted summary judgment in favor of the College and Titus.

I. Americans with Disabilities Act Claims

We have previously held that, to survive summary judgment at the district court level, a plaintiff must establish each element of his or her prima facie case. Under the ADA, a plaintiff must demonstrate that he or she: "(1) is disabled within the meaning of the ADA; (2) is qualified (with or without reasonable accommodation) to perform the essential functions of the job at issue; and (3) has suffered adverse employment action under circumstances giving rise to an inference of discrimination." . . . The district court found that Hatchett was not "qualified" within the meaning of the ADA, reasoning that Hatchett could only perform the job on a part-time basis. Alternatively, the district court found that her claim was barred by the statute of limitations.

The determination of whether a person is "qualified" under the ADA is a two-fold inquiry: first, the court must determine whether the individual meets the necessary prerequisites for the job, such as education, experience, and training; second, the court must determine whether the individual can perform the essential job functions, with or without reasonable accommodation. *Id*. (citing *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000)). The parties agree that the time to evaluate Hatchett's abilities is September 1996, when she was told that the Business Manager position was no longer in existence and she was offered three alternative part-time positions.

Hatchett can establish the first part of the inquiry by virtue of having previously held the position. . . . However, she may not rely upon her past performance to establish that she could perform the essential functions of the job. [N]othing in the record demonstrates that she could perform the essential functions of the job. The essential functions of a job include the "fundamental job duties . . . [but] does not include the marginal functions of the position." *Moritz v. Frontier Airlines, Inc*., 147 F.3d 784, 787 (8th Cir. 1998). There is no issue of fact as to the essential functions of the Business Manager position.

The job description of Business Manager is lengthy and includes, among other duties, holding monthly meetings and attending seminars. Hatchett also stated in her deposition that she was required to confer with parents and students about unpaid tuition and the impact on the student's ability to sit for finals.

According to a letter written by Hatchett's neuropsychologist dated October 1, 1996, Hatchett at that time still could only work on one-on-one projects that involved a focused subject, were goal-oriented, and were relatively conflict-free. The letter further states that she became confused and emotionally upset when faced with conflict or multiple input. The neuropsychologist recommended that she not confer with students or attend staff meetings and other large group meetings. These are essential aspects of the Business Manager position. Thus, she was not "qualified" and was not entitled to ADA protection unless she could perform the essential functions with reasonable accommodation.

A reasonable accommodation is one that enables a individual with a disability to perform the essential functions of the position. 29 C.F.R. § 1630.2(o)(1)(i). From the outset, the Court notes that an employee seeking a reasonable accommodation must request such an accommodation. . . . Hatchett alleges that at the time she returned, she requested a part-time schedule or intermittent FMLA leave.[4] A part-time schedule may be reasonable in the appropriate circumstances. 42 U.S.C. § 12111(9). However, an employer is not required to reallocate essential functions that an individual must perform. *Moritz*, 147 F.3d at 788. Furthermore, an employer is not required to hire additional employees or assign those tasks that the employee could not perform to other employees. The accommodation requested by Hatchett does not enable her to perform the essential functions of the job. Even if allowing Hatchett to work only four hours per day were reasonable, she still is not able to perform the essential functions while at work. There also is some question as to whether the Business Manager's duties could be completed on a part-time schedule, which would make Hatchett's part-time request unreasonable. See e.g., *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349 (D. Kan. 1996) (holding that plaintiff was not qualified because he was unable to perform the duties of the eight-hour job within his four-hour work restriction). However, because the Court finds that Hatchett is not able to otherwise perform the essential functions while on the job for the proposed four hours, she is not qualified.

In addition, Hatchett has not rebutted this evidence with a showing of her individual capabilities. See *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (holding that if the employer demonstrates that an employee cannot perform the essential functions of the

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[4] Hatchett also claims that she requested a "work-hardening" program as an accommodation. However, a reasonable accommodation allows the employee to perform the essential functions of the job while at work. Hatchett does not demonstrate that the "work-hardening" accommodation would accomplish this purpose. Hatchett also claims that intermittent FMLA leave is *per se* reasonable. Again, this argument fails because Hatchett does not provide any evidence that she could perform the essential functions of the job while at work. Even intermittent FMLA leave does not excuse an employee from the essential functions of the job. In addition, the regulations regarding FMLA clearly state that "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." 29 C.F.R. § 825.702(a)

job with or without accommodation, the burden shifts to the employee to present evidence of individual capabilities). Hatchett claims her individual capabilities are demonstrated by her expected return to work full-time, if the College would have allowed her to work-harden. Employers, however, are not required to predict the employee's degree of success with recovery. . . . Protection under the ADA based upon an employee's eventual degree of future recovery was not Congress's intent in passing the ADA. Hatchett has not established her prima facie case of disability discrimination under the ADA.

For these same reasons, Hatchett cannot prevail on her failure to hire claim. She claims that the College's failure to hire her for the Dean of Administrative Services position violates the ADA.[5] In her brief, she admits that the job descriptions of the two positions are virtually identical. This is fatal to her failure to hire claim. As we have noted, Hatchett is unable to perform the essential job functions of either position with or without reasonable accommodation, and thus is not a "qualified" individual with a disability entitled to ADA protection. Finally, Hatchett's ADA retaliation claim fails because she has not presented any evidence that she was terminated for any reason other than her inability to perform the essential functions of the job with or without reasonable accommodation.

II. Family and Medical Leave Act Claims

The issue before the Court is one that has not been addressed in a reported opinion. Specifically, we must determine whether an employee, who is unable to perform the essential functions of a job, is entitled to intermittent or reduced schedule leave. The district court found that at the end of the twelve-week period, Hatchett was unable to perform the essential functions of the job and was not entitled to restoration. On appeal, Hatchett does not specifically challenge the district court's conclusion regarding full-time leave and entitlement to restoration. Rather, Hatchett attacks the district court's failure to address her request for intermittent leave. Hatchett argues that she would have been able to return to work by the time her FMLA leave expired, or within 24 weeks, if the College and Titus would have allowed her to "work-harden" on a reduced schedule, gradually working up to full-time. We hold that the legislative history of the FMLA and the statute's restoration provisions demonstrate that an employee who could not otherwise perform the essential functions of her job, apart from the inability to work a full-time schedule, is not entitled to intermittent or reduced schedule leave.

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[5] In her failure to hire argument, Hatchett points to the College's failure to hire her in 1995, when the Dean of Administrative Services position was first advertised. This time is prior to the accident for which she now claims disability, and is thus irrelevant to our inquiry.

The FMLA was enacted in the wake of increasing struggle between work and family life. To help ease the growing tension between work and family, the FMLA establishes a right to unpaid family and medical leave for those employees covered under the Act. . . . Specifically, the FMLA entitles an eligible employee to twelve (12) weeks leave for one of the articulated medical conditions, one of which is the employee's own serious medical condition. 29 U.S.C. § 2612(a)(1). In addition to full-time leave, an employee may take intermittent or part-time leave when medically necessary. 29 U.S.C. § 2612(b)(1).

The purpose of the FMLA is to allow an employee to be away from the job, as opposed to using the statute as a means to force an employer to be directly involved in an employee's rehabilitation. For example, an employee's inability to work may be due to a required absence for chemotherapy. While the employee is receiving treatment and is away from his or her job, the employee is unable to perform the functions of his or her job and is entitled to leave under the FMLA. . . . However, while the employee is at his or her job, the employee must be able to perform the essential functions of the job. Similarly, the legislative history addresses a situation involving an employee who is recovering from a serious health condition and is able to return to work, but must periodically leave work for continued medical supervision. In such a situation, the employee is deemed to be temporarily unable to perform the functions of the job when away from work to receive the continued medical supervision, thus entitling that individual to intermittent leave. . . . In short, the legislative history demonstrates that the FMLA protects an employee who must leave work, or reduce his or her work schedule, for medical reasons, as long as that employee can perform the job while at work.

Our conclusion that an employee must be able to perform the essential functions of the job to take intermittent or reduced schedule leave is further supported by an examination of the restoration provisions of the FMLA. Upon return from FMLA leave, an employee is generally entitled to be restored to the position held prior to leave, or one that is equivalent in terms of benefits, pay and other terms and conditions. 29 U.S.C. § 2614(a)(1). However, an employee is not entitled to restoration if, at the end of the FMLA leave period, the employee is still unable to perform an essential function of the job. 29 C.F.R. § 825.214; *Reynolds v. Phillips & Temro Industries, Inc.*, 195 F.3d 411, 414 (8th Cir. 1999). An employee is only entitled upon return from leave to that which she would have been entitled absent the leave time. . . . Allowing Hatchett to stay in a position she cannot perform gives her more than if she had not taken leave.

Based upon the undisputed facts, Hatchett was unable to perform the essential functions of the Business Manager position, and thus she was not entitled to intermittent or reduced schedule leave. The FMLA does not require an employer to allow an employee to stay in a position that the employee cannot perform. This type of claim is addressed under the ADA.

For similar reasons, Hatchett's FMLA retaliation claim fails. In order to establish the prima facie case for FMLA retaliation, the employee must demonstrate that FMLA leave was the determinative factor in the employment decision at issue. *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1229 (S. D. Iowa 1997). Like the employee in Beal, Hatchett has not only failed to demonstrate she was entitled to FMLA leave, but she has failed to rebut the undisputed fact that she was unable to perform the job, and thus was terminated by the College. We have also reviewed the district court's denial of Hatchett's motion to alter or amend the judgment and find no error in that ruling.

Conclusion

The undisputed evidence demonstrates that Hatchett was unable to perform the essential functions of the job of Business Manager and, therefore, she is not a qualified individual entitled to ADA protection. Hatchett also has failed to demonstrate entitlement to intermittent or reduced schedule leave. Accordingly, we affirm the district court's grant of summary judgment for the College and Titus and the denial of Hatchett's motion to alter or amend.

Notes and Questions

1. The ADA only protects those individuals who can perform the essential functions of the position with or without reasonable accommodation. Hatchett's requested accommodation was to work part-time and to perform only those functions that did not involve face-to-face meetings or conflict. Why did the court not require the college to provide these accommodations for Hatchett?

2. Did the fact that Hatchett's initial injury occurred in a work-related setting affect the court's analysis of her legal claims? As a policy matter, should this fact make a difference in the ADA/FMLA analysis?

3. The court notes that there had been no published opinions on whether an individual must be able to perform the essential functions of a position in order to qualify for intermittent leave. Since the Hatchett case, several federal courts have ruled that an employee who is medically not able to return to work after the FMLA leave has expired is not protected by that law, and may be terminated. *Conroy v. Township of Lower Merion,* 77 Fed. Appx.

556 (3d Cir. 2003); *Edgar v. JAC Products, Inc.*, 2006 U.S. App. LEXIS 8301 (6th Cir. 2006); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998). *Hicks v. LeRoy's Jewelers, Inc.*, 2000 U.S. App. LEXIS 17568 (6th Cir. 2000); *Green v. Alcan Aluminum Corp*., 1999 U.S. App. LEXIS 30158 (6th Cir. 1999); *Reynolds v. Phillips & Temro Indus., Inc.* 195 F.3d 411 (8th Cir. 1999). DOL Regulations state that the employee loses the right to reinstatement "if the employee is unable to perform an essential function of the position because of a physical or mental condition" (29 C.F.R. §825.214(b)). On the other hand, the ADA suggests that a leave of absence may be a reasonable accommodation. In light of these conflicting provisions, what would you suggest an employer should do when an employee on a medical leave cannot return at the end of the statutory leave period (12 weeks)?

4. What would the employer's legal obligation have been if Hatchett had been able to perform the essential functions of her job but could only work four hours a day because of physical limitations?

5. Given the facts of this case (Hatchett's job was eliminated and another individual was hired for the newly created position), would the outcome have differed even if she had been able to perform the essential functions of the business manager position?

SEC. 4.5.2.9 and Sec. 4.5.2.10
Laws Prohibiting Sexual Orientation Discrimination and
Laws Prohibiting Transgender Discrimination

Bostock v. Clayton County
140 S. Ct. 1731 (2020)

OPINION BY: GORSUCH

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to " live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U. S. C. §2000e-2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of "

sex. And, as this Court has previously explained, "the ordinary meaning of 'because of ' is 'by reason of ' or 'on account of.'" In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of " the confluence of multiple factors do not violate the law. Or it could have written "primarily because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, §107, 105 Stat. 1075, codified at 42 U. S. C. §2000e-2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. .

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of " sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. The employers acknowledge that they

discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word otherwise, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White*, 548 U. S. 53, 59, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 986, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." §2000e-2(a)(1) (emphasis added). And the

meaning of “individual” was as uncontroversial in 1964 as it is today: “A particular being as distinguished from a class, species, or collection.” Webster’s New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that “it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment.” It might have said that there should be no “sex discrimination,” perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only “sexist policies” against women as a class. But, once again, that is not the law we have.

The consequences of the law’s focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It’s no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff ’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII’s message is “simple but momentous”: An individual employee’s sex is “not relevant to the selection, evaluation, or compensation of

employees." *Price Waterhouse v. Hopkins*, 490 U. S. 228, 239, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an

employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex

stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis."

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of " sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True,

women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. *Ibid.* The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex.

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff 's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to *achieve* sex equality. In Phillips, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here. When an employer fires an employee for being homosexual or

transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As Manhart teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

* * * * *

[T]he employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit

exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something.

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff 's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for

Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

* * * * *

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the

same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U. S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address.

* * * * *

Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

* * * * *

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of "'the sex provision of Title VII [are] difficult to . . . control.'" . . . The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law.

* * * * *

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge

any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties [*682] are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. §2000e-1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U. S. C. §2000bb *et seq*. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb-1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none

of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits in Nos. 17-1623 and 18-107 are affirmed. The judgment of the Eleventh Circuit in No. 17-1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENTs BY: ALITO, KAVANAUGH

ALITO:
There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. [3] This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, §7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. [4] A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation--not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated--the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22

(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is *whether Congress* did that in 1964.

It indisputably did not.

I

A

Title VII, as noted, prohibits discrimination "because of . . . sex," §2000e-2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("The property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively").

* * * * *

The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of . . . sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII can be interpreted that way but that they *cannot reasonably be interpreted any other way*. According to the Court, the text is unambiguous.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. *Hively v. Ivy Tech Community College of Ind.*, 853 F. 3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law. Day in and day out, the Commission enforced Title VII but did not grasp what discrimination "because of . . . sex" unambiguously means.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes (recognizing that "discrimination on

these bases" does not have "some disparate impact on one sex or another"). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes. And individuals who are born with the genes and organs of either biological sex

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Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual."

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2

The Court argues that two other decisions--*Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), and *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702 (1978)--buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In *Philips*, the employer treated women with young children less favorably than men with young children. In *Manhart*, the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three "lessons" from *Phillips*, *Manhart*, and *Oncale*, but none sheds any light on the question before us. The first lesson is that "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it." This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought

that the application of a law to a person's conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer's conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination [****109] because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I-A, *supra*, it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that "[i]n *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.'" But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes [*720] between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips*, because women with children were treated disadvantageously compared to men with children.

Lesson number two—"the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a "motivating factor" when an employer discriminates on the basis of sexual orientation or gender identity. But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.

Lesson number three--"an employer cannot escape liability by demonstrating that it treats males and females comparably as groups," is also irrelevant. There is no dispute that discrimination against an individual employee based on that person's sex cannot be justified on the ground that the employer's treatment of the average employee of that sex is at least as favorable as its

treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips*. That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex.

A

Because the opinionof the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. [*721] Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation.

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IV

What the Court has done today--interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity--is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at

least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.

"*[B]athrooms, locker rooms, [and other things] of [that] kind*." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time. Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.

In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination, and some lower court decisions have agreed.

Women's sports. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex. This issue has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male. Students in these latter categories have found success in athletic competitions reserved for females.

The logic of the Court's decision could even affect professional sports. Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women's professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U. S. C. §2000e-2(e), but the BFOQ exception has been read very narrowly.

Housing. The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U. S. C. §1686, allows schools to maintain "separate living facilities for the different sexes," but it may be argued that a student's "sex" is the gender with which the student identifies. Similar claims may be brought under the Fair Housing Act. See 42 U. S. C. §3604.

Employment by religious organizations. Briefs filed by a wide range of religious groups--Christian, Jewish, and Muslim--express deep concern that the position now adopted by the Court "will trigger open conflict with faith based employment practices of numerous churches,

synagogues, mosques, and other religious institutions." They argue that "[r]eligious organizations need employees who actually live the faith," and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable message.

This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching." 53 Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be "ministers." But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for the ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the "activities" of the organization or school, but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.

Healthcare. Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery. Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.

Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore

requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Freedom of speech. The Court's decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories. Some jurisdictions, such as New York City, have ordinances making the failure to use an individual's preferred pronoun a punishable offense, and some colleges have similar rules. After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal antidiscrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds.

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is.

The Court itself recognizes this:

"The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us."

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

NOTES AND QUESTIONS

1. *Bostock* was a 6-3 decision, which struck some Court observers as a surprise, since three justices in the majority who are viewed as typically leaning toward conservative judicial philosophies were in the majority. Do you think his focus on the link between biological sex and sexual orientation or transgender status provided a rationale that some of the more conservative justices could agree with?

2. The majority opinion focuses on several earlier Supreme Court cases in which the court found that the *Manhart* and *Martin Marietta* opinions bolstered its finding that "sex plus" rationales for discrimination against women violated Title VII. *Manhart* involved an employer's requirement that women employees make larger pension contributions because they tend to live longer than men violated Title VII. *Martin Marietta* involved an employer's practice of preferring to hire

males rather than women with small children also violated Title VII. How do these precedents bolster the rationale of the majority (although the Alito dissent disagrees that they are relevant)?

3. Consider the language used by Justice Alito in his dissent? It seems unusually strident to some readers. Do you agree?

4. Note that the Alito dissent discusses a number of possible *policy* issues that may arise as a result of what he views as an inappropriate expansion of the definition of "sex" in Title VII. From a legal perspective, should the effect on *policy* be considered in interpreting the text of a statute? What other policy challenges can you suggest that were a result of the passage of Title VII of the Civil Rights Act of 1964, and other federal nondiscrimination statutes?

5. In another example of the law's impact on policy, the federal Age Discrimination in Employment Act originally capped protections at age 65—employees dismissed who were older than 65 were not protected under the ADEA. That cap was lifted by subsequent legislation. What impact has the removal of this cap had on the age profile of tenured faculty members?

SEC. 4.6.2. Affirmative Action in Employment

Taxman v. Board of Education of the Township of Piscataway
91 F.3d 1547 (3d Cir. 1996) (*en banc), cert. granted,* 117 S. Ct. 2506,
cert. dismissed, 118 S. Ct. 595

MANSMANN, Circuit Judge [for the *en banc* court]:

In this Title VII matter, we must determine whether the Board of Education of the Township of Piscataway violated that statute when it made race a factor in selecting which of two equally qualified employees to lay off. Specifically, we must decide whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote "racial diversity."

It is clear that the language of Title VII is violated when an employer makes an employment decision based upon an employee's race. The Supreme Court determined in *United Steelworkers v. Weber*, 443 U.S. 193(1979), however, that Title VII's prohibition against racial discrimination is not violated by affirmative action plans which first, "have purposes that mirror those of the statute" and second, do not "unnecessarily trammel the interests of the [non-minority] employees," *id*. at 208.

We hold that Piscataway's affirmative action policy is unlawful because it fails to satisfy either prong of *Weber*. Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster. We will affirm the district court's grant of summary judgment to Sharon Taxman.

I.

In 1975, the Board of Education of the Township of Piscataway, New Jersey, developed an affirmative action policy applicable to employment decisions. . . . The 1975 document states that the purpose of the Program is "to provide equal educational opportunity for students and equal employment opportunity for employees and prospective employees," and "to make a concentrated effort to attract . . . minority personnel for all positions so that their qualifications can be evaluated along with other candidates." The 1983 document states that its purpose is to "ensure[] equal employment opportunity . . . and prohibit[] discrimination in employment because of [, *inter alia*,] race. . . ."

The operative language regarding the means by which affirmative-action goals are to be furthered is identical in the two documents. "In all cases, the most qualified candidate will be

recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." The phrase, "candidates meeting the criteria of the affirmative action program," refers to members of racial, national origin or gender groups identified as minorities for statistical reporting purposes by the New Jersey State Department of Education, including Blacks. The 1983 document also clarifies that the affirmative action program applies to "every aspect of employment including . . . layoffs . . . ."

The Board's affirmative action policy did not have "any remedial purpose"; it was not adopted "with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities within the Piscataway Public School System." At all relevant times, Black teachers were neither "underrepresented" nor "underutilized" in the Piscataway School District work force. Indeed, statistics in 1976 and 1985 showed that the percentage of Black employees in the job category that included teachers exceeded the percentage of Blacks in the available work force.

A.

In May 1989, the Board accepted a recommendation from the Superintendent of Schools to reduce the teaching staff in the Business Department at Piscataway High School by one. At that time, two of the teachers in the department were of equal seniority, both having begun their employment with the Board on the same day nine years earlier. One of those teachers was intervenor plaintiff Sharon Taxman, who is White, and the other was Debra Williams, who is Black. Williams was the only minority teacher among the faculty of the Business Department.

Decisions regarding layoffs by New Jersey school boards are highly circumscribed by state law; nontenured faculty must be laid off first, and layoffs among tenured teachers in the affected subject area or grade level must proceed in reverse order of seniority. N.J. Stat. Ann. § 18A:28-9 et seq. Seniority for this purpose is calculated according to specific guidelines set by state law. N.J. Stat. Ann. § 18A:28-10; N.J. Admin. Code Tit. 6 § 6:3-5.1. Thus, local boards lack discretion to choose among employees for layoff, except in the rare instance of a tie in seniority among the two or more employees eligible to fill the last remaining position.

The Board determined that it was facing just such a rare circumstance in deciding between Taxman and Williams. In prior decisions involving the layoff of employees with equal seniority, the Board had broken the tie through "a random process which included drawing

numbers out of a container, drawing lots or having a lottery."[1] In none of those instances, however, had the employees involved been of different races.

In light of the unique posture of the layoff decision, Superintendent of Schools Burton Edelchick recommended to the Board that the affirmative action plan be invoked in order to determine which teacher to retain. Superintendent Edelchick made this recommendation "because he believed Ms. Williams and Ms. Taxman were tied in seniority, were equally qualified, and because Ms. Williams was the only Black teacher in the Business Education Department." [The court then quotes two members of the Board of Education who voted to apply the affirmative action policy; they testified that they did so to preserve the diversity of the teaching staff].

* * * *

Following the Board's decision, Taxman filed a charge of employment discrimination with the Equal Employment Opportunity Commission. Attempts at conciliation were unsuccessful, and the United States filed suit under Title VII against the Board in the United States District Court for the District of New Jersey. Taxman intervened, asserting claims under both Title VII and the New Jersey Law Against Discrimination (NJLAD).

Following discovery, the Board moved for summary judgment and the United States and Taxman cross-moved for partial summary judgment only as to liability. The district court denied the Board's motion and granted partial summary judgment to the United States and Taxman, holding the Board liable under both statutes for discrimination on the basis of race. *United States v. Board of Educ. of Township Piscataway* , 832 F. Supp. 836, 851 (D.N.J. 1993). A trial proceeded on the issue of damages. By this time, Taxman had been rehired by the Board, and thus, her reinstatement was not an issue. The court awarded Taxman damages in the amount of $134,014.62 for backpay, fringe benefits, and prejudgment interest under Title VII. A jury awarded an additional $10,000 for emotional suffering under the NJLAD….

The Board appealed, contending that the district court erred in granting Taxman summary judgment as to liability. The Board also contends, in the alternative, that the court erred in awarding Taxman 100% backpay and in awarding prejudgment interest at the IRS rate rather than under 28 U.S.C. § 1961. Taxman cross-appealed, contending that the district court erred in

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[1] The dissent of Chief Judge Sloviter characterizes the use of a random process as "a solution that could be expected of the state's gaming tables." We take issue with this characterization, noting that those wiser than we have advised that "the lot puts an end to disputes and is decisive in a controversy between the mighty." *Proverbs* 18:18 (New American). Furthermore, the use of a random process is not something that the court has imposed upon the Board, but is instead a mechanism adopted by the Board itself in reaching a decision in prior employment matters. Board of Education Brief at 3.

dismissing her claim for punitive damages. Subsequently, the United States sought leave to file a brief as amicus curiae in support of reversal of the judgment, representing that it could no longer support the judgment of the district court. By order of November 17, 1995, we denied the United States' request. We treated the position of the United States at the original argument before this court on January 24, 1995, as a motion to withdraw as a party, which we granted. Thus, the only parties before us on this appeal are the Board and Taxman. . . .

II.

In relevant part, Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee" on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). For a time, the Supreme Court construed this language as absolutely prohibiting discrimination in employment, neither requiring nor permitting any preference for any group. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 643 (1987) (Stevens, J., concurring).…

In 1979, however, the Court interpreted the statute's "antidiscriminatory strategy" in a "fundamentally different way," *id*. at 644, holding in the seminal case of *United Steelworkers v. Weber*, 433 U.S. 193 (1979), that Title VII's prohibition against racial discrimination does not condemn all voluntary race-conscious affirmative action plans. [The court discussed the test created by *Weber* against which all voluntary affirmative action plans challenged under Title VII have been measured. The test is outlined below].

In 1987, the Supreme Court decided a second Title VII affirmative action case, *Johnson v. Transportation Agency, Santa Clara County*. [The court discusses the reasoning of the Supreme Court in *Johnson*, in which the Court found that the affirmative action plan in question, and the gender-conscious promotion effected under that plan, met the *Weber* test.]

III.

We analyze Taxman's claim of employment discrimination under the approach set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1978). Once a plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to show a legitimate nondiscriminatory reason for the decision; an affirmative action plan may be one such reason. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 626 (1987). When the employer

satisfies this requirement, the burden of production shifts back to the employee to show that the asserted nondiscriminatory reason is a pretext and that the affirmative action plan is invalid. *Id.*

For summary judgment purposes, the parties do not dispute that Taxman has established a *prima facie* case or that the Board's decision to terminate her was based on its affirmative action policy. The dispositive liability issue, therefore, is the validity of the Board's policy under Title VII.

IV.

* * * *

A.

Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force.

Title VII's first purpose is set forth in section 2000e-2's several prohibitions, which expressly denounce the discrimination that Congress sought to end. 42 U.S.C. § 2000e-2(a)-(d),(l); *McDonnell Douglas*, 411 U.S. at 800 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."). . .

Title VII's second purpose, ending the segregative effects of discrimination, is revealed in the congressional debate surrounding the statute's enactment. In *Weber*, the Court carefully catalogued the comments made by the proponents of Title VII that demonstrate the Act's remedial concerns. *Weber*, 433 U.S. at 202-04. . . The significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination per se but the *consequences* of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's antidiscrimination mandate.

Thus, based on our analysis of Title VII's two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test.

We see this case as one involving straightforward statutory interpretation controlled by the text and legislative history of Title VII as interpreted in *Weber* and *Johnson*. The statute on its face provides that race cannot be a factor in employer decisions about hires, promotions, and

layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress' primary objective. If exceptions to this bar are to be made, they must be made on the basis of what Congress has said. The affirmative action plans at issue in *Weber* and *Johnson* were sustained only because the Supreme Court, examining those plans in light of congressional intent, found a secondary congressional objective in Title VII that had to be accommodated -- i.e., the elimination of the effects of past discrimination in the workplace. Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.[2]

Accordingly, it is beyond cavil that the Board, by invoking its affirmative action policy to lay off Sharon Taxman, violated the terms of Title VII. While the Court in *Weber* and *Johnson* permitted some deviation from the anti-discrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial deviations. Here, as in *Weber* and *Johnson*, the Board must justify its deviation from the statutory mandate based on positive legislative history, not on its idea of what is appropriate.[3]

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[2] Our dissenting colleagues would have us substitute our judgment for that expressed by Congress and extend the reach of Title VII to encompass "means of combating the attitudes that can lead to future patterns of discrimination." Such a dramatic rewriting of the goals underlying Title VII does not have support in the Title VII caselaw.

[3] Although no other reported case has addressed the precise question before us, we believe that the decision reached by the Court of Appeals for the Tenth Circuit in *Cuncio v. Pueblo School Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990), merits mention. There the plaintiff, a White social worker who was laid off during a reduction in force, sued her employer, a Colorado school district, under Title VII and the Constitution for discriminating against her on the basis of race by retaining Wayne Hunter, a less senior Black social worker. The district asserted in its defense that even though there was no evidence of past discriminatory conduct on its part to justify remedial race-conscious affirmation action, its decision was lawful because it was made pursuant to a valid affirmative action plan and aimed at retaining the district's only Black administrator. *Id*. at 436, 439. The affirmative action plan at issue had two long-range goals: "to achieve a diverse, multi-racial faculty and staff capable of providing excellence in the education of its students and for the welfare and enrichment of the community" and "to achieve equity for all individuals through equal employment opportunity policies and practices." *Id*. at 437 n.3. Affirming the district court's judgment in the plaintiff's favor, the court of appeals stated that "[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination." *Id*. at 437 (citing, *inter alia*, *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)) (footnote omitted). Because the record did not contain evidence of past or present discrimination against Blacks by the district or proof of a statistical imbalance in the district's work force, the court held that the district's decision to lay off the plaintiff violated the first prong of either a Title VII or Equal Protection analysis. *Id*. at 438-39 & n.5. Unfortunately, the court did not set forth its reasons for concluding that affirmative action must be remedial to be lawful.

B.

The Board recognizes that there is no positive legislative history supporting its goal of promoting racial diversity "for education's sake," and concedes that there is no caselaw approving such a purpose to support an affirmative action plan under Title VII. "[T]he Board would have [us] infer the propriety of this purpose from fragments of other authority." *Board of Educ. of Township of Piscataway*, 832 F. Supp. at 845. . . .

We find the Board's reliance on Fourteenth Amendment caselaw misplaced . . . We are acutely aware, as is the Board, that the federal courts have never decided a "pure" Title VII case where racial diversity for education's sake was advanced as the sole justification for a race-based decision. The Board argues that in deciding just such a case, we should look to the Supreme Court's endorsement of diversity as a goal in the Equal Protection context. This argument, however, is based upon a faulty premise.

* * * *

We are...unpersuaded by the Board's contention that Equal Protection cases arising in an education context support upholding the Board's purpose in a Title VII action. These Equal Protection cases, unlike the case at hand, involved corrective efforts to confront racial segregation or chronic minority underrepresentation in the schools. In this context, we are not at all surprised that the goal of diversity was raised. While we wholeheartedly endorse any statements in these cases extolling the educational value of exposing students to persons of diverse races and backgrounds, given the framework in which they were made, we cannot accept them as authority for the conclusion that the Board's non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII. *See , e.g. , Wygant* [*v. Jackson Board of Education*], 476 U.S. at 267 (Marshall, J., dissenting) (noting that the racially-conscious layoff provision at issue was aimed at preserving the faculty integration achieved by the Jackson, Michigan Public Schools in the early 1970s through affirmative action; minority representation went from 3.9% in 1969 to 8.8% in 1971); *Columbus Board of Education v. Penick*, 443 U.S. 449, 467 (1979) (condemning intentional segregation and the creation of racially-identifiable schools practiced by the Columbus, Ohio Board of Education); *Regents of the University of California v. Bakke*, 438 U.S. 265, 272 (1978) (Powell, J., announcing the judgment of the Court) (observing that the 1968 class of the Medical School of the University of California at Davis contained three Asians, no Blacks, no Mexican-Americans and no American Indians) . . . More specifically, two Supreme Court cases upon which the Board relies, *Bakke* and *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), are inapposite. *Bakke* involved a rejected White

applicant's challenge under the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to a special admissions program instituted by the Medical School of the University of California at Davis, which essentially set aside 16 places for minority candidates. Justice Powell, whose vote was necessary both to establish the validity of considering race in admission decisions and to invalidate the racial quota before the Court,[4] was of the opinion that the attainment of a "diverse student body" is a constitutionally permissible goal for an institution of higher education. . . .

Bakke's factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are, in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in *Bakke* to guide us.

Likewise, statements regarding the value of programming diversity made by the Court in *Metro Broadcasting* when it upheld two minority preference policies adopted by the Federal Communications Commission, 497 U.S. at 547, have no application here. The diversity interest the Court found sufficient under the Constitution to support a racial classification had nothing whatsoever to do with the concerns that underlie Title VII. Citing *Bakke*, the Court concluded that "[j]ust as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (citation omitted).

Finally, we turn to the Board's argument that the diversity goal underlying its application of the affirmative action policy was endorsed in Justice O'Connor's concurring opinion in *Wygant* and in Justice Stevens' concurring opinion in *Johnson*. We find that these statements are slender reeds indeed and any bearing that they may have in the situation presented here is minimal. . . .

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[4] Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concluded that the Davis program violated Title VI and declined to address the constitutional question. *Regents of the University of California v. Bakke*, 438 U.S. 265, 408-21 (Stevens, J., concurring in the Court's judgment in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.). Justice Powell addressed the constitutional issue and concluded that race may be taken into account in school admissions. *Id*. at 311-15 (Powell, J., announcing the judgment of the Court). In Justice Powell's view, however, Davis failed to show that its program was necessary to promote a constitutionally permissible purpose. *Id*. at 315-20. Accordingly, these Members of the Court formed a Majority of five, affirming the California Supreme Court's order invalidating the Davis program and ordering the plaintiff's medical school admission. Justices Brennan, White, Marshall and Blackmun concluded that the program, created for the purpose of remedying the effects of past societal discrimination, was constitutional. *Id.* at 324-79 (Brennan, J., concurring in the Court's judgment in part and dissenting in part, joined by White, Marshall and Blackmun, JJ.). Thus, along with Justice Powell, they formed a majority of five, reversing the state court's order prohibiting Davis from establishing race-conscious programs in the future.

V.

Since we have not found anything in the Board's arguments to convince us that this case requires examination beyond statutory interpretation, we return to the point at which we started: the language of Title VII itself and the two cases reviewing affirmative action plans in light of that statute. Our analysis of the statute and the caselaw convinces us that a non-remedial affirmative action plan cannot form the basis for deviating from the anti-discrimination mandate of Title VII.

The Board admits that it did not act to remedy the effects of past employment discrimination. The parties have stipulated that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between Taxman and Williams was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher workforce as a whole. Nor does the Board contend that its action here was directed at remedying any *de jure* or *de facto* segregation. . . . Even though the Board's race-conscious action was taken to avoid what could have been an all-White faculty within the Business Department, the Board concedes that Blacks are not underrepresented in its teaching workforce as a whole or even in the Piscataway High School.

Rather, the Board's sole purpose in applying its affirmative action policy in this case was to obtain an educational benefit that it believed would result from a racially diverse faculty. While the benefits flowing from diversity in the educational context are significant indeed, we are constrained to hold, as did the district court, that inasmuch as "the Board does not even attempt to show that its affirmative action plan was adopted to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities," 832 F. Supp. at 845, the Board has failed to satisfy the first prong of the *Weber* test. . . .

We turn next to the second prong of the *Weber* analysis. This second prong requires that we determine whether the Board's policy "unnecessarily trammel[s] . . . [non-minority] interests. . . ." *Weber*, 433 U.S. at 208. Under this requirement, too, the Board's policy is deficient.

We begin by noting the policy's utter lack of definition and structure. While it is not for us to decide how much diversity in a high school facility is "enough," the Board cannot abdicate its responsibility to define "racial diversity" and to determine what degree of racial diversity in the Piscataway School is sufficient. The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks which served to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plans' purpose. . . . By contrast, the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose.

Indeed, under the terms of this policy, the Board, in pursuit of a "racially diverse" work force, could use affirmative action to discriminate against those whom Title VII was enacted to protect. Such a policy unnecessarily trammels the interests of non-minority employees.

Moreover, both *Weber* and *Johnson* unequivocally provide that valid affirmative action plans are "temporary" measures that seek to "'attain'", not "maintain" a "permanent racial . . . balance.". . . The Board's policy, adopted in 1975, is an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway School is skewed. On this basis alone, the policy contravenes *Weber*'s teaching. . . .

Finally, we are convinced that the harm imposed upon a non-minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion. This is especially true where, as here, the non-minority employee is tenured. In *Weber* and *Johnson*, when considering whether non-minorities were unduly encumbered by affirmative action, the Court found it significant that they retained their employment. . . . We, therefore, adopt the plurality's pronouncement in *Wygant* that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U.S. at 283.

Accordingly, we conclude that under the second prong of the *Weber* test, the Board's affirmative action policy violates Title VII. In addition to containing an impermissible purpose, the policy "unnecessarily trammel[s] the interests of the [non-minority] employees."

* * * *

While we have rejected the argument that the Board's non-remedial application of the affirmative action policy is consistent with the language and intent of Title VII, we do not reject in principle the diversity goal articulated by the Board. Indeed, we recognize that the differences among us underlie the richness and strength of our Nation. Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures.

Having found that the district court properly concluded that the affirmative action plan applied by the Board to lay off Taxman is invalid under Title VII, and that the district court did not err in calculating Taxman's damages or in dismissing her claim for punitive damages, we will affirm the judgment of the district court.

SLOVITER, Chief Judge, dissenting, with whom Judges Lewis and McKee join.

In the law, as in other professions, it is often how the question is framed that determines the answer that is received. Although the divisive issue of affirmative action continues on this country's political agenda, I do not see this appeal as raising a broad legal referendum on affirmative action policies. Indeed, it is questionable whether this case is about affirmative action at all, as that term has come to be generally understood – i.e. preference based on race or gender of one deemed "less qualified" over one deemed "more qualified." Nor does this case even require us to examine the parameters of the affirmative action policy originally adopted in 1975 by the Board of Education of the Township of Piscataway (School Board or Board) in response to a state regulation requiring affirmative action programs or the Board's concise 1983 one-page Affirmative Action policy.

Instead, the narrow question posed by this appeal can be restated as whether Title VII requires a New Jersey school or school board, which is faced with deciding which of two equally qualified teachers should be laid off, to make its decision through a coin toss or lottery, a solution that could be expected of the state's gaming tables, or whether Title VII permits the school board to factor into the decision its bona fide belief, based on its experience with secondary schools, that students derive educational benefit by having a Black faculty member in an otherwise all-White department. Because I believe that the area of discretion left to employers in educational institutions by Title VII encompasses the School Board's action in this case, I respectfully dissent.

The posture in which the legal issue in this case is presented is so stripped of extraneous factors that it could well serve as the question for a law school moot court. I emphasize at the outset issues that this case does not present. We need not decide whether it is permissible for a school to lay off a more qualified employee in favor of a less qualified employee on the basis of race, because that did not happen here. Nor need we consider what requirements Title VII may impose on unwilling employers, or how much racial diversity in a high school faculty may be "enough."

* * * *

It was the Board's decision to include the desire for a racially diverse faculty among the various factors entering into its discretionary decision that the majority of this court brands a Title VII violation as a matter of law. No Supreme Court case compels that anomalous result. Notwithstanding the majority's literal construction of the language of Title VII, no Supreme Court case has ever interpreted the statute to preclude consideration of race or sex for the

purpose of insuring diversity in the classroom as one of many factors in an employment decision, the situation presented here. Moreover, in the only two instances in which the Supreme Court examined under Title VII, without the added scrutiny imposed by the Equal Protection Clause, affirmative action plans voluntarily adopted by employers that gave preference to race or sex as a determinative factor, the Court upheld both plans. . .

The majority presents *Weber* and *Johnson* as if their significance lies in the obstacle course they purportedly establish for any employer adopting an affirmative action program. But, as the Justices of the Supreme Court recognized, the significance of each of those cases is that the Supreme Court sustained the affirmative action plans presented, and in doing so deviated from the literal interpretation of Title VII precluding use of race or gender in any employment action. . . . However, it does not follow as a matter of logic that, because the two affirmative action plans in *Weber* and *Johnson*, which sought to remedy imbalances caused by past discrimination, withstood Title VII scrutiny, every affirmative action plan that pursues some purpose other than correcting a manifest imbalance or remedying past discrimination will run afoul of Title VII. Indeed, the Court in *Weber* explicitly cautioned that its holding in that case should not be read to define the outer boundaries of the area of discretion left to employers by Title VII for the voluntary adoption of affirmative action measures. . .

The majority here has taken the language of *Weber* where the Court observed that the plan's purposes "mirrored" those of the statute, and has elevated it to a litmus test under which an affirmative action plan can only pass muster under Title VII if particular language in the text or legislative history of the statute can be identified that matches the articulated purpose of the plan. Nothing in *Weber* suggests that the Court intended by its "mirroring" language to create such a rigid test.

In *Weber*, when the Court found that the purposes of the plan were consistent with those of Title VII, it did so by reference not only to the language of the legislative history, but to the historical context from which the Act arose as well. *Id*. at 201. In *Johnson*, the Court made no attempt at all to identify language in the legislative history paralleling the particular objectives of the plan it sustained. Thus, even in those cases the Court did not demonstrate the kind of close fit between the plan and the statutory history demanded of the Board in this case.

* * * *

It is "ironic indeed" that the promotion of racial diversity in the classroom, which has formed so central a role in this country's struggle to eliminate the causes and consequences of racial discrimination, is today held to be at odds with the very Act that was triggered by our "Nation's concern over centuries of racial injustice." *Weber*, 443 U.S. at 204. Nor does it seem

plausible that the drafters of Title VII intended it to be interpreted so as to require a local school district to resort to a lottery to determine which of two qualified teachers to retain, rather than employ the School Board's own educational policy undertaken to insure students an opportunity to learn from a teacher who was a member of the very group whose treatment motivated Congress to enact Title VII in the first place. In my view, the Board's purpose of obtaining the educational benefit to be derived from a racially diverse faculty is entirely consistent with the purposes animating Title VII and the Civil Rights Act of 1964.

I therefore respectfully disagree with the majority, both in its construction of *Weber* and *Johnson* as leaving no doors open for any action that takes race into consideration in an employment situation other than to remedy past discrimination and the consequential racial imbalance in the workforce, and in what appears to be its limited view of the purposes of Title VII. I would hold that a school board's bona fide decision to obtain the educational benefit to be derived from a racially diverse faculty is a permissible basis for its voluntary affirmative action under Title VII scrutiny.

III.

I return to the question raised at the outset: whether Title VII requires that the Board toss a coin to make the layoff selection between equally situated employees. In his opinion for the majority in *Weber* , Justice Brennan noted the distinction made by Congress between requiring and permitting affirmative action by employers. . . . He deemed it important that, while Congress explicitly provided that Title VII should not be interpreted to require any employer to grant preferential treatment to a group because of its race, Congress never stated that Title VII should not be interpreted to permit certain voluntary efforts.

In this case, the majority gives too little consideration to the tie-breaking method that its holding will impose on the Board. It points to no language in Title VII to suggest that a lottery is required as the solution to a layoff decision in preference to a reasoned decision by members of the School Board, some of whom are experienced educators, that race of a faculty member has a relevant educational significance if the department would otherwise be all White. While it may seem fairer to some, I see nothing in Title VII that requires use of a lottery.

Because I cannot say that faculty diversity is not a permissible purpose to support the race conscious decision made here and because the Board's action was not overly intrusive on Taxman's rights, I would reverse the grant of summary judgment for Taxman under Title VII and direct that summary judgment be granted to the School Board.

Notes and Questions

1. The school board determined that the qualifications of the two candidates for layoff were identical. What policy choices did the school board have with respect to this determination?

2. The court reviewed the legislative history of Title VII in order to determine its original purposes. How does this device enable the court to reach the conclusion that Title VII does not permit race-conscious employment decisions in order to maintain or enhance diversity?

3. How does Justice Powell's opinion in *Bakke* influence the majority's analysis? Contrast this court's treatment of *Bakke* with the opinion of the U.S. Supreme Court in the *Grutter* case, which is discussed in the Text Section 7.2.5.

4. What other decision criteria could the school board have used to decide which employee to select for layoff? Which would be most closely linked to the school board's concern for diversity in its teacher population?

5. Note the differences between the majority in *Taxman* and the majority in *Grutter* with respect to their views of the significance of diversity as a justification for affirmative action. If the *Grutter* case had involved layoffs instead of college admission, do you think the majority's analysis would have been different?

6. The majority in *Taxman* rejects equal protection clause reasoning, yet the majority in *Grutter* commends this reasoning. Can this difference be explained by the fact that *Taxman* is litigated under Title VII and *Grutter* is litigated under Title VI, or is there some other explanation?

7. Judge Sloviter's dissent attempts to reframe the issue and the ensuing legal arguments. How would you evaluate her analysis?

8. *Taxman* was decided prior to the U.S. Supreme Court's ruling in *Students for Fair Admissions v. Harvard.*. Although *Taxman* is a case involving employment, rather than student admissions, it is likely that future litigants challenging layoffs that have taken diversity into consideration will use the same reasoning as the the court used in *Taxman.*

SEC 4.7. Application of Nondiscrimination Laws to Religious Institutions

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission
132 S. Ct. 694 (2012)

ROBERTS, C.J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which KAGAN, J., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers.

I

A

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a "Christ-centered education" to students in kindergarten through eighth grade.

The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a "colloquy" program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.

"Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally

performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

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.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22 – the first day she was medically cleared to return to work – Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her "regrettable" actions. Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior" on February 22, as

well as the damage she had done to her "working relationship" with the school by "threatening to take legal action. "The congregation voted to rescind Perich's call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act, 42 U. S. C. §12101 *et seq.* (1990). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. §12112(a). It also prohibits an employer from retaliating "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."§12203(a).[5]

The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws §37.1602(a) (1979). The EEOC and Perich sought Perich's reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney's fees, and other injunctive relief.

Hosanna-Tabor moved for summary judgment. Invoking what is known as the "ministerial exception," the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason--namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.

The District Court agreed that the suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor. . . . The Court of Appeals for the Sixth Circuit vacated and remanded, directing the District Court to proceed to the merits of Perich's retaliation claims. . . .

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[5] The ADA itself provides religious entities with two defenses to claims of discrimination that arise under subchapter I of the Act. The first provides that "[t]his subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities" §12113(d)(1) (2006 ed., Supp. III). The second provides that "[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization." §12113(d)(2). The ADA's prohibition against retaliation, § 12203(a), appears in a different subchapter-subchapter IV. The EEOC and Perich contend, and Hosanna-Tabor does not dispute, that these defenses therefore do not apply to retaliation claims.

We granted certiorari. 131 S. Ct. 1783 (2011).

II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have said that these two Clauses "often exert conflicting pressures," *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005), and that there can be "internal tension ... between the Establishment Clause and the Free Exercise Clause,"*Tilton v. Richardson*, 403 U. S. 672, 677 (1971) (plurality opinion). Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.

A

Controversy between church and state over religious offices is hardly new. [The Court reviews the history of tension between the English monarchs and citizens, which culminated in the settling of the English colonies, later the United States of America. It also reviews the history behind the adoption of the First Amendment to the U.S. Constitution.]

* * * *

The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

* * * *

B

Given this understanding of the Religion Clauses – -and the absence of government employment regulation generally--it was some time before questions about government interference with a church's ability to select its own ministers came before the courts. This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers.. . .

C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.[6]

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. 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.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association--a right "implicit" in the First Amendment. *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984). The EEOC and Perich thus see no need--and no basis--for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. 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.

* * * *

[6] [Footnote omitted].

[The Court then distinguishes its prior decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), a free exercise case relied on by the EEOC and Perich.]

III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a "diploma of vocation" according her the title "Minister of Religion, Commissioned." She was tasked with performing that office "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures." The congregation prayed that God "bless [her] ministrations to the glory of His holy name, [and] the building of His church." In a supplement to the diploma, the congregation undertook to periodically review Perich's "skills of ministry" and "ministerial responsibilities," and to provide for her "continuing education as a professional person in the ministry of the Gospel."

Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry- related questions. Finally, she had to pass an oral examination by a faculty committee at a Lutheran college. It took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach. At that point, her call could be rescinded only upon a supermajority vote of the congregation--a protection designed to allow her to "preach the Word of God boldly."

Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning

their compensation "'in the exercise of the ministry.'" ("If you are not conducting activities 'in the exercise of the ministry,' you cannot take advantage of the parsonage or housing allowance exclusion" (quoting Lutheran Church-Missouri Synod Brochure on Whether the IRS Considers Employees as a Minister (2007)). In a form she submitted to the Synod following her termination, Perich again indicated that she regarded herself as a minister at Hosanna-Tabor, stating: "I feel that God is leading me to serve in the teaching ministry .... I am anxious to be in the teaching ministry again soon."

Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and--about twice a year – she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

In light of these considerations – 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 – we conclude that Perich was a minister covered by the ministerial exception.

In reaching a contrary conclusion, the Court of Appeals committed three errors. First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position. It was wrong for the Court of Appeals – and Perich, who has adopted the court's view, to say that an employee's title does not matter.

Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions – particularly when, as here, they did so only because commissioned ministers were unavailable.

Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. It is true that her religious duties consumed only 45 minutes of each work- day, and that the rest of her day was devoted to teaching secular subjects. The EEOC regards that as conclusive, contending that any ministerial exception "should be limited to those employees who perform exclusively religious functions." We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. 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.

Perich no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.[7]

The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich – that she violated the Synod's commitment to internal dispute resolution – was pretextual. That suggestion misses the point of the ministerial exception. 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

[7] Perich does not dispute that if the ministerial exception bars her retaliation claim under the ADA, it also bars her retaliation claim under Michigan law.

minister to the faithful – a matter "strictly ecclesiastical," *Kedroff*, 344 U. S., at 119 – is the church's alone.[8]

IV

The EEOC and Perich foresee a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers "unfettered discretion" to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.

Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves. Hosanna-Tabor also notes that the ministerial exception has been around in the lower courts for 40 years, see *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), and has not given rise to the dire consequences predicted by the EEOC and Perich.

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

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[8] A conflict has arisen in the Courts of Appeals over whether the ministerial exception is a jurisdictional bar or a defense on the merits. . . . We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is "whether the allegations the plaintiff makes entitle him to relief," not whether the court has "power to hear [the] case." *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (internal quotation marks omitted). District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Notes and Questions

1. *Hosanna-Tabor* is discussed in the Text at pages 236-239.

2. Also discussed in the Text, at page 235, is *Curay-Cramer v. Ursuline Academy*, a case in which a professor alleged sex discrimination in her dismissal from her teaching job at a Catholic school. The court dismissed the case, stating that its review of the reasons for her dismissal (allegedly for signing a pro-abortion advertisement in the newspaper) implicated matters of religious doctrine, and thus raised constitutional barriers to judicial review.

3. In comparing the reasoning of *Hosanna-Tabor* and *Curay-Cramer*, can you think of situations where a religious college would not be protected by the ministerial exception, but would be protected under the reasoning of *Curay-Cramer*?

4. Suppose a religious college explicitly discriminates against employees on grounds of gender, but the institution claims that such discrimination is a tenet of its religious doctrine. Where does the law stand now on whether such discrimination would be permissible under Title VII and the establishment and free exercise clauses? Would the court be required to determine whether, in fact, discrimination against women was a genuine tenet of the religion's doctrine?

5. Many state laws prohibit discrimination on the basis of marital status, sexual orientation, and gender identity. Would a *state* court be able to consider and rule on such discrimination claims against a religious college or university? Under what circumstances do you think this might be possible?

E.

CHAPTER V: SPECIAL ISSUES IN FACULTY EMPLOYMENT

SEC. 5.2. Faculty Contracts

Salaita v. Kennedy
118 F. Supp. 3d 1068 (N.D. Ill. 2015)

Harry D. Leinenweber, Judge, United States District Court

* * * *

I. *BACKGROUND*

This case involves Dr. Steven Salaita's employment status with the University of Illinois following controversial statements he made via Twitter. The following facts are culled from the Complaint, which the Court must accept as true in deciding a motion to dismiss. Dr. Salaita was a tenured professor at Virginia Tech when he discovered that the University of Illinois at Urbana–Champaign ("the University") was looking for a professor in its American Indian Studies program. Dr. Salaita, who has expertise in Native American and Indigenous Studies, applied for the position, and the University began its vetting process. The process culminated in the University sending a letter to Dr. Salaita that is largely the subject of this lawsuit.

Because the letter is the source of most of the parties' disagreements, the Court reproduces the relevant portions of it here in full:

Dear Professor Salaita:

> Upon the recommendation of Professor Jodi Byrd, Acting Director of the American Indian Studies, I am pleased to offer you a faculty position in that department at the rank of Associate Professor at an academic year (nine-month) salary of $85,000 paid over twelve months, effective [August 16], 2014. This appointment will carry indefinite tenure. This recommendation for appointment is subject to approval by the Board of Trustees of the University of Illinois.
>
> ...
>
> At the University of Illinois, like at most universities in this country, we subscribe to the principles of academic freedom and tenure laid down by the American Association of University Professors (AAUP). The Statement on Academic Freedom and Tenure of the

> [AAUP] has been since 1940 the foundation document in this country covering the freedoms and obligations of tenure.... I am enclosing copies of these documents for your information, and commend them to your attention.
>
> We would appreciate learning of your decision by 10/14/2013. I have included an enclosure describing some of the general terms of employment at the University. If you choose to accept our invitation, we would appreciate your returning a photocopy of this letter with the form at the bottom completed and signed. When you arrive on campus, you will be asked to present proof of your citizenship and eligibility to work (see the I–9 form). If you are not a U.S. citizen, this offer will be contingent upon your being able to secure the appropriate visa status. Should you accept our offer, our Office of International Faculty and Staff Affairs is available to assist you with this process.
>
> Please let me express my sincere enthusiasm about your joining us. The University ... offers a wonderfully supportive community, and it has always taken a high interest in its newcomers. I feel sure that your career can flourish here, and I hope earnestly that you will accept our invitation.

(Defs.' Mem. in Support of its Mot. to Dismiss ("Defs.' Mem."), Ex. 1, ECF No. 33–1). The letter is then signed by Interim Dean Brian Ross and includes a place for Dr. Salaita to sign. The signature page says "I accept the above offer of October 3, 2013" and includes spaces for Dr. Salaita's date of birth, citizenship status, and signature. Dr. Salaita signed this page and returned it on October 9, 2013, and the parties agreed that Dr. Salaita would start in his new position on August 16, 2014. The University also assigned Dr. Salaita two courses for the fall semester, assigned him an office, and provided him a University email address.

With the expectation that he would be starting at the University in August, Dr. Salaita resigned his position at Virginia Tech and started the process of moving his family to Illinois. The University paid a majority of Dr. Salaita's moving expenses. During this time, a skirmish between Palestine and Israel resulted in the death of "approximately 2100 Palestinians, including more than 500 children." (Pl.'s Resp. to Mot. to Dismiss, ECF No. 43 at 4). Dr. Salaita took to his personal Twitter account to voice his displeasure. The Court need not reproduce Dr. Salaita's tweets verbatim; to put it mildly, they were critical of Israel's actions and used harsh, often profanity-laden rhetoric.

Dr. Salaita's tweets soon garnered media coverage, which prompted the University to respond publicly regarding Dr. Salaita's employment. In response to one newspaper's request for comment, a University spokesperson said that "Professor Salaita will begin his employment with the University on Aug. 16, 2014. He will be an associate Professor and will teach American Indian Studies courses." (Compl., ECF No. 1 ¶ 69). The spokesperson went on to tout the University's policy of "recognize[ing] the freedom-of-speech rights of all *our employees*." (*Id.* (emphasis added)).

Despite the initial show of support, however, the University soon changed its tune. Letters and emails obtained via Illinois' Freedom of Information Act revealed that students, alumni, and donors wrote to the University's Chancellor, Phyllis Wise ("Wise"), to voice their concerns over Dr. Salaita joining the University. One writer in particular claimed to be a "multiple 6 figure donor" who would be ceasing support of the University because of Dr. Salaita and his tweets.

Two other specific interactions are critical to Dr. Salaita's Complaint. The first involves an unknown donor who met with Chancellor Wise and provided her a two-page memo about the situation. (Compl., ECF No. 1 ¶ 80). Wise ultimately destroyed the memo, but an email Wise sent University officials summarized it as follows: "He [the unknown donor] gave me [Chancellor Wise] a two-pager filled with information on Professor Salaita and said how we handle the situation will be very telling." (*Id.*) The second interaction involves a particularly wealthy donor who asked to meet with Chancellor Wise to "share his thoughts about the University's hiring of Professor Salaita." (Compl., ECF No. 1 ¶ 79). The meeting took place on August 1, 2014, but what was said during the meeting is currently unknown at this early stage in the litigation. What is known, however, is that Chancellor Wise sent Dr. Salaita a letter on the same day stating that Dr. Salaita's "appointment will not be recommended" and that the University would "not be in a position to appoint [him] to the faculty of the University." (Defs.' Mem., Ex. A, ECF No. 33–1).

The University's Board of Trustees met on September 11, 2014 to vote on new faculty appointments. The Board unanimously and summarily appointed 120 new faculty members in a single vote, and then voted separately on Dr. Salaita's appointment. Chancellor Wise stated that, despite the earlier letter affirming that Dr. Salaita would be recommended for appointment, she was not recommending him. The Board then voted eight-to-one to deny Dr. Salaita's appointment. The vote occurred one month after the start of the semester, when the other appointed professors had already started teaching, and one month after Dr. Salaita's agreed-upon start date. According to the Complaint, this is the first time in the University's history that something like this has happened.

Following the Board's vote, Dr. Salaita filed this lawsuit. The Complaint contains nine counts against various Defendants. Count I alleges that the Board of Trustees, Chancellor Wise, and the University's President and Vice President violated § 1983 by retaliating against Dr. Salaita for exercising his First Amendment free speech rights. Count II alleges that the same Defendants robbed Dr. Salaita of his procedural due process rights by depriving him of his job without any pre- or post-deprivation measures. Count III alleges that all Defendants engaged in a conspiracy to deprive Dr. Salaita of his job in violation of § 1985. Count IV alleges promissory estoppel against the Trustee Defendants. Count V alleges breach of contract against the Trustee

Defendants. Counts VI and VII alleges that the various donor Defendants tortiously interfered with Dr. Salaita's contractual and business relations. Count VIII alleges that all Defendants intentionally inflicted emotional distress on Dr. Salaita. Finally, Count IX is a state-law spoliation of evidence claim against Chancellor Wise for destroying the two-page memo. Defendants now move to dismiss all counts under Rule 12(b)(6).

II. *LEGAL STANDARD*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) challenges the legal sufficiency of a complaint. . . .

III. *ANALYSIS*

The crux of this case involves the agreement between Dr. Salaita and the University. Dr. Salaita claims that, by signing and returning the University's offer letter, he entered into an employment contract that the University violated by firing him because of his political speech. According to the University, Dr. Salaita was never an employee and the parties never had a valid contract because Dr. Salaita's appointment was "subject to" the Board of Trustees' approval. Many of the parties' arguments hinge on whether there is a contract; thus, the Court will start with the breach of contract and promissory estoppel claims and then consider the remaining arguments.

A. Breach of Contract (Count V)

The University's central argument is that the parties never entered into a valid contract. The University claims that the "subject to" language in its initial letter made its *offer* conditional on the Board's approval, and thus Dr. Salaita's acceptance was likewise only conditional. Dr. Salaita argues that the condition, if any, was a condition on *performance* under the contract, not on the offer itself. Moreover, Dr. Salaita argues that the condition was a mere formality and that the Board's approval was ministerial in nature.

Under Illinois law, the elements for a breach of contract claim are: "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages." *Vill. of S. Elgin v. Waste Mgmt. of Ill., Inc.*, 348 Ill.App.3d 929, 284 Ill.Dec. 868, 810 N.E.2d 658, 669 (2004). Defendants' arguments go to the offer element, and "the offeror has total control over its own offer and may condition acceptance to the terms of the offer." *McCarty v. Verson Allsteel Press Co.*, 89 Ill.App.3d 498, 44 Ill.Dec. 570, 411 N.E.2d 936, 944 (1980). The ability to make an *offer* conditional also

extends to *performance*: that is, an offeror may make *performance* under the contract subject to some other condition. *See, McKee v. First Nat'l Bank of Brighton,* 220 Ill.App.3d 976, 163 Ill.Dec. 389, 581 N.E.2d 340, 343–44 (1991). The difference is crucial; if the condition applies to the *offer*, there is no contract before the condition is satisfied, but if the condition applies to *performance*, there is a valid contract even if the condition is not satisfied. Moreover, if there is a contract at all, then the obligation of good faith and fair dealing—which is inherent in all contracts—applies. *Martindell v. Lake Shore Nat'l Bank,* 15 Ill.2d 272, 154 N.E.2d 683, 690 (1958).

The Court's first task is to interpret the contract, and "Illinois uses in general a 'four corners' rule in the interpretation of contracts." *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir.1998) (quoting *Ford v. Dovenmuehle Mortg. Inc.*, 273 Ill.App.3d 240, 209 Ill.Dec. 573, 651 N.E.2d 751, 755 (1995)). The Court's goal is "to give effect to the intentions of the parties as expressed in the four corners of the instrument." *Allen v. Cedar Real Estate Grp., LLP,* 236 F.3d 374, 381 (7th Cir.2001).

Under the four corners rule, "the threshold inquiry is whether the contract is ambiguous," and a contract term is "ambiguous only if the language used is reasonably or fairly susceptible to having more than one meaning." *Bourke,* 159 F.3d at 1036. There are generally two kinds of ambiguity: extrinsic or intrinsic. *Id.* The classic example of an extrinsic ambiguity involved a contract term that required cotton to be shipped aboard a ship named Peerless when there were two identically named ships to which the contract term could have referred. *Id.* (citing *Raffles v. Wichelhaus,* 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864)). Nothing about the contract term itself was ambiguous; the ambiguity arose from the surrounding, external facts. *See, id.* An intrinsic ambiguity, on the other hand, occurs when the term itself is susceptible to multiple reasonable interpretations without reference to anything outside the contract. *Id.* at 1037.

As to the offer in this case, the basic terms are about as unambiguous as they could possibly be. The offer letter says that the University is "pleased to offer [Dr. Salaita] a faculty position." The offer then sets forth the important, relevant terms in plain English. The offer is for a salary of $85,000 and the position includes indefinite tenure. Finally, the University used unambiguous terms in drafting the means by which Dr. Salaita could accept: "I accept the above offer of October 03, 2013." Nothing about the actual offer, nor the mode of acceptance, indicates that no contract would be formed until after the Board's approval.

The University points solely to the "subject to" language as evidence that there was no contract, but that term, read in light of the other contract terms, is at least plausibly a term of performance. That term says that the University would recommend Dr. Salaita's appointment to the Board, but that the Board would have ultimate say on whether to appoint Dr. Salaita as a professor. The other concrete terms make clear that the parties had a contract, but that the

University might be excused from performing if the Board rejected the University's recommendation. The University's own offer letter uses definite terms like "offer" and "acceptance" without any qualification. If the University really felt that there would be no contract whatsoever unless the Board first approved, it could have drafted its offer letter in those terms. It could have, for example, drafted the acceptance that Dr. Salaita signed to say "If the Board ultimately approves of my recommendation, I will accept the appointment." Or the letter could have said, "You are not employed until the Board first approves of the University's recommendation." This is precisely what Purdue University did in *Lutz*. *See, Lutz v. Purdue Univ.*, 133 F.Supp.2d 1101, 1109 (N.D.Ind.2001) (granting summary judgment in favor of Purdue when a professor's contract stated that he was "not officially employed until a completed and signed contract has been approved by the President of Purdue University").

Better still, the "subject to" provision could have used the word "offer," which courts have found "telling" when deciding whether an offer is conditional. *Allen*, 236 F.3d at 381 (finding that the contract drafter's "choice of the word 'offer' is telling" when he drafted a provision that said "*this offer* is subject to" a certain condition). Here, the University used the word "offer" when referencing the teaching position, but did not use the word "offer" when referencing the Board's approval as a condition. And, elsewhere in the letter, the University did explicitly impose a condition on the offer itself: "If you are not a U.S. citizen, *this offer* will be contingent upon your being able to secure the appropriate visa status." (Defs.' Mem., Ex. 1, ECF No. 33–1 (emphasis added)). This suggests that the University knew how to ensure that a condition related specifically to the offer, yet did not do so in referencing Board approval. Thus, the contract as a whole demonstrates that the parties intended to enter into a valid contract.

Moreover, to the extent that the "subject to" language is ambiguous as to whether it applies to contract formation or performance, the Court would look to extrinsic evidence to interpret the contract. *Bourke*, 159 F.3d at 1037. Taking the facts alleged in the Complaint as true, there is no doubt that the parties' actions demonstrated their intent to enter into a contract. The University paid for Dr. Salaita's moving expenses, provided him an office and University email address, assigned him two courses to teach in the fall, and stated to a newspaper that he would in fact join the faculty, despite his unsavory tweets. The University spokesperson went so far as referencing Dr. Salaita as one of "our employees." The University also did not hold a Board vote until after the start of the semester. If the Board vote was truly a condition to contract formation, then the University would have the Board vote on appointments before the start of a semester and before spending money on a new professor or treating the professor as a full-fledged employee. Finally, the University actually held the Board vote despite its claim that it had no agreement whatsoever. If the University truly felt no obligation to Dr. Salaita, the University could have simply not put the appointment to a vote at all. Instead, the University still

went ahead with the vote, which is at least some evidence that it felt obligated to hold a vote according to the terms of the offer letter. Simply put, the University cannot argue with a straight face that it engaged in all these actions in the absence of any obligation or agreement.

Also, the University's argument, if applied consistently, would wreak havoc in this and other contexts. What if a professor took the University's money to move to Chicago, but decided instead to teach at Northwestern University before the Board voted on her appointment? According to the University, that professor would be free to keep the money without fear of a breach of contract claim. And what about the other professors who started teaching classes before the Board voted on their appointment? According to the University's argument, those teachers were not employees and had no contract, despite working for, and presumably getting paid by, the University. Finally, what if, before a Board vote, the University offered a job to a different person after already receiving the signed acceptance letter from someone else? According to the University, the person originally offered the job would have no recourse because there was no contract. If the Court accepted the University's argument, the entire American academic hiring process as it now operates would cease to exist, because no professor would resign a tenure position, move states, and start teaching at a new college based on an "offer" that was absolutely meaningless until after the semester already started. In sum, the most reasonable interpretation of the "subject to" term in the University's offer letter is that the condition was on the University's performance, not contract formation.

Under the University's reading of the law, however, any "subject to" term in a contract is a talisman that offers the drafter a get-out-of-contract-free card. But the cases the University relies upon are distinguishable. In *Allen*, discussed above, the drafter explicitly referenced "this offer" when drafting a "subject to" condition. *Allen,* 236 F.3d at 381. Here, the University's "subject to" condition contains no similar explicit reference. And in *Cobb–Alvarez,* the purported "offer" was a letter that invited employees to apply for a program that would allow them to "quit in exchange for [a] severance package[ ]." *Cobb–Alvarez v. Union Pac. Corp.*, 962 F.Supp. 1049, 1054 (N.D.Ill.1997). Rather than provide a means for "accepting" the offer, the letter told employees that "if [they] appl[ied], [their] application[s] can be denied." *Id.* The plaintiffs tried to argue that the letter was an "offer" that they could "accept" simply by submitting an application, which the court found unreasonable. *Id.*

Here, in contrast, Dr. Salaita is not arguing that he "accepted" the job by submitting an application for it. Instead, he argues that, by signing the University's letter that said "I accept the above offer," he was, in fact, accepting the above offer. In short, the cases the University relies on involve contracts where the condition was, without question, a condition to contract formation. In this case, at the very least, there is a reasonable argument that the condition went to performance and not formation, which precludes dismissal.

In a related argument, the University asserts that, even if the basic elements of a contract exist here, Dean Ross had no actual or apparent authority to make a binding offer. The University also argues that under Illinois law, apparent authority cannot apply to bind the State of Illinois, which the University is a part of. The Court can quickly reject these arguments for two reasons.

First, Dr. Salaita's Complaint contains facts indicating that the University gave "the faculty departments and dean" the actual authority to make binding job offers. (Compl., ECF No. 1 ¶¶ 48–51). Although Dr. Salaita has not alleged precisely how or when the University gave Dean Ross actual authority, the facts alleged make it plausible that such a delegation occurred. For example, the Board ultimately voted on Dr. Salaita's appointment pursuant to Dean Ross's offer letter, even though Chancellor Wise had already decided she did not want Dr. Salaita to join the faculty. These facts make it plausible that the University and the Board gave Dean Ross actual authority to make a binding offer and in fact felt bound by his offer. Otherwise, why hold a vote at all? Moreover, for the other 120 professors mentioned above, the Board voted on their appointment in one block, after they had already started teaching, and without reference to any terms of employment like salary. If the Board did not delegate authority to these professors' respective deans to make binding offers that set essential employment terms, then how did those terms get set? The Board apparently voted without discussing any employment terms, and according to the University's argument, no one with actual authority has yet to make a binding offer as to those essential terms. Also, if the University and Board had not delegated actual authority to the deans, why did the University allow the other professors to start working before the Board vote? If the deans had no authority to make any binding offers, the University would have been confused as to why 120 professors showed up to work when no one with actual authority had offered them a job. In short, the Complaint contains facts that make it plausible that the Dean Ross had actual authority.

Second, to the extent that actual or apparent authority is a disputed issue, the issue is best resolved at trial or on a motion for summary judgment. *See, Schoenberger v. Chi. Transit Auth.*, 84 Ill.App.3d 1132, 39 Ill.Dec. 941, 405 N.E.2d 1076, 1081 (1980) (upholding a trial court's determination—based on extensive evidence and testimony—that the plaintiff could not have reasonably believed an agent to have apparent authority to bind the defendant).

In sum, Dr. Salaita has pleaded an adequate breach of contract claim.

B. Promissory Estoppel (Count IV)

Dr. Salaita's Complaint also contains a promissory estoppel count in the alternative to his breach of contract claim. Under Illinois law, a plaintiff may *plead* both breach of contract and

promissory estoppel but cannot pursue both once a contract is found to exist, either by judicial determination or by the parties' admission. *Discom Int'l, Inc. v. R.G. Ray Corp.,* No. 10 C 2494, 2010 WL 4705178, at *5 (N.D.Ill. Nov. 10, 2010) (citing *Prentice v. UDC Advisory* Servs., Inc., 271 Ill.App.3d 505, 207 Ill.Dec. 690, 648 N.E.2d 146, 150 (1995)). As discussed above, the Court has found that Dr. Salaita has pleaded a breach of contract claim, but not that he has proved it. Thus, even though Dr. Salaita cannot ultimately recover under both claims, the Court must analyze whether Dr. Salaita's promissory estoppel claim survives a motion to dismiss.

To establish a promissory estoppel claim, a plaintiff must prove that "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill.2d 46, 329 Ill.Dec. 322, 906 N.E.2d 520, 523 (2009). Dr. Salaita argues that the University made two unambiguous promises: first, it promised to hire Dr. Salaita subject to limited Board approval, and second, it promised that the Board would consider Dr. Salaita's appointment in "accord with principles of good faith and fair dealing." (Pl.'s Resp. to Mot. to Dismiss, ECF No. 43 at 30). The Court need not consider the second promise because Dr. Salaita has adequately pleaded the first, which precludes dismissing his claim.

The University's key arguments are that any alleged promise was either (1) subject to a condition, and therefore ambiguous, or (2) made by someone without apparent or actual authority. The Court already rejected these arguments and need not discuss them again. Dr. Salaita's Complaint contains facts to support a promissory estoppel claim. According to those facts, the University unambiguously promised to recommend to the Board that Dr. Salaita be appointed as a tenured professor. In reliance on that promise, Dr. Salaita resigned a valuable tenured position at a respected institution and moved his family to Illinois. The University must have reasonably foreseen that Dr. Salaita would act on its promise because it paid for most of his moving expenses after he accepted the position. But after Dr. Salaita arrived in Illinois, the University reneged on its promise when Chancellor Wise informed the Board that Dr. Salaita was in fact *not* recommended for appointment. Dr. Salaita is now left with neither his previous job nor his prospective job. These facts are sufficient to state a promissory estoppel claim in the alternative to his breach of contract claim.

C. First Amendment (Count I)

Count I in Dr. Salaita's Complaint alleges that certain Defendants violated his First Amendment free speech rights in violation of § 1983. In order to state a First Amendment

retaliation claim, Dr. Salaita must allege fact showing that: "(1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action." *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir.2006). For the purposes of this claim, it does not matter whether the University's action is characterized as firing Dr. Salaita or simply not hiring him; failure to hire is enough to constitute a deprivation under the second element. *See, George v. Walker,* 535 F.3d 535, 538 (7th Cir.2008). Dr. Salaita alleges that the Board and individual Defendants Robert Easter (the University President), Christephe Pierre (Vice President), and Chancellor Wise either fired or refused to hire him because of the content of his tweets.

The University's Motion does not dispute that Dr. Salaita's speech was constitutionally protected or that he suffered a deprivation in the form of either being fired or not hired. Instead, the University argues first that Dr. Salaita has not pleaded facts that implicate the specific Defendants named in Count I. The University also argues that Dr. Salaita was not fired because of his constitutionally protected speech, and that even if he was, the University's interest in providing a safe and disruption-free learning environment outweighs Dr. Salaita's free speech interest under the balancing test in *Pickering v. Bd. of Educ.,* 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

*** * * ***

2. Sufficiency of Dr. Salaita's First Amendment Claim

The University's second argument is that its action was not motivated by the *content* or *viewpoint* of Dr. Salaita's tweets, and that even if it was, its interest in providing a disruption-free learning environment outweighs Dr. Salaita's free speech interest under the balancing test in *Pickering*. The first part of the argument is premature; summary judgment or trial will reveal the University's actual motivation, but the facts viewed in Dr. Salaita's favor amply support a claim that the University fired Dr. Salaita because of disagreement with his point of view. The University's attempt to draw a line between the profanity and incivility in Dr. Salaita's tweets and the views those tweets presented is unavailing; the Supreme Court did not draw such a line when it found Cohen's "Fuck the Draft" jacket protected by the First Amendment. *Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). The tweets' contents were certainly a matter of public concern, and the topic of Israeli–Palestinian relations often brings passionate emotions to the surface. Under these circumstances, it would be nearly impossible to separate the tone of tweets on this issue with the content and views they express. And the Supreme Court has warned of the dangers inherent in punishing public speech on public matters

because of the particular words or tone of the speech. *See, id.* ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.") At the motion to dismiss stage, the Court simply cannot find that the University was not at all motivated by the content of Dr. Salaita's tweets.

The University next argues that the Court should apply the balancing test in *Pickering* and find that under no set of facts could Dr. Salaita prove that his First Amendment rights were violated. This argument is also premature. "Normally, application of the *Pickering* balancing test will be possible only after the parties have had an opportunity to conduct some discovery." *Gustafson v. Jones,* 117 F.3d 1015, 1019 (7th Cir.1997). Of course, there are some cases where a plaintiff has "pled herself out of court," but those are "rare cases" indeed. *Klug v. Chi. Sch. Reform Bd. of Trs.,* 197 F.3d 853, 859 (7th Cir.1999). The cases in which it is clear at the motion to dismiss stage that a First Amendment claim is certain to fail usually involve speech that is not on a matter of public concern or speech that is not protected at all. *See, e.g., id.* at 858 ("[I]n the context of this complaint, the association seems much more devoted to petty office politics than to matters of public concern."); *Chi. Sch. Reform Bd. of Trs. v. Substance, Inc.,* 79 F.Supp.2d 919, 928 (N.D.Ill.2000) ("Defendants possessed no First Amendment right to publish copyrighted tests."). This is not one of those rare cases because Dr. Salaita's has alleged facts that plausibly demonstrate he was fired because of the content of his political speech in a public forum. In other words, Dr. Salaita's tweets implicate every "central concern" of the First Amendment. *Burson v. Freeman,* 504 U.S. 191, 196, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (stating that there are "three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech."). The Court therefore declines to engage in a full-fledged *Pickering* balancing analysis at this early stage in the litigation.

Additionally, even if the Court were to apply the balancing test, it would still have to view the facts in Dr. Salaita's favor. And when the plaintiff's speech "more substantially involve[s] matters of public concern," the defendant must make a "stronger showing" of potential disruption. *Connick v. Myers,* 461 U.S. 138, 151, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *see also, McGreal v. Ostrov,* 368 F.3d 657, 681–82 (7th Cir.2004) ("The employer bears the burden of justifying a particular disciplinary action, and a stronger showing may be necessary when an employee's speech more substantially involves matters of public concern."). A cursory look at the Complaint reveals facts that provide some evidence of potential disruption, but also some evidence that there would be no disruption. For example, the Complaint alleges that that University faculty fully supported Dr. Salaita's appointment, including faculty members that disagree with Dr. Salaita on the substance of his speech. (Compl., ECF No. 1 ¶ 99). Although *Pickering* balancing is not appropriate at this stage in this case, it appears that the evidence is

conflicting as to the level of disruption Dr. Salaita's appointment would cause. Thus, viewing this evidence in Dr. Salaita's favor, it seems unlikely that the University would win its *Pickering* challenge at the motion to dismiss stage.

Dr. Salaita's Complaint alleges facts showing that he was fired or not hired because of the University's disagreement with his personal speech in a public forum on a matter of public concern. This is enough to survive a motion to dismiss.

*** * * ***

IV. *CONCLUSION*

For the reasons stated herein, the University's Motion to Dismiss [ECF No. 32] is granted to the extent that Counts VI, VII, VIII, and IX are dismissed with prejudice. The Motion is denied as to the remaining counts.

Notes and Questions

1. Why did the court determine that the university and Salaita had entered into an employment contract, despite language in the letter to Salaita that the appointment was "subject to approval by the Board of Trustees"?

2. Besides the terms contained in the letter, what types of instrinsic evidence did the court find persuasive in concluding that an employment contract existed between Salaita and the University?

3. How does the court suggest the university could have drafted the letter to Salaita to make the appointment conditional upon approval by the Board of Trustees?

4. What circumstances did the court find important in ruling that Salaita had also asserted sufficient facts to support a promissory estoppel claim at this point in the litigation?

SEC. 5.3. Bargaining Unit Eligibility of Faculty

NLRB v. Yeshiva University.
444 U.S. 672 (1980)

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined.

I.

Yeshiva is a private university that conducts a broad range of arts and sciences programs at its five undergraduate and eight graduate schools in New York City. On October 30, 1974, the Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board). The Union sought certification as bargaining agent for the full-time faculty members at 10 of the 13 schools. The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act). A Board-appointed hearing officer held hearings over a period of five months, generating a voluminous record.

The evidence at the hearings showed that a central administrative hierarchy serves all of the University's schools. Ultimate authority is vested in a Board of Trustees, whose members (other than the President) hold no administrative positions at the University. The President sits on the Board of Trustees and serves as chief executive officer, assisted by four Vice Presidents who oversee, respectively, medical affairs and science, student affairs, business affairs, and academic affairs. An Executive Council of Deans and Administrators makes recommendations to the President on a wide variety of matters.

University-wide policies are formulated by the central administration with the approval of the Board of Trustees, and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits. The budget for each school is drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators.[3] The faculty participate in University-wide governance through their

[3] At Yeshiva College, budget requests prepared by the senior professor in each subject area receive the "perfunctory" approval of the Dean "99 percent" of the time and have never been rejected by the central administration. App. 298-299. A council of elected department chairmen at Ferkauf approves the school's budget allocations when discretionary funds are available. *Id.*, at 626-627. All of these professors were included in the bargaining unit approved by the Board.

representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the Dean of the affected school or to the President. Such recommendations are purely advisory.

The individual schools within the University are substantially autonomous. Each is headed by a Dean or Director, and faculty members at each school meet formally and informally to discuss and decide matters of institutional and professional concern. At four schools, formal meetings are convened regularly pursuant to written bylaws. The remaining faculties meet when convened by the Dean or Director. Most of the schools also have faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiate with administrators concerning salary and conditions of employment. Through these meetings and committees, the faculty at each school effectively determine the school's curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.[4]

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school make recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the Dean or Director, the overwhelming majority of faculty recommendations are implemented.[5] Even when financial problems in the early 1970s restricted Yeshiva's budget, faculty recommendations still largely controlled personnel decisions made within the constraints imposed by the administration. Indeed, the faculty of one school

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[4] For example, the Deans at Yeshiva and Erna Michael Colleges regard faculty actions as binding. *Id*. at 248-249, 312-313. Administrators testified that no academic initiative of either faculty had been vetoed since at least 1968. *Id*., at 250, 313. When the Stern College faculty disagreed with the Dean's decision to delete the education major, the major was reinstituted. *Id*., at 191. The Director of the Teacher's Institute for Women testified that "the faculty is the school," *id*., at 379, while the Director of the James Striar School described his position as the "executive arm of the faculty," which had overruled him on occasion, *id*., at 360-361. All decisions regarding academic matters at the Yeshiva Program and Bernard Revel are made by faculty consensus. *Id*., at 574, 583-586. The "internal operation of [Wurzweiler] has been heavily governed by faculty decisions," according to its Dean. *Id*., at 502.

[5] One Dean estimated that 98% of faculty hiring recommendations were ultimately given effect. *Id*., at 624. Others could not recall an instance when a faculty recommendation had been overruled. *Id*., at 193-194. At Stern College, the Dean in six years has never overturned a promotion decision. *Ibid*. The President has accepted all decisions of the Yeshiva College faculty as to promotions and sabbaticals, including decisions opposed by the Dean. *Id*., at 268-270. At Erna Michael, the Dean has never hired a full-time faculty member without the consent of the affected senior professor, *id*., at 333-335, and the Director of Teacher's Institute for Women stated baldly that no teacher had ever been hired if "there was the slightest objection, even on one faculty member's part." *Id*., at 388. The faculty at both these schools have overridden recommendations made by the deans. No promotion or grant of tenure has ever been made at Ferkauf over faculty opposition. *Id*., at 620, 633. The Dean of Belfer testified that he had no right to override faculty decisions on tenure and non-renewal. *Id*., at 419.

recently drew up new and binding policies expanding their own role in these matters. In addition, some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school. [6]

II.

A three-member panel of the Board granted the Union's petition in December 1975, and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools. 221 N.L.R.B. 1053. The unit included Assistant Deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors.[7] Deans and Directors were excluded. The Board summarily rejected the University's contention that its entire faculty are managerial, viewing the claim as a request for reconsideration of previous Board decisions on the issue. Instead of making findings of fact as to Yeshiva, the Board referred generally to the record and found no "[significant]" difference between this faculty and others it had considered. The Board concluded that the faculty are professional employees entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." *Id*., at 1054 (footnote omitted).

The Union won the election and was certified by the Board. The University refused to bargain, reasserting its view that the faculty are managerial. In the subsequent unfair labor practice proceeding, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union. 231 N.L.R.B. 597 (1977). When the University still refused to sit down at the negotiating table, the Board sought enforcement in the Court of Appeals for the Second Circuit, which denied the petition. 582 F.2d 686 (1978).

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[6] The Director of Teacher's Institute for Women once recommended that the school move to Brooklyn to attract students. The faculty rejected the proposal and the school remained in Manhattan. *Id*., at 379-380.

[7] Full-time faculty" were defined as those

> "appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding . . . part-time faculty; lecturers; principal investigators; deans, acting deans and directors; [and others not relevant to this action]." 221 N. L. R. B., at 1057.

The term "faculty" in this opinion refers to the members of this unit as defined by the Board.

Since the Board had made no findings of fact, the court examined the record and related the circumstances in considerable detail. It agreed that the faculty are professional employees under § 2 (12) of the Act. 29 U.S.C. § 152 (12). But the court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well the "crucial role of the full-time faculty in determining other central policies of the institution." 582 F.2d, at 698. The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are, "in effect, substantially and pervasively operating the enterprise." *Ibid*. Accordingly, the court held that the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act. We granted certiorari, 440 U.S. 906 (1979), and now affirm.

III.

There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions that did not "affect commerce." . . . Moreover, the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret. The Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which [the] Act was designed to cope in the typical organizations of the commercial world." *Adelphi University*, 195 N.L.R.B. 639, 648 (1972).

The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. *Ibid*. In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. See J. Baldridge, *Power and Conflict in the University* 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decision making in which guilds of scholars were responsible only to themselves. See N. Fehl, *The Idea of a University in East and West* 36-46 (1962); D. Knowles, *The Evolution of Medieval Thought* 164-168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, *Higher Education in Transition: A History of American Colleges and Universities*, 1636-1976, pp. 25-30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many universities, including Yeshiva. For these reasons, the Board has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *Syracuse University*, 204 N.L.R.B. 641, 643 (1973).

The absence of explicit congressional direction, of course, does not preclude the Board from reaching any particular type of employment. See *NLRB* v. *Hearst Publications, Inc*., 322 U.S. 111, 124-131 (1944). Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970. *Cornell University*, 183 N.L.R.B. 329 (1970). Within one year, it had approved the formation of bargaining units composed of faculty members. *C. W. Post Center*, 189 N. L. R. B. 904 (1971). The Board reasoned that faculty members are "professional employees" within the meaning of § 2 (12) of the Act and therefore are entitled to the benefits of collective bargaining. 189 N.L.R.B., at 905; 29 U.S.C. § 152 (12).

Yeshiva does not contend that its faculty are not professionals under the statute. But professionals, like other employees, may be exempted from coverage under the Act's exclusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer, or under the judicially implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy. Both exemptions grow out of the same concern: that an employer is entitled to the undivided loyalty of its representatives. *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653, 661-662 (1974); see *NLRB* v. *Bell Aerospace Co*., 416 U.S. 267, 281-282 (1974). Because the Court of Appeals found the faculty to be managerial employees, it did not decide the question of their supervisory status. In view of our agreement with that court's application of the managerial exclusion, we also need not resolve that issue of statutory interpretation.

IV.

Managerial employees are defined as those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *NLRB* v. *Bell Aerospace Co., supra*, at 288 (quoting *Palace Laundry Dry Cleaning Corp*., 75 N. L. R. B. 320, 323, n. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S., at 283. Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id*., at 286-287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The Board does not contend that the Yeshiva faculty's decision making is too insignificant to be deemed managerial. Nor does it suggest that the role of the faculty is merely advisory and thus not managerial.[17] Instead, it contends that the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties. The status of such employees, in the Board's view, must be determined by reference to the "alignment with management" criterion. The Board argues that the Yeshiva faculty are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance, and because they are neither "expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies." Because of this independence, the Board contends there is no danger of divided loyalty and no need for the managerial exclusion. In its view, union pressure cannot divert the faculty from adhering to the interests of the university, because the university itself expects its faculty to pursue professional values rather than institutional interests. The Board concludes that application of the managerial exclusion to such employees would frustrate the national labor policy in favor of collective bargaining.

This "independent professional judgment" test was not applied in the decision we are asked to uphold. The Board's opinion relies exclusively on its previous faculty decisions for both legal and factual analysis. 221 N.L.R.B., at 1054. But those decisions only dimly foreshadow the reasoning now proffered to the Court. Without explanation, the Board initially announced two different rationales for faculty cases,[18] then quickly transformed them into a litany to be repeated in case after case: (i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees. *Northeastern University*, 218 N. L. R. B. 247, 250 (1975); *University of Miami*, 213 N. L. R. B. 634, 634 (1974); see *Tusculum College*, 199 N. L. R. B. 28, 30 (1972).

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[17] The Union does argue that the faculty's authority is merely advisory. But the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. . . . The statutory definition of "supervisor" expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

[18] Two cases simply announced that faculty authority is neither managerial nor supervisory because it is exercised collectively. *C. W. Post Center*, 189 N.L.R.B. 904, 905 (1971); *Fordham University*, 193 N.L.R.B. 134, 135 (1971). The Board later acknowledged that "a genuine system of collegiality would tend to confound us," but held that the modern university departs from that system because "ultimate authority" is vested in a board of trustees which neither attempts to convert the faculty into managerial entities nor advises them to advocate management interests. *Adelphi University*, 195 N.L.R.B. 639, 648 (1972). See *Fairleigh Dickinson University*, 227 N.L.R.B. 239, 241 (1976).

In their arguments in this case, the Board's lawyers have abandoned the first and third branches of this analysis, which in any event were flatly inconsistent with its precedents, and have transformed the second into a theory that does not appear clearly in any Board opinion.

V.

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority, which in any other context, unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[23]

The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument. There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training. But we have been directed to no authority suggesting that that tension can be resolved by reference to the "independent professional judgment" criterion proposed in this case. Outside the university context, the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise. Indeed, the Board has twice implicitly rejected the contention that decisions based on professional judgment cannot be managerial. Since the Board does not suggest that the "independent professional judgment" test is to be limited to university faculty, its new approach would overrule *sub silentio* this body of Board precedent and could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities.

[23] The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. See *supra*, at 677, and n. 5. These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority.

Moreover, the Board's approach would undermine the goal it purports to serve: to ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union. In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests – as applied to governance at a university like Yeshiva – cannot be separated from those of the institution.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. See K. Mortimer & T. McConnell, *Sharing Authority Effectively* 23-24 (1978). Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is "expected to conform" to one goal or another when the two are essentially the same.

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy. It may appear, as the Board contends, that the professor performing governance functions is less "accountable" for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy. But the analogy of the university to industry need not, and indeed cannot, be complete. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies.[29]

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[29] The dissent concludes, citing several secondary authorities, that the modern university has undergone changes that have shifted "the task of operating the university enterprise" from faculty to administration. *Post*, at 703. The shift, if it exists, is neither universal nor complete. See K. Mortimer & T. McConnell, *Sharing Authority Effectively* 27-28, 158-162, 164-165 (1978). In any event, our decision must be based on the record before us. Nor can we decide this case by weighing the probable benefits and burdens of

The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial.[31]

VI.

Finally, the Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case. The Court of Appeals took a different view, and determined that the faculty of Yeshiva University, "in effect, substantially and pervasively [operate] the enterprise." 582 F.2d, at 698. We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978). In this case, we hold that the Board's decision satisfies neither criterion.

Affirmed.

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faculty collective bargaining. See *Post*, at 702-705. That, after all, is a matter for Congress, not this Court.

[31] We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.

DISSENT: MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

In holding that the full-time faculty members of Yeshiva University are not covered employees under the National Labor Relations Act, but instead fall within the exclusion for supervisors and managerial employees, the Court disagrees with the determination of the National Labor Relations Board. Because I believe that the Board's decision was neither irrational nor inconsistent with the Act, I respectfully dissent

I.

Ten years ago the Board first asserted jurisdiction over private nonprofit institutions of higher education. *Cornell University*, 183 N.L.R.B. 329 (1970). Since then, the Board has often struggled with the Procrustean task of attempting to implement in the altogether different environment of the academic community the broad directives of a statutory scheme designed for the bureaucratic industrial workplace. See, *e. g.*, *Adelphi University*, 195 N.L.R.B. 639, 648 (1972). Resolution of the particular issue presented in this case – whether full-time faculty members are covered "employees" under the Act – is but one of several challenges confronting the Board in this "unchartered area." *C. W. Post Center*, 189 N.L.R.B. 904, 905 (1971).

Because at the time of the Act's passage Congress did not contemplate its application to private universities, it is not surprising that the terms of the Act itself provide no answer to the question before us. Indeed, the statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of "professional employees" under § 2 (12), 29 U.S.C. § 152 (12), and its exclusion, on the other, of "supervisors" under § 2 (11), 29 U.S.C. § 152 (11). Similarly, when transplanted to the academic arena, the Act's extension of coverage to professionals under § 2 (12) cannot easily be squared with the Board-created exclusion of "managerial employees" in the industrial context. See generally *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

Primary authority to resolve these conflicts and to adapt the Act to the changing patterns of industrial relations was entrusted to the Board, not to the judiciary. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Court has often admonished that "[the] ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957). Accord, *Beth Israel Hospital* v. *NLRB*, 437

U.S. 483, 501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-236 (1963). Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act. And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to the realities of industrial life. Accordingly, the judicial role is limited; a court may not substitute its own judgment for that of the Board. The Board's decision may be reviewed for its rationality and its consistency with the Act, but once these criteria are satisfied, the order must be enforced.

II.

In any event, I believe the Board reached the correct result in determining that Yeshiva's full-time faculty is covered under the NLRA. The Court does not dispute that the faculty members are "professional employees" for the purposes of collective bargaining under § 2 (12), but nevertheless finds them excluded from coverage under the implied exclusion for "managerial employees." The Court explains that "[the] controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Ante*, at 686. But the academic community is simply not "any other context." The Court purports to recognize that there are fundamental differences between the authority structures of the typical industrial and academic institutions which preclude the blind transplanting of principles developed in one arena onto the other; yet it nevertheless ignores those very differences in concluding that Yeshiva's faculty is excluded from the Act's coverage.

As reflected in the legislative history of the Taft-Hartley Amendments of 1947, the concern behind the exclusion of supervisors under § 2 (11) of the Act is twofold. On the one hand, Congress sought to protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union. "If supervisors were members of and active in the union which represented the employees they supervised it could be possible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job." *NLRB* v. *Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1178 (CA2 1968). In addition, Congress wanted to ensure that employers would not be deprived of the undivided loyalty of their supervisory foremen. Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus interfering with the supervisors' ability to discipline and control the employees in the interest of the employer.

Identical considerations underlie the exclusion of managerial employees. See *ante*, at 682. Although a variety of verbal formulations have received judicial approval over the years, see *Retail Clerks International Assn*. v. *NLRB*, 125 U. S. App. D. C. 63, 65-66, 366 F.2d 642, 644-645 (1966), this Court has recently sanctioned a definition of "managerial employee" that comprises those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" See *NLRB* v. *Bell Aerospace Co.*, 416 U.S., at 288. The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee in performing his duties represents his own interests or those of his employer. If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act and is entitled to the benefits of collective bargaining.

After examining the voluminous record in this case, the Board determined that the faculty at Yeshiva exercised its decision-making authority in its own interest rather than "in the interest of the employer." . . . The Court, in contrast, can perceive "no justification for this distinction" and concludes that the faculty's interests "cannot be separated from those of the institution." *Ante*, at 688.[6] But the Court's vision is clouded by its failure fully to discern and comprehend the nature of the faculty's role in university governance.

Unlike the purely hierarchical decision-making structure that prevails in the typical industrial organization, the bureaucratic foundation of most "mature" universities is characterized by dual authority systems. The primary decisional network is hierarchical in nature: Authority is lodged in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process. See J. Baldridge, *Power and Conflict in the University* 114 (1971); Finkin, "The NLRB in Higher Education," 5 *U. Toledo L. Rev*. 608, 614-618 (1974).

What the Board realized – and what the Court fails to apprehend – is that whatever influence the faculty wields in university decision making is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. Although the administration may look to the faculty for advice on matters of professional and

[6] The Court thus determines that all of Yeshiva's full-time faculty members are managerial employees, even though their role in university decision making is limited to the professional recommendations of the faculty acting as a collective body, and even though they supervise and manage no personnel other than themselves. The anomaly of such a result demonstrates the error in extending the managerial exclusion to a class of essentially rank-and-file employees who do not represent the interests of management and who are not subject to the danger of conflicting loyalties that motivated the adoption of that exemption.

academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship.[7] And while the administration may attempt to defer to the faculty's competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal and other managerial policies which the faculty has no part in developing. The University always retains the ultimate decision making authority, see *ante*, at 675-676, and the administration gives what weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives.[8]

The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement – both for professional and nonprofessional employees – by conferring managerial status only upon those employees "whose interests are closely aligned with management *as true representatives of management*." (Emphasis added.) *E.g., Sutter Community Hospitals of Sacramento*, 227 N.L.R.B. 181, 193 (1976); *Bell Aerospace*, 219 N.L.R.B. 384, 385 (1975); *General Dynamics Corp*., 213 N.L.R.B. 851, 857 (1974). Only if the employee is expected to conform to

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[7] As the Board has recognized, due to the unique nature of their work, professional employees will often make recommendations on matters that are of great importance to management. But their desire to exert influence in these areas stems from the need to maintain their own professional standards, and this factor – common to all professionals – should not, by itself, preclude their inclusion in a bargaining unit. See *Westinghouse Electric Corp*., 113 N. L. R. B. 337, 339-340 (1955). In fact, Congress clearly recognized both that professional employees consistently exercise independent judgment and discretion in the performance of their duties, see 29 U. S. C. § 152 (12), and that they have a significant interest in maintaining certain professional standards, see S. Rep. No. 105, 80th Cong., 1st Sess., 11 (1947). Yet Congress specifically included professionals within the Act's coverage. See *NLRB* v. *Bell Aerospace Co*., 416 U.S. 267, 298 (1974) (WHITE, J., dissenting in part).

[8] One must be careful not to overvalue the significance of the faculty's influence on academic affairs. As one commentator has noted, "it is not extraordinary for employees to seek to exert influence over matters embedded in an employment relationship for which they share a concern, or that management would be responsive to their strongly held desires." Finkin, "The NLRB in Higher Education," 5 *U. Toledo L. Rev*. 608, 616 (1974). Who, after all, is better suited than the faculty to decide what courses should be offered, how they should be taught, and by what standards their students should be graded? Employers often will attempt to defer to their employees' suggestions, particularly where – as here – those recommendations relate to matters within the unique competence of the employees.

Moreover, insofar as faculty members are given some say in more traditional managerial decisions such as the hiring and promotion of other personnel, such discretion does not constitute an adequate basis for the conferral of managerial or supervisory status. Indeed, in the typical industrial context, it is not uncommon for the employees' union to be given the *exclusive* right to recommend personnel to the employer, and these hiring-hall agreements have been upheld even where the union requires a worker to pass a union-administered skills test as a condition of referral. See, *e.g., Local 42 (Catalytic Constr. Co.)*, 164 N. L. R. B. 916 (1967); see generally *Teamsters* v. *NLRB*, 365 U.S. 667 (1961).

management policies and is judged by his effectiveness in executing those policies does the danger of divided loyalties exist.

Yeshiva's faculty, however, is not accountable to the administration in its governance function, nor is any individual faculty member subject to personal sanction or control based on the administration's assessment of the worth of his recommendations. When the faculty, through the schools' advisory committees, participates in university decision making on subjects of academic policy, it does not serve as the "representative of management." Unlike industrial supervisors and managers, university professors are not hired to "make operative" the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration. Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy. Board Member Kennedy aptly concluded in his concurring opinion in *Northeastern University*, 218 N.L.R.B. 247, 257 (1975) (footnote omitted):

> "[The] influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'for management' or 'in the interest of the employer,' but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations."

It is no answer to say, as does the Court, that Yeshiva's faculty and administration are one and the same because their interests tend to coincide. In the first place, the National Labor Relations Act does not condition its coverage on an antagonism of interests between the employer and the employee. The mere coincidence of interests on many issues has never been thought to abrogate the right to collective bargaining on those topics as to which that coincidence is absent. Ultimately, the performance of an employee's duties will always further the interests of the employer, for in no institution do the interests of labor and management totally diverge. Both desire to maintain stable and profitable operations, and both are committed to creating the

best possible product within existing financial constraints. Differences of opinion and emphasis may develop, however, on exactly how to devote the institution's resources to achieve those goals. When these disagreements surface, the national labor laws contemplate their resolution through the peaceful process of collective bargaining. And in this regard, Yeshiva University stands on the same footing as any other employer.

Moreover, the congruence of interests in this case ought not to be exaggerated. The university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation. The record evinces numerous instances in which the faculty's recommendations have been rejected by the administration on account of fiscal constraints or other managerial policies. Disputes have arisen between Yeshiva's faculty and administration on such fundamental issues as the hiring, tenure, promotion, retirement, and dismissal of faculty members, academic standards and credits, departmental budgets, and even the faculty's choice of its own departmental representative. The very fact that Yeshiva's faculty has voted for the Union to serve as its representative in future negotiations with the administration indicates that the faculty does not perceive its interests to be aligned with those of management. Indeed, on the precise topics that are specified as mandatory subjects of collective bargaining – wages, hours, and other terms and conditions of employment – the interests of teacher and administrator are often diametrically opposed.

Finally, the Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decision making that is a vestige of the great medieval university. But the university of today bears little resemblance to the "community of scholars" of yesteryear.[14] Education has become "big business," and the task of

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[14] See generally J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636-1976 (3d ed. 1976). In one of its earliest decisions in this area, the Board recognized that the governance structure of the typical modern university does not fit the mold of true collegiality in which authority rests with a peer group of scholars. *Adelphi University*, 195 N.L.R.B. 639, 648 (1972). Accord, *New York University*, 205 N.L.R.B. 4, 5 (1973). Even the concept of "shared authority," in which university decision making is seen as the joint responsibility of both faculty and administration, with each exerting a dominant influence in its respective sphere of expertise, has been found to be "an ideal rather than a widely adopted practice." K. Mortimer & T. McConnell, *Sharing Authority Effectively* 4 (1978). The authors conclude:

> "Higher education is in the throes of a shift from informal and consensual judgments to authority based on formal criteria. . . . There have been changes in societal and legislative expectations about higher education, an increase in external regulation of colleges and universities, an increase in emphasis on managerial skills and the technocratic features of modern management, and a greater codification of internal decision-making procedures.

operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decision making process

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. In response to this friction, and in an attempt to avoid the strikes and work stoppages that have disrupted several major universities in recent years, many faculties have entered into collective-bargaining relationships with their administrations and governing boards. An even greater number of schools – Yeshiva among them – have endeavored to negotiate and compromise their differences informally, by establishing avenues for faculty input into university decisions on matters of professional concern.

Today's decision, however, threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement. By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the NLRA and, in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct. Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur." *Ford Motor Co*. v. *NLRB*, 441 U.S. 488, 499 (1979).

III.

In sum, the Board analyzed both the essential purposes underlying the supervisory and managerial exclusions and the nature of the governance structure at Yeshiva University. Relying on three factors that attempt to encapsulate the fine distinction between those professional employees who are entitled to the NLRA's protections and those whose managerial responsibilities require their exclusion, the Board concluded that Yeshiva's full-time faculty

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These changes raise the question whether existing statements of shared authority provide adequate guidelines for internal governance." *Id*., at 269.

qualify as the former rather than the latter. I believe the Board made the correct determination. But even were I to have reservations about the specific result reached by the Board on the facts of this case, I would certainly have to conclude that the Board applied a proper mode of analysis to arrive at a decision well within the zone of reasonableness. Accordingly, in light of the deference due the Board's determination in this complex area, I would reverse the judgment of the Court of Appeals.

Notes and Questions

1. In prohibiting the faculty from bargaining with the administration, the Court relied on the "managerial employee" doctrine. What functions of the faculty did the Court find to contribute to their "managerial" status?

2. To what degree would bargaining over salaries interfere with the faculty's "managerial" duties? What potential contract issues could pose a conflict for the faculty's dual role?

3. On whose behalf do the faculty exercise their "independent judgment?" The institution's? The students'? Their own?

4. Is the Court really saying that collective bargaining and collegial decision making are incompatible? Is there language in the NLRA that addresses this issue?

5. The Court says that the University is the faculty; yet shortly after the decision was announced, University administrators announced a reduction in force that resulted in layoffs of faculty. The faculty did not participate in planning the RIF. If this event had occurred prior to the Supreme Court's ruling, should it have changed the outcome? Why or why not?

6. Which description of a university is more accurate – Powell's or Brennan's? Is either generalization accurate for all or most "mature" colleges and universities?

7. *Yeshiva* engendered many challenges to faculty unions at private colleges. Given the post-*Yeshiva* experience, what would be your advice to administrators at a private college who prefer that the faculty not bargain under the protections of the NLRA?

SEC. 5.3. Coexistence of Collective Bargaining and Traditional Academic Practices

Problem 6

Jane Jones is the president of Hemlock College, a private liberal arts college in the Midwest. She arrived on campus only recently, having come from a position as academic vice president at a large public university in a southern state.

Hemlock College has had a faculty senate for approximately 20 years, but it has been relatively inactive and is considered ineffective by most faculty. Just before President Jones assumed office, the faculty voted to be represented for purposes of collective bargaining by the Hemlock Independent Faculty Union. Negotiations have just begun.

Shortly after President Jones' arrival, she decided to reinvigorate the faculty senate, for she is a strong believer in faculty governance. Several standing committees – one on faculty compensation, one on faculty teaching loads, one on curriculum, and one on parking – have been elected and are meeting. Some of the committees are ready to present a set of recommendations to the full senate, which, if it approves the recommendations, will forward them to President Jones for her approval.

Yesterday, Freida Flynn, president of the faculty union, walked into President Jones' office. She was extremely upset, and accused President Jones of trying to "sabotage" the new union and "torpedo" the negotiations. She said that the union would be filing an unfair labor practice charge with the National Labor Relations Board and that all activity by the faculty senate, including discussions that do not culminate in any recommendations at all, must cease.

President Jones has never worked in a unionized atmosphere before. What are the legal issues that this situation presents? Does the union have a strong claim before the National Labor Relations Board? Should she suspend all meetings of the faculty senate and its committees? Should she design some other form of faculty governance organization?

Please advise President Jones.

SEC. 5.4.2. Judicial Deference and Remedies for Tenure Denial

Kunda v. Muhlenberg College
621 F.2d 532 (3d Cir. 1980)

OPINION BY**:** SLOVITER

I.

This case raises significant questions regarding the application in an educational setting of the statutory provisions prohibiting discrimination on the basis of sex and the appropriate relief to be awarded when discrimination has been proven.

Connie Rae Kunda, an instructor in the Department of Physical Education at Muhlenberg College in Allentown, Lehigh County, Pennsylvania, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1976), alleging that Muhlenberg had discriminated against her on the basis of sex when it failed to promote her and denied her tenure. Kunda sought an injunction requiring Muhlenberg to appoint her as an Associate Professor of Physical Education with tenure, backpay, and costs and attorneys' fees.

After a trial on the merits, the district court found that Muhlenberg discriminated against Kunda on the basis of sex. In its Order of October 19, 1978, amended November 17, 1978, the court ordered that Muhlenberg grant Kunda: (1) reinstatement; (2) backpay, from the date of termination, less amounts earned in the interim; (3) promotion to the rank of Assistant Professor effective September 1973; and (4) the opportunity to complete or substantially complete the requirements of a master's degree within two full school years from the date of the Order and, if the master's degree is successfully achieved, an award of tenure effective September 1975. *Kunda v. Muhlenberg College*, 463 F. Supp. 294 (E.D.Pa.1978). Muhlenberg has appealed. For the reasons that follow, we affirm the Order of the district court.

II.

The procedure for the awarding of promotion and granting of tenure at Muhlenberg at the time in question was set forth in the Muhlenberg College Bylaws and the Muhlenberg College Faculty Handbook. Normally, the Department Head initiates the action with regard to promotion and/or tenure of a faculty member in his or her department by submitting to the Dean a written recommendation. This recommendation is forwarded by the Dean to the Faculty Personnel and Policies Committee, hereinafter "FPPC," composed of six elected faculty members, which has

the responsibility, inter alia, of reviewing recommendations concerning promotion and/or tenure submitted by the Department Head and making and submitting its own recommendation to the President of the College. The three recommendations – that of the Department Head, the FPPC, and the independent recommendation of the Dean – are reviewed by the President who must make his own recommendations to the Board of Trustees Committee on Educational Policies and Faculty Affairs, hereinafter "Trustees Committee." The Trustees Committee reports to the full Board of Trustees, which is vested with the power to award promotion and grant tenure.

The exhibits show that in practice the Board of Trustees, at least since 1970, invariably followed the President's recommendations, granting tenure on his recommendation and similarly denying it when he recommended against it, even when there were contrary recommendations by the Dean or FPPC. The same was true for promotions. There is one additional procedure available to those faculty members who wish to appeal from adverse decisions regarding promotion and/or tenure. There is a Faculty Board of Appeals, hereinafter "FBA," created by the Board of Trustees on November 5, 1973, composed of seven non-administrative faculty members and three alternates elected by the faculty, which can consider the appeals of individual teaching-faculty members pertaining to questions of promotion and tenure and then make its own recommendation to the President. Thus, in effect, there are two separate faculty committees that independently review a candidate's credentials and performance and that make recommendations to the President on behalf of the faculty members of the College regarding promotion and tenure.

The faculty ranks at Muhlenberg are Professor, Associate Professor, Assistant Professor, Instructor, and Lecturer. The policy for promotion, as set forth in the Faculty Handbook, is:

> Promotion Requirements
>
> Promotion is awarded for meritorious service to the College. For promotion to Professor or Associate Professor, the Ph.D. or its scholarly equivalent or recognized achievement in a field shall be required. These requirements normally apply to the rank of Assistant Professor also, although this rank may be obtained without the Ph.D. if there is sufficient evidence of progress toward the completion of all requirements for the degree.
>
> For faculty members in the Physical Education Department, the terminal degree for purposes of tenure and promotion is the master's degree.

The Faculty Handbook does not articulate the requirements for tenure as it does for promotion. The President of the College testified that the academic qualifications for the grant of tenure

were similar to those published for promotion, i.e., possession of the terminal academic degree or its scholarly equivalent, or recognized achievement in the field.

A college's policy for tenure and promotion often encompasses not only the qualifications needed but also the time schedule in which a candidate must show achievement of the necessary credentials. In the case of promotion to Assistant Professor, the rank relevant in this case, the Faculty Handbook provides that "no person may remain indefinitely at the rank of Instructor although contracts as Instructor may be renewed annually for no more than nine years."

The relevant Faculty Handbook provision regarding tenure is:

> Tenure is granted only by action of the Board of Trustees upon recommendation of the President. A faculty member shall obtain continuous tenure upon reappointment after seven years' full-time college or university teaching at the rank of Instructor, Assistant Professor or Associate Professor, at least four of which shall have been at Muhlenberg. Not more than three of the total seven years shall be served at the rank of Instructor. No person, however, shall teach at Muhlenberg for more than nine years without obtaining tenure.

Although there were different interpretations as to the meaning of the above provision, the President testifying that a faculty member must have served at least four years at a professional rank, i.e., above Instructor, before entitlement to tenure and a contrary position taken by the faculty member who helped draft the policy, the trial court found that the Board of Trustees retained the power to grant tenure to a faculty member who had not served at a professional rank for four years.

III.

Connie Rae Kunda was appointed as an instructor in the Department of Physical Education of Muhlenberg College in September 1966, a position she held until June 1975 following annual reappointments. At the time Kunda was hired she had a Bachelor of Arts degree in Physical Education. The trial court found that at the time she was hired she was not told a master's degree was needed for employment or advancement at the College.

At all relevant times, Raymond Whispell was the Chairman of the Physical Education Department, Philip B. Secor was the Dean, and John H. Morey was the President of Muhlenberg.

The first recommendation of Kunda for promotion occurred on October 14, 1971 (her fifth year on the faculty) when Professor Whispell wrote to Dean Secor recommending that

Kunda be promoted to Assistant Professor. Kunda's name was sent to the FPPC, which divided equally on whether to recommend her promotion. Dean Secor did not recommend Kunda for promotion. President Morey also did not recommend the promotion, testifying that he considered the FPPC tie vote to be a failure to recommend promotion. At the request of Professor Whispell the FPPC reconsidered the Kunda promotion at its March 15, 1972 meeting. Dean Secor, who did not usually attend such meetings of the FPPC, spoke in opposition, stating that the future of the Physical Education Department was doubtful and that the decision to promote Kunda should be made at a later date. Thereafter, the FPPC voted not to recommend the promotion by a vote of 4 (no) to 2 (yes).

In the spring of 1972, in an effort to ascertain the reasons for denial of the promotion, Kunda met separately with Professor Whispell, Dean Secor and President Morey. The trial court found that:

> None of those persons told Mrs. Kunda that she was not promoted because she lacked a masters degree, or stated that a masters degree would be mandatory in order for her to be promoted or considered for tenure in the future.

The following academic year, 1972-73, Professor Whispell again initiated the promotion process by sending a written recommendation to Dean Secor on October 5, 1972 that Kunda be promoted to Assistant Professor. Although all but one of the other recommendations were timely forwarded by Dean Secor to the FPPC, Dean Secor wrote to the FPPC that due to an "egregious oversight," he had failed to bring the promotion recommendation of Kunda to the FPPC's attention when it was considering the other tenure and promotion decisions. By this time, Dean Secor had forwarded all of his recommendations to President Morey, President Morey had in turn forwarded his recommendations for granting promotions to the Board of Trustees, and the Board of Trustees had already approved all of President Morey's recommendations.

At its meeting of January 25, 1973 the FPPC unanimously recommended Kunda's promotion. The FPPC noted "that despite the lack of an advanced degree, Mrs. Kunda provide(d) a vital service in the athletic program and, in fact, does have training beyond the Baccalaureate level." The FPPC recommendation was forwarded to President Morey.

Dean Secor recommended that Kunda not be promoted. His letter to President Morey of February 13, 1973 contained the following comments:

> Concerning Mrs. Kunda, I have considerable difficulties. I cannot recommend that she be promoted because she holds only a Bachelor's degree. If she held a Master's

> degree I would certainly recommend her promotion on the strength of the known excellence of her work at the College. . . .

President Morey did not recommend Kunda's promotion to the rank of Assistant Professor that year, and she was not promoted.

During the next academic year, once again Kunda's Department Chairman, Professor Whispell, this time joined by all senior members of her department, wrote to Dean Secor by letter dated October 2, 1973 recommending that Kunda be promoted and also, for the first time, recommending that she be granted tenure. The FPPC unanimously concurred by a vote of 6 (yes) to 0 (no). The FPPC found Kunda was an excellent teacher who had developed several new courses, participated in numerous professional organizations related to her specialty of dance, taken some post-graduate courses, published in her field, and presented a television series on physical fitness. The FPPC statement concluded:

> It seems to us that the usual requirement for the Ph.D. does not apply in this case. We should instead measure the professional performance of Mrs. Kunda in teaching physical education at Muhlenberg, participating in professional groups as an officer or as a member, continuing her professional development by attending post-graduate courses and demonstrating her competence before the local audience on Channel 39 TV.

Once again, Dean Secor forwarded to the President a negative recommendation, this time as to tenure. He acknowledged that Kunda's "performance justifies a permanent appointment," but cited as the basis for his position the high percentage of tenured faculty in the Physical Education Department and the uncertainty of the Department's future at Muhlenberg. Dean Secor's memo did not refer to Kunda's lack of a terminal degree.

President Morey did not recommend Kunda's appointment to the Board of Trustees. Accordingly, she was notified that tenure had been denied and that she would receive a terminal contract for the 1974-75 academic year.

Kunda appealed the decision to deny her tenure to the FBA, which referred her appeal to a three-member subcommittee. The subcommittee unanimously recommended that Kunda be granted tenure and promoted to the rank of assistant professor. The full FBA adopted this recommendation, also unanimously. It notified President Morey on January 20, 1975 that its recommendation was based on the fact that Kunda displayed the scholarly equivalent of a master's degree, that the policy of granting promotions only to those who had obtained the appropriate degree had been bypassed in the Physical Education Department with some

frequency, and that there were no significant fiscal considerations that mandated the ultimate decision, since the abandonment of the Physical Education requirement did not seem to be a real possibility.

Upon receiving the FBA recommendation, President Morey invited Kunda to present her case at a meeting of the Trustee Committee. Morey prepared a memorandum for the meeting defending his refusal to recommend Kunda for tenure because she lacked a master's degree. After a hearing, the Trustees Committee voted not to grant Kunda tenure, and, in March 1975, the Board of Trustees adopted this recommendation. Kunda then initiated this action.

IV.

The statute prohibits only "discrimination." Therefore, consideration of the practices of the college toward the plaintiff must be evaluated in light of its practices toward the allegedly more favored group, in this case males.

With respect to promotion, three members of the faculty of the Physical Education Department were promoted during the period of Kunda's employment notwithstanding their failure to have a master's degree. Professor Whispell, the department chairman, was promoted to full Professor effective September 1970, although he had only a bachelor of science degree. Ronald Lauchnor, hired as an Instructor in 1967, was promoted to Assistant Professor effective September 1972 even though he did not have a master's degree.[2] William Flamish was promoted to Associate Professor effective September 1972 although he did not have a master's degree. In departments other than Physical Education, Robert Bohm was promoted to Assistant Professor of Classics effective September 1972 although he lacked the terminal degree.

Central to the trial court's ultimate finding of disparate treatment was the difference in counseling received by male members of the Physical Education Department and by plaintiff. Although plaintiff had not been told of the necessity to have a master's degree either at the time of her initial employment at the college or by her department chairman, Dean, or President when she was being considered for promotion and tenure, male candidates for promotion and tenure were so advised. Dean Secor initiated a meeting with Ronald Lauchnor, a candidate for tenure about the same time as Kunda, and specifically advised him that he should obtain a master's degree because it was required for grant of tenure. Dean Secor encouraged him to pursue that degree. Dean Secor also initiated two meetings with Samuel Beidleman, an Instructor in the

[2] Prof. Whispell recommended the promotion of Lauchnor stating that Lauchnor had 43 credits toward his degree. In fact, Lauchnor had discontinued his studies toward a master's degree after earning 24 credits. Both President Morey and Dean Secor recommended Lauchnor's promotion, and the trial court found they "knew or should have known that (he) did not have a master's degree and was not actively pursuing one."

Physical Education Department, in the fall of 1967 and 1968 and advised him that a master's degree was a prerequisite to his tenure and promotion. A sabbatical leave had been offered to Robert Bohm, the professor in the Classics Department, so that he would be enabled to return to full-time doctoral study, which would have been required for him to obtain tenure.

V.

The trial court found that the College discriminated against Kunda on the basis of her sex with respect to both the denial of promotion and the denial of tenure. The court found that plaintiff had satisfied both alternatives to the terminal degree requirement for promotion, in that she had the scholarly equivalent of the master's degree and recognized achievement in her field. Using the paradigm for such cases prescribed in *McDonnell Douglas v. Green,* 411 U.S. 792 (1977), the court determined plaintiff established a prima facie case of violation of the statute with regard to Muhlenberg's failure to promote her to Assistant Professor. The court found that Muhlenberg's asserted reason for not promoting her – lack of a master's degree – was pretextual in view of its promotion of male members of the department who also did not have masters' degrees.

The court used a different approach in considering the elements needed to make a prima facie case with regard to tenure. The court stated that:

> (Due) to the unusual nature of the tenure decision and the undeniable fact that qualified faculty members may be denied tenure due to reasons relating to the needs of the college, we believe that an additional element must be shown in order to establish a prima facie case. Some courts have found this "additional element" in the existence of significant procedural irregularities in the tenure process. . . . We do not believe, however, that a showing of "procedural irregularities" is absolutely required. Alternatively a plaintiff may be able to show that males with similar qualifications were in fact granted tenure during the time period when plaintiff was being considered. In any case, where a plaintiff is able to demonstrate either or both of these "additional elements," a prima facie case is established. 463 F. Supp. at 308.

The court found that the "additional element" required to establish a prima facie case was present in this case. There was evidence of two procedural irregularities that occurred during consideration of plaintiff's candidacy for promotion and tenure. The first was the presence of Dean Secor at the FPPC meeting in March 1972 when he spoke against her candidacy,

purportedly because of the uncertain future of the department, although he had "generally absented himself" from the FPPC meetings when there was a vote on tenure or promotion. The second was the "egregious oversight" (Dean Secor's language) when he failed to forward Kunda's name to the FPPC with the other names to be considered for promotion. By the time her name proceeded through the steps to Board of Trustees' approval, the Board had already acted on the tenure and promotion of other candidates. The court accepted the conclusion of the FBA that Dr. Secor's oversight in failing to forward plaintiff's promotion recommendation at the proper time may have materially affected the decision not to recommend her promotion to the Board of Trustees.

In considering whether Kunda established a prima facie case for tenure, the trial court found that she was qualified for tenure, as well as promotion. The court, "loathe to act as a "super-tenure review committee," noted that it was the "virtually unanimous opinion of those in a position to examine Mrs. Kunda's performance most closely, the Muhlenberg College faculty, that plaintiff was highly qualified for both promotion and tenure." However, the court found that the requirement that a faculty member possess the terminal degree in order to be granted tenure was uniformly applied by the College since the terminal degree requirement "was applied evenhandedly and in a nondiscriminatory manner. Since 1970, no faculty member at Muhlenberg has been granted tenure who did not possess a terminal degree." Therefore, by requiring that plaintiff possess a master's degree before being awarded tenure, Muhlenberg did not treat plaintiff less favorably than male members of her Department or other Departments. On the other hand, the court found that plaintiff was treated differently than male faculty members "in that she was never counseled that the failure to obtain a masters degree would preclude her from being considered for tenure." Since plaintiff could reasonably have believed that a master's degree was not an exclusive requirement for tenure and that she could qualify for tenure by meeting one or both of the alternate criteria listed in the Faculty Handbook, the court found that she was accorded disparate treatment.

It also found that such disparate treatment constituted purposeful discrimination on the basis of sex. The court noted that although plaintiff had a number of discussions with Dean Secor and President Morey concerning her future at Muhlenberg, neither utilized the available opportunity to tell her that he considered a master's degree was necessary for the award of tenure. Further, the court found that each knew that members of the faculty of that department might have believed a master's degree was not necessary in view of the treatment of Beidleman and Lauchnor. The court also noted that the statistical evidence submitted was relevant to the finding of discriminatory motive in the failure to adequately counsel plaintiff. The court found that if Kunda had been adequately counseled, she would have made every effort to obtain a master's degree. Finally, the court found that the College gave no convincing reason for the

failure of its officials to inform Kunda of the necessity of obtaining a master's degree. Since the defendant articulated no reason for the disparate treatment, the court found plaintiff proved her case, and awarded the relief previously referred to.

* * * *

VIII.

Appellant's quarrel with the trial court's conclusion that Kunda was the victim of purposeful discrimination in Mulhenberg's failure to promote her is factual in nature, and is primarily directed to the court's finding that Kunda was qualified, one of the *McDonnell Douglas* prerequisites for finding that a prima facie case has been established. Appellant concedes that the standard that governs appellate review of such factual findings is the "clearly erroneous" standard. . . . On review of the record we cannot say that the trial court's finding that plaintiff was qualified for promotion to Assistant Professor was clearly erroneous. In its Findings of Fact the court referred to the detailed exposition by the FPPC of Kunda's qualifications. That committee, vested with the responsibility of reviewing qualifications of other faculty members, found that Kunda was regarded by her colleagues as an excellent teacher of physical education; developed and introduced new course offerings in the area of her specialty, dance, and in physical fitness; had excellent rapport with students; participated in many and varied professional organizations both on and off campus and at local and state levels; had publications about dance in various professional journals on Physical Education; was active in local women's groups and professional organizations; and presented a series on physical education on local TV. The court also relied on the memorandum of Kunda's department chairman and the testimony of senior members of her department and the faculty of the college that Kunda satisfied all of the requirements for promotion and tenure as set forth in the Faculty Handbook.

The College's contention that Kunda was not qualified is limited to her failure to obtain the master's degree. Although there is evidence from which one might question whether the College's published policies permitted the inference that a terminal degree was required for promotion to Assistant Professor,[5] the trial court found the College met its burden in articulating a legitimate reason for its failure to promote by presenting testimony of the importance of a

[5] Throughout this appeal, appellant has attempted to avoid the fact that the Faculty Handbook lists three independent bases for the award of promotion, and that a terminal degree is only one of the three. As noted in the text, infra, Muhlenberg's President testified that the qualifications for tenure were similar to those published for promotion. . . .

terminal degree within the college community. Following the program devised by the Supreme Court, the trial court next considered plaintiff's claim that the reason articulated was pretextual, and here found in plaintiff's favor on the issue, referring to the Finding of Fact that three male members of the department who did not have master's degrees were promoted. Muhlenberg's attempt to explain and distinguish each of the three situations raised a factual issue, which the trier of fact decided against. We cannot say that the record is barren of any evidence to support the trial court's findings, and therefore will affirm its ultimate conclusion that plaintiff was discriminated against on the basis of sex in the denial of a promotion.

With respect to tenure, the district court followed a somewhat different pattern, imposing on plaintiff the burden to show an "additional element" in establishing a prima facie case because of the "unusual nature of the tenure decision." We see nothing in the Supreme Court decisions that permits the trial courts to require any additional proof by Title VII plaintiffs because the relevant employment decision has been made within the confines of an academic institution. We do not understand that when the Court indicated the requirements for establishing a prima facie case may vary in different factual situations, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13, it intended to impose a higher burden on those seeking permanent employment in an academic institution. As will be discussed at more length in the next section on remedy, academic institutions and decisions are not *ipso facto* entitled to special treatment under federal laws prohibiting discrimination.

We do not suggest that either of the factors referred to by the trial court as sufficient to show the additional "element" is irrelevant in this case. On the contrary, the trial court recognized that the procedural irregularities could be considered in connection with its finding that the discrimination was intentional. The other proof referred to by the court that could show the additional "element" needed for a prima facie case, that comparable males were granted tenure, is already part of the required Title VII case, since it fits within the fourth *McDonnell Douglas* factor paraphrased for this situation to require a showing that there were tenure positions open and the employer continued to grant tenure to comparable male members.

Since the court found that plaintiff had established a prima facie case on the denial of tenure but that the college's articulated reason for its denial – lack of a master's degree – was not pretextual, the only issue before us on tenure is the court's conclusion that Kunda was the subject of disparate treatment because males were counseled as to the need to obtain a master's degree in order to be granted tenure and Kunda was not so counseled. Here again, Muhlenberg's objection is that the finding was "clearly erroneous," and once again, our review of the record discloses that it contains the sufficient quantum of evidentiary support for that finding.

The trial court found that "(defendants) have given no convincing reason for their failure to inform Mrs. Kunda of the necessity of obtaining a masters degree," nor has appellant done so

in this court. Thus, there was a failure on the part of Muhlenberg to articulate a legitimate basis for its failure to counsel Kunda comparably to males regarding the need for a master's degree. In view of the importance that the College itself placed on the possession of such a degree, notwithstanding the published standards referring to other criteria, the disparate treatment could reasonably have been considered substantial by the trial court.

The final issue on liability is whether the requisite intentional discrimination needed in a disparate treatment case has been shown. . . . The trial court recognized the need to make findings on this issue, and determined that the disparate treatment with respect to counseling was not the result of mere inadvertence, but instead constituted purposeful discrimination on the basis of sex. Among the factors on which the trial court relied for this finding were the failure of Dean Secor and President Morey to tell Kunda that her failure to obtain a master's degree would be a barrier to her advancement, although she had sought them out concerning her future at Muhlenberg; that Dean Secor at least was particularly alert to the need to counsel in this area since his own memorandum of his conversation with Lauchnor indicates that he cautioned Lauchnor that he could not rely on the prior actions as to Whispell and Flamish; and that statistical evidence, credited by the court, suggested that Secor's tenure recommendations were related to a candidate's sex. In an earlier paragraph, the trial court had referred to the relevance of the procedural irregularities by Dean Secor to the issue of intent. While appellant again attempted to explain each of these factors, we cannot say that the district court could not reasonably determine that, in totality, they showed the requisite intent.

IX.

The most provocative issue raised on appeal concerns the remedy fashioned by the district court. Those aspects of the remedy that award reinstatement and back pay fit within the traditional Title VII remedies. . . Appellant and one group of amici argue, however, that the portion of the court's order dealing with tenure is unique, and that this will be the first case in which a judicial award of tenure for a Title VII violation has been sustained. This, they claim, represents an unwarranted intrusion by the judiciary into the academic mission of an educational institution that they apparently conclude threatens academic freedom itself. The contention warrants careful analysis because appellant's claim misconceives both the nature of academic freedom and the nature of the relief awarded by the court.

The essence of academic freedom is the protection for both faculty and students "to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). It is the lifeblood of any educational institution because it provides "that atmosphere which is most conducive to speculation, experiment and creation."

Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop. Academic freedom prevents "a pall of orthodoxy over the classroom"; it fosters "that robust exchange of ideas which discovers truth." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Our future, not only as a nation but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process. From unconventional contemplation we have derived, among others, current theories of the solar system, gravitational force, relativity, and the origin of the species. Therefore, academic freedom, the wellspring of education, is entitled to maximum protection.

It does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution. Colleges may fail to promote or to grant tenure for a variety of reasons, such as anticipated decline in enrollment, retrenchment for budgetary reasons, termination of some departments, or determination that there are higher priorities elsewhere. These are decisions that may affect the quality of education but do not necessarily intrude upon the nature of the educational process itself.

On the other hand, it is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations that do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and although there may be tension between the faculty and the administration on their relative roles and responsibilities, it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility for judging candidates. "(T) he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D.Pa.1977).

Wherever the responsibility lies within the institution, it 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. In the cases cited by appellant in support of the independence of the institution, an adverse judgment about the qualifications of the individual involved for the position in question had been made by the professionals, faculty, administration or both. It was

those adverse judgments that the courts refused to re-examine. See, e.g., *Johnson v. University of Pittsburgh, supra*; *Huang v. College of the Holy Cross*, 436 F. Supp. 639 (D.Mass.1977); *EEOC v. Tufts Institution of Learning*, 421 F. Supp. 152 (D.Mass.1975). But see *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979) (on remand from 439 U.S. 24 (1978)).

The distinguishing feature in this case is that Kunda's achievements, qualifications, and prospects were not in dispute. She was considered qualified by the unanimous vote of both faculty committees that evaluated her teaching, research, and creative work, and college and public service. Her department chairman consistently evaluated her as qualified. Even Dean Secor, who did not affirmatively recommend Kunda, commented favorably on her performance, which he rated as "justify(ing) a permanent appointment."

The College has not suggested that financial considerations played a role in the denial of Kunda's tenure. Therefore, the reason for the reference to such considerations in the dissent is puzzling. Despite the concern expressed by Dean Secor on the future of the Physical Education Department when Kunda was being reconsidered at the 1972 FPPC meeting and in his negative recommendation letter to President Morey of November 30, 1973, at his deposition (introduced at trial) Dean Secor "absolutely" and "most emphatically" denied that such concerns were used at any stage of Kunda's review. Dean Secor's testimony is explicit that financial considerations were not a factor in his consideration.

The district court made a specific finding of fact (No. 30) that President Morey did not recommend tenure for Kunda "because of her lack of an advanced degree." The record is manifest that if President Morey had recommended Kunda for tenure, the Board of Trustees would have ratified that decision. The College had ample opportunity during the trial to present testimony as to any other factor on which the decision to deny tenure was based and failed to do so. Thus, the trial judge's finding that plaintiff "had satisfied both alternatives to the terminal degree requirement for promotion and tenure" was based not on his independent judgment, but on the judgment of the university community itself. In the line of cases challenging university decisions not to promote or grant tenure, this case may therefore be sui generis, or at least, substantially distinguishable.

Nor can the court's order be construed as appellant does as a judicial grant of tenure. Underlying the court's order was its finding of fact that "(h)ad Mrs. Kunda been counseled in the same manner as male members of the Physical Education Department, we find that she would have done everything possible to obtain a masters degree in order to further enhance her chances of obtaining tenure." The court did not award Kunda tenure. The court instead attempted to place plaintiff in the position she should have been "but for" the unlawful discrimination. Having found she was denied tenure because she did not have a terminal degree, the court gave

her the opportunity to secure one within two full school years, the period between the time she should have been counseled in 1972 and the tenure decision in 1974. The direction by the court to the college to grant her tenure after she secured the one missing link upon which her rejection by the college had been based is consistent with the line of Title VII cases awarding seniority and other employment perquisites to those found to have been victims of discrimination. . . . The court could have reasonably decided that there would be no purpose to be served to require that the Board of Trustees reconsider plaintiff's tenure after she achieved a master's degree because of the impossibility of asking the Board to ignore changes such as the financial situation, student enrollment, and faculty hiring that may have occurred in the intervening five-year period, as well as the intangible effect upon that decision because the candidate being considered was the successful party to a Title VII suit.

The touchstone of Title VII remedies is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). . . .

The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions that employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those that employ persons who work primarily with their hands.

The legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements. When originally enacted, Title VII exempted from the equal employment requirements educational institution employees connected with educational activities. This exemption was removed in 1972. . . .

[The appellate court then summarizes the history of discrimination against women faculty members in higher education and cites statistics on the employment and compensation of women faculty, compared to that of male faculty].

X.

In summary, appellant's arguments are directed to the factual findings and the inferences to be drawn from them. We have reviewed the evidence in what may be excessive detail because of the vehemence of Muhlenberg's claim that the findings cannot be supported. While there may have been room for differing interpretations of the facts, Judge Huyett had the opportunity to observe the principal witnesses, Kunda, Lauchnor, Whispell, Beidleman, President Morey, and

others. His findings are unequivocal and reasonable in light of the record. Appellant cannot retry the case in this court because it would prefer that contrary inferences had been made.

For all of the foregoing reasons, we will affirm the order of the trial court in its entirety.

DISSENT: GARTH, Circuit Judge, concurring and dissenting in part:

I agree with the majority that we should affirm the district court's finding that the College had discriminated against Kunda. I also agree that it is appropriate to affirm the remedy of reinstatement with promotion and back pay. Thus, I join parts I through VII of the majority opinion.

I part company, however, with the majority when, in the absence of an essential finding of fact, and, of more importance, in the absence of record evidence supporting such a finding, it unconditionally directs that Kunda be granted tenure if she obtains her master's degree within two years. This remedy, in my view, is not called for on this record and constitutes a serious judicial intrusion upon the obligations and responsibilities of Muhlenberg's Board of Trustees. . .

I would therefore reverse so much of the district court order as directs that tenure be granted to Kunda when she obtains her master's degree, and I would leave the decision of whether tenure should be granted, to the Board of Trustees, on whom that obligation rests. This, in my view, would restore Kunda to the position in which she would have been had there been no discrimination. Title VII requires no less and we can do no more.

Notes and Questions

1. Note that the Faculty Handbook stated that a faculty member who wished to be promoted must hold the PhD or its "scholarly equivalent." What do think the drafters of that language intended? Did the college's failure to argue that the "scholarly equivalent" needed to be an actual degree rather than other forms of achievement affect the outcome of the case? Could it have made that argument, given its past behavior?

2. The outcome in this case is unusual for two reasons. First, plaintiffs usually do not prevail in Title VII cases challenging tenure denials; courts generally defer to the judgments of faculty and administrators. Second, tenure (conditional or unconditional) is usually not awarded as a remedy even if a plaintiff succeeds in proving discrimination. For what reasons might judges be less willing to overturn academic employment

decisions than decisions of other employers? For what reasons might courts be unwilling to award tenure as a remedy?

3. The court noted the strong support for Kunda from her faculty peers. There was no testimony that her past performance did not merit the award of tenure. How should courts balance such peer judgments with administrators' concerns for fiscal planning and institutional mission?

4. What rationale did the court use to support its award to Kunda of "conditional tenure"? What alternative remedy could the court have chosen? Would other alternatives have insulated Kunda from potential retaliation?

5. Although other plaintiffs have sought tenure as a remedy in discrimination lawsuits, the courts usually have been reluctant to comply. Some federal courts, however, have awarded tenure as a remedy for discrimination that the court believed was egregious. See the discussion of tenure as a remedy for discrimination, with particular attention to *Brown v. Trustees of Boston University*, in Text, p. 274.

6. Several women have challenged tenure denials based upon their peers' determination that the topic of their research is unworthy, particularly when the "unworthy" discipline is women's studies. Are such considerations of unworthiness appropriate in making promotion and tenure decisions? Should a court defer to peer judgments based on determinations of the unworthiness of women's studies? Or is a disdain for women's studies as a discipline *per se* gender bias? For a discussion of this issue, see *Lynn v. Board of Regents*, 656 F.2d 1337 (9th Cir. 1981).

SEC. 5.4. Application of Nondiscrimination Laws to Faculty Employment Decisions

Problem 7

The School of Engineering at Elite University, a private, non-profit university, has four departments: Electrical Engineering, Mechanical Engineering, Chemical Engineering, and Aerospace Engineering. Although the school has tried faithfully, it has been able to recruit only one woman faculty member – a third-year assistant professor of aerospace engineering, Dr. Gemini.

Dr. Gemini has been offered a position at a prestigious university in a nearby state at a salary that is higher than that of several associate professors in Elite University's department of Aerospace Engineering. Dr. Gemini has implied that she would be willing to stay at Elite University if it can match the salary offer. Matching the salary offer will virtually exhaust the school's merit pay increase funds for the new year. However, the school has been identified by the University's affirmative action office as a unit in which women are severely underrepresented. In fact, the school will not be permitted to hire any male tenure-track faculty until more women faculty have been hired.

The school must make a decision regarding Dr. Gemini's request.

1. What are the legal issues related to a salary increase?

2. What factual information does the administration need before making the decision? What legal information does it need?

3. What appear to be the school's alternatives, and their advantages/disadvantages?

4. What decision should the school make? To what extent is this decision based on legal considerations? Policy considerations?

5. Would the legal issues change if Dr. Gemini had not received an outside offer, but merely demanded a bigger salary and threatened to leave if the university didn't comply?

SEC. 5.6.2. Standards and Criteria for Faculty Personnel Decisions.

McConnell v. Howard University
818 F.2d 58 (D.C. Cir. 1987)

Opinion for the Court filed by Circuit Judge Edwards.

Alan McConnell brought an action in the District Court alleging that Howard University (the "University") breached certain clear contractual obligations when it terminated his appointment as a tenured faculty member without cause and without adhering to prescribed procedures. He also claimed that University officials had made certain defamatory statements about him. The District Court entered summary judgment in favor of Howard University. *McConnell v. Howard Univ.*, 621 F. Supp. 327 (D.D.C. 1985). We agree that the defamation claim is without merit, and affirm that portion of the judgment. However, because the District Court applied erroneous legal theories in deciding the appellant's contract claims, and because there exist several disputed questions of fact material to those claims, we vacate that portion of the judgment and remand the case to the District Court for further proceedings.

I. BACKGROUND

Dr. McConnell was appointed as an associate professor of mathematics at Howard University in 1971, and was granted an appointment with indefinite tenure in 1975. One of the courses he was assigned to teach during the Fall 1983 semester was a section of Elementary Functions I, a course similar in content to a course in Algebra II. About forty students were enrolled in the class, all of whom were black. Dr. McConnell is white. At the first class session, on August 23, 1983, Dr. McConnell informed the class that, over the past ten years, fewer than half of the students who enrolled in Elementary Functions I successfully completed the course. He advised class members to cut back on their other commitments, by taking a reduced course load and by limiting their obligations outside of school, so that they would have sufficient time to study and prepare for his course.

On September 1, the fourth session of the class, McConnell administered a one-question quiz to the class based on material he had presented the previous sessions. Only five students out of forty correctly answered the question. At the next class session, McConnell reiterated his advice that the students concentrate their efforts on his class and cut back on their other activities. He then told the class the fable about a monkey who put his hand in a cookie jar and

was unable to get his hand out because he had tried to grab too many cookies and was unwilling to let go of some of them.

Later, during that same class session, Dr. McConnell became distracted by a conversation between two students. He asked the students to refrain from talking to each other. Apparently, one of the students, Janice McNeil, took some exception to Dr. McConnell's request. A colloquy ensued, culminating in a verbal statement by Ms. McNeil to the effect that Dr. McConnell was a "condescending, patronizing racist." Dr. McConnell demanded that Ms. McNeil apologize, which she refused to do. Dr. McConnell then taught the remainder of the class session without further incident.

At the conclusion of the class, Dr. McConnell asked Ms. McNeil to remain so that he could speak with her. She refused. Dr. McConnell tried to meet with Ms. McNeil immediately before the next class session, on September 8, and Ms. McNeil again refused to speak with him. He then raised the subject during the September 8 class. Ms. McNeil refused to apologize or explain her actions, but instead told McConnell to "go on and teach the course." McConnell asked her to leave the classroom, and, when she refused to do so, he called the Office for Security. On the instructions of Dean Austin Lane, Dean for Special Student Services, an officer escorted Ms. McNeil to Dean Lane's office. Dr. McConnell requested that appropriate actions be taken. Dean Lane asked Ms. McNeil to apologize to Dr. McConnell, but she refused to do so. Dean Lane advised Ms. McNeil that her conduct was unacceptable and that any further activity of this kind would result in disciplinary action.

At the next meeting of the class, on September 13, Dr. McConnell renewed his request that Ms. McNeil either apologize or leave the room. Ms. McNeil refused to do either. Thereupon, Dr. McConnell dismissed the entire class. Upon hearing of this development, Professor James D. Donaldson, Chairman of the Mathematics Department, advised Dr. McConnell that his actions could be considered by the University as neglect of his professional responsibilities. Dr. McConnell, however, emphasized that he would not return to the classroom until the "right atmosphere" was reestablished by having Ms. McNeil either apologize or remove herself from the class.

The next day, Dr. McConnell sent a letter to Dean Lane requesting that disciplinary action be taken against Ms. McNeil for her allegedly slanderous statement, and that she be removed from his class pending satisfactory resolution of the situation. On September 15, the day of the next session of the class, Professor Donaldson handed Dr. McConnell a letter directing him to resume teaching the Elementary Functions course. Professor Donaldson accompanied Dr. McConnell into the classroom. Dr. McConnell renewed his request to Ms. McNeil to either apologize or leave the classroom. When she refused to do either, Dr. McConnell gave the following statement to the class:

> It will be clear to most of you that a proper academic atmosphere conducive to teaching and learning is not possible in the presence of a person who persists in her right to slander the teacher. I have requested the administration of this University to restore conditions to this classroom in which you and I can resume our proper work. I remain hopeful that they will soon do this. We shall resume as soon as they do.[1]

He then left the classroom, and Professor Donaldson proceeded to teach the class. That same day, Dean Lane sent Dr. McConnell a letter indicating that slander was not an offense under the University System of Judiciaries and Code of Conduct, and that no further action would be taken with regard to Ms. McNeil.

On September 19, Dr. McConnell met with Professor Donaldson and Dr. Michael R. Winston, the University's Vice President for Academic Affairs. Dr. Winston told Dr. McConnell that if McConnell persisted in his refusal to teach, further action would be taken against him. Dr. McConnell indicated that he was eager to return to the class, but felt that he could not do so until the proper teaching atmosphere was restored. After Dr. McConnell failed to appear at the next scheduled session of the class, September 20, Robert L. Owens, III, the Dean of the College of Liberal Arts, instituted formal charges against Dr. McConnell, seeking the termination of Dr. McConnell's appointment at the University. Dr. McConnell was relieved of his duties to teach the Elementary Functions I class pending resolution of the case against him. He continued to teach his other assigned courses and to fulfill his other responsibilities as an associate professor.

A Grievance Committee, composed of five tenured faculty members outside the mathematics department, was convened to conduct a hearing and make findings and recommendations. The committee held a hearing on October 22 and 24, and on December 21 reported its findings and recommendations. It found that "Dr. McConnell did not neglect his professional responsibility." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 6, reprinted in *Appendices to Brief for Appellant* (*Appellant App*.) 66. The Grievance Committee emphasized that, although failure to teach an assigned class might ordinarily justify termination, in this case "the mitigating circumstances are such that termination is not warranted." *Id*. at 7, reprinted in *Appellant App*. 67. It noted that the incident must be placed "within a broader context of professorial authority inherent in the teacher-student relationship," *id*., and that "[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships." *Id*. at 8, reprinted in *Appellant App*. 68. It viewed the

[1] Exhibit 12 to Defendant's Statement of Material Facts as to Which There is no Genuine Issue.

failure of Dr. McConnell to teach the class "as being as much a consequence of attempts to restore what he believed to be standard teacher-student relationships as a neglect of his professional responsibilities." *Id.* The Committee also noted that "it is convincingly clear from the evidence presented that [Dr. McConnell's] departmental colleagues, including the Departmental Chairman, fail[ed] to view him as being professionally negligent." *Id*. In addition to exonerating Dr. McConnell's actions, the Grievance Committee pointed to the failure of the University to take adequate steps to support Dr. McConnell in the aftermath of the McNeil incident. *Id*. at 6-7, reprinted in *Appellant App*. 66-67.

The report and the record of the hearing were transmitted to Dr. James E. Cheek, President of the University. He then transmitted to the Board of Trustees the record and a two-page summary of the report. The Board referred the matter to a subcommittee composed of three Board members. The subcommittee requested further clarification of the Grievance Committee's findings, and, in response, the Grievance Committee issued a supplementary report. This report emphasized that Dr. McConnell was willing to teach the Elementary Functions I class "provided some efforts were made to resolve what he saw as a disruptive situation caused by Miss McNeil's actions;" that Dr. McConnell had acted in good faith to resolve the situation; that administrative procedures for handling such student incidents were "apparently inadequate;" that Dr. McConnell was not adequately informed by the University as to what avenues of redress were available to him; and that there was no evidence that Dr. McConnell had been negligent in his relations with students or faculty. *Report of the Liberal Arts Grievance Committee* dated April 5, 1984 at 1-2, reprinted in *Appellant App*. 71-72.

Despite the findings of the Grievance Committee, the Trustees' subcommittee recommended that Dr. McConnell's appointment at the University be terminated. On June 2, 1984, the Board of Trustees so voted, terminating Dr. McConnell's appointment as of that date.

* * * *

Dr. McConnell filed an action in the District Court alleging that Howard University breached its contract with him by terminating his appointment, and also alleging that University officials had made defamatory statements about him. The court granted Howard University's motion for summary judgment on both claims.

The District Court viewed the Faculty Handbook as constituting the contract defining the parties' rights and obligations. The trial court found that, under the contract, Dr. McConnell's appointment could be terminated for neglect of professional responsibilities and that the teaching of assigned classes was a professional responsibility. The judge held that Dr. McConnell's "refusal to teach a class...must constitute a failure to meet a professional responsibility," 621 F.

Supp. at 331, and so Dr. McConnell was terminated for "cause." He further found "no provision of the contract giving [Dr. McConnell] any legal right to be excused from performance of his teaching duty." *Id.* Finally, the trial judge found no "material evidence that [Dr. McConnell] was deprived of procedural rights guaranteed by the contract." *Id*. at 330-31. Therefore, termination was proper under the contract.

The District Court went on to hold that, under the contract and general principles of adjudication, judicial review of the University's actions was limited and that the Board of Trustees' decision should be upheld "unless the Board's decision was arbitrary, or plaintiff has proffered evidence of improper motivation or irrational action." *Id*. at 311; see also *id*. at 330 n.13. ("The cases generally support the proposition...that a federal court should hesitate before significantly intruding in the administration of university affairs...."). The court then found that the Board's decision was not "arbitrary" or "irrational," and that there was no evidence of improper motivation. *Id*. at 331.

* * * *

II. THE BREACH OF CONTRACT CLAIMS

The appellant argues that summary judgment was inappropriate in this case because a number of material facts are in dispute. Moreover, he alleges that the District Court relied on improper legal theories in rendering its judgment. We agree. As will be shown below, using the correct legal framework, several disputed issues of fact must be resolved before a judgment may be rendered on the appellant's breach of contract claims.

A. Introduction

It is well established that, under District of Columbia law, an employee handbook such as the Howard University Faculty Handbook defines the rights and obligations of the employee and the employer, and is a contract enforceable by the courts. See *Greene v. Howard Univ.*, 134 U.S. App. D.C. 81, 412 F.2d 1128, 1132 (D.C. Cir. 1969); *Howard Univ. v. Best*, 484 A.2d 958, 970 (D.C. 1984). Our analysis of this case must, therefore, begin with an examination of the Faculty Handbook. The Faculty Handbook provides that, "subject to provisions in Section VI [specifying dismissal procedures], an appointment with indefinite tenure is terminable by the University only for cause or on account of extraordinary financial emergencies." Among the enumerated causes is "neglect of professional responsibilities." The parties agree that Dr. McConnell enjoyed an appointment with indefinite tenure and that the sole ground for his

dismissal was neglect of professional responsibilities. Thus, the relevant issues are whether Dr. McConnell, by failing to teach four classes, neglected his professional responsibilities, and, assuming that he did, whether the University followed the procedures set forth in the Faculty Handbook.

B. Neglect of Professional Responsibilities

The District Court apparently viewed the term "neglect of professional responsibilities" as if the words "neglect of" were interchangeable with the words "failure to meet." It held that "it seems incontrovertible that the refusal to teach a class (flouting direct administration orders in the process) must constitute a failure to meet a professional responsibility." 621 F. Supp. at 331. It is difficult to doubt the assertion that teaching assigned classes was part of McConnell's professional responsibilities and that, by not teaching assigned classes, McConnell failed to meet a professional responsibility. "Failure to meet professional responsibilities," however, is not the standard set forth in the Faculty Handbook for dismissal for cause; "neglect of professional responsibilities" is. Thus, the issue that must be resolved is whether Dr. McConnell's failure to teach assigned classes constituted neglect of his professional responsibilities.

Dr. McConnell contends that his failure to teach the classes did not constitute neglect of professional responsibilities. He maintains that the McNeil incident disrupted the class and that he needed to reestablish an appropriate teaching atmosphere before he could resume teaching. In essence, Dr. McConnell asserts that, had he persisted in attempting to teach the class without resolving the incident, he could not teach effectively, and would thus be neglecting his professional responsibilities by continuing to teach in such a situation. Dr. McConnell argues that the District Court erred in viewing his failure to teach as per se constituting cause for his dismissal.

We agree with the appellant. The term "neglect" necessarily implies an assessment as to whether Dr. McConnell's actions, given the entire factual context, were within the acceptable range of conduct within his profession. The Grievance Committee's findings suggest that Dr. McConnell's actions may well not have constituted a neglect of professional responsibilities. The Grievance Committee stated that, in its view, Dr. McConnell's decision not to teach the class was an attempt "to restore what [he] believed to be standard teacher-student relationships," *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 8, reprinted in *Appellant App*. 68, and that "it is convincingly clear from the evidence presented that his departmental colleagues, including the Departmental Chairman, fail to view him as being professionally negligent." *Id*.

At trial, Dr. McConnell should be allowed to present evidence that, under the facts and circumstances of this case, he acted within the bounds of reasonable behavior for a professor. Among the relevant issues are: (1) whether Dr. McConnell's reaction to the McNeil incident was a reasonable one; (2) whether Dr. McConnell took reasonable steps to resolve the incident; and (3) whether, under the circumstances, including Howard University's alleged lack of action to rectify the McNeil incident, McConnell acted reasonably in deciding not to teach the class until Ms. McNeil either dropped the class or apologized.

In short, we believe that the term "neglect of professional responsibilities," by its very words, includes a consideration of the reasonableness of Dr. McConnell's actions under the totality of the circumstances surrounding them. We also believe that the very concept of termination for "cause" necessarily includes the consideration of mitigating factors. In any event, it is clear that the terms "neglect of professional responsibilities" and "cause" certainly do not explicitly exclude the consideration of reasonableness and mitigating circumstances. So, at worst, the terms are ambiguous and must be construed in keeping with general usage and custom at the University and within the academic community.

In the instant case, the termination procedures set forth in the Faculty Handbook make sense only if the determination as to whether "cause" for termination exists includes an assessment of professional standards in the context of the particular facts and circumstances. The termination procedures include a hearing before a Grievance Committee composed of tenured faculty members. The Grievance Committee, after conducting the hearing, then prepares a report containing findings and recommendations for presentation to the Board of Trustees. The Board then decides whether to adopt the Grievance Committee's recommendations, or to conduct its own review of the record. Such a structure, with fact-finding and recommendations made by a panel of fellow professors, would make little sense if the only relevant issue was whether an established responsibility had not been fulfilled. The contract clearly contemplates an evaluation of a professor's actions according to the standards of the profession and a determination as to whether, given the facts and circumstances, the actions of the professor constituted cause for termination. A wooden exercise in single-issue fact-finding is simply not contemplated under this structure.

In viewing Dr. McConnell's failure to teach as *per se* constituting cause for his dismissal, the District Court foreclosed consideration of the reasonableness of the appellant's actions and possible mitigating circumstances. This was error.

C. Breach of the Contract by the University's Inaction

Dr. McConnell also presents an alternative theory supporting his decision not to teach the classes. He claims that Howard University had a duty to act to rectify incidents such as the September 6 incident involving Ms. McNeil. Dr. McConnell maintains that if the University was in breach of its obligations to him as a result of its actions (or inaction) in the wake of the McNeil incident, it cannot terminate his appointment for his subsequent decision not to teach the classes.

There is no specific language in the Faculty Handbook regarding the University's role in resolving student/teacher grievances. However, Dr. McConnell argues that this duty is implied by the nature of the University setting and the existence of the Howard University Code of Conduct and of the System of Judiciaries that has been set up to enforce the code. The Code of Conduct states that "[a] student may be disciplined for...'[the] obstruction or disruption of teaching...or [of] other University activities.'" The Grievance Committee agreed with Dr. McConnell. It found that "the right to teach and the responsibilities associated with it are deeply rooted in academic tradition and reenforced by various organizational structures in the academy." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 7, reprinted in *Appellant App*. 67. The Committee believed that "[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships." *Id*. at 8, reprinted in *Appellant App*. 68.

At trial, Dr. McConnell should be allowed to demonstrate that the University owed him a contractual duty to protect his professional authority in the classroom and that the University's actions constituted a breach of that duty. In this regard, we find it notable that, although Dean Lane stated that "the University strongly disapproves of the type of behavior attributed to Miss McNeill" and that "repetition of a similar incident on the part of the student [would not] be tolerated," the University apparently took no steps to address the incident. If it was powerless to do so, Dean Lane's statement that repetition of a similar incident would not be tolerated is curious. Furthermore, although Elementary Functions I was offered in multiple sections, the University evidently took no steps either to transfer Ms. McNeil to a different section, or to assign Dr. McConnell to a different section. The Grievance Committee's evaluation of the University's actions was blunt and damning: "No one representing the University seemed inclined to do anything except to prefer charges against Dr. McConnell." *Report of the Liberal Arts Grievance Committee* dated December 21, 1983 at 7, reprinted in *Appellant App*. 67.

If Dr. McConnell can show that the University owed him a duty to protect his professional authority, there is still an additional showing that must be made. He must also prove that, under the contract, the breach either relieved him of his obligation to teach or that the

breach itself constituted a mitigating factor precluding the University from terminating his appointment for cause.

We cannot at this point offer a final assessment of the appellant's position with respect to the University's alleged inaction. But we find that he has presented a claim that easily withstands summary judgment. As this court noted in *Greene v. Howard University*, 412 F.2d at 1135, "contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars." Surely, "among a community of scholars," one who is assigned to teach must have some semblance of control over the classroom. If control is lost, learning invariably will be obstructed and the teacher will be unable to fulfill a professional responsibility. In such a situation, it seems quite clear that there are a number of issues to be resolved: (1) Has there been a significant breakdown in classroom discipline, i.e., such that teaching and learning are or may be impaired? (2) If so, does the fault lie with the students, the instructor, or both? (3) What is the role of the University in such a situation? and (4) If it has a role to play, has the University acted to protect the professional authority of the teacher and/or to restore order to the classroom?

On the facts of this case, the District Court must consider whether Dr. McConnell was due some support from the University that he did not receive in connection with a student disciplinary matter. This matter could not be resolved on summary judgment because the parties have vastly different views about the responsibility of the University under the contract to protect Dr. McConnell's professional authority in the classroom. The resolution of this issue – along with the resolution of the issues pertaining to reasonableness and mitigating circumstances – is essential to any determinations regarding "neglect of professional responsibilities" and "cause" to justify the termination of a tenured appointment.

* * * *

III. THE STANDARD OF REVIEW OVER THE UNIVERSITY'S DECISION

The foregoing analysis of Dr. McConnell's breach of contract claims assumes that the trial court's posture in reviewing these claims is no different than the posture a court would take in analyzing any breach of contract claim. Namely, the court is charged with interpreting the meaning of the contractual terms, and determining whether the facts establish that a party has breached those terms. Both the District Court and the appellee have advanced reasons why a court should not engage in its typical role in this case, and ought to take a more deferential stance toward Howard University's decision to terminate Dr. McConnell's tenured appointment at the University. These arguments are without merit.

A. Contractual Limitation of Judicial Review

The District Court seized on language in the section of the Faculty Handbook dealing with the dismissal procedures stating that "the decision of the Board of Trustees shall be final." Faculty Handbook, reprinted in *McConnell v. Howard Univ.*, 621 F. Supp. at 335. It assumed that the "decision" referred to is the decision whether to terminate the services of the faculty member. The court then concluded:

> The plaintiff having agreed to accept employment on those terms, this Court should uphold the Board's decision and grant defendant's motion for summary judgment, unless the Board's decision was arbitrary, or plaintiff has proffered evidence of improper motivation or irrational action.

621 F. Supp. at 331.

In other words, according to the trial court, any Trustees' decision to fire a tenured faculty member is largely unreviewable, with judicial scrutiny limited to a modest inquiry as to whether the Trustees' decision was "arbitrary," "irrational," or infected by improper motivation. Such a reading of the contract renders tenure a virtual nullity. Faculty members like Dr. McConnell would have no real substantive right to continued employment, but only certain procedural rights that must be followed before their appointment may be terminated. We find this to be an astonishing concept, and one not compelled by a literal reading of the Faculty Handbook.

We begin with the language from the Faculty Handbook relied on by the District Court. It is clear to us that the language in the contract is not intended to shield decisions of the Board of Trustees from judicial scrutiny, but is designed to indicate the endpoint of the internal grievance procedures.

* * * *

Given the structure of the prescribed procedures, it appears that the Board of Trustees has tremendous leeway to reject findings of the Grievance Committee. If we were to adopt a view limiting judicial review over the substance of the Board of Trustees' decision, we would be allowing one of the parties to the contract to determine whether the contract had been breached. This would make a sham of the parties' contractual tenure arrangement.

On remand, the trial court must consider de novo the appellant's breach of contract claims; no special deference is due the Board of Trustees once the case is properly before the court for resolution of the contract dispute.[2]

B. Administrative Agency Analogy

Howard University attempts to argue from higher education cases involving public universities, usually involving due process claims, that courts should view the decisions of private universities as if they were made by government agencies. There is no basis for this conceptual leap. See Rosenblum, "Legal Dimensions of Tenure," in *Faculty Tenure*, *supra*, at 161 ("A tenure plan promulgated by a governing board of a public institution is generally considered a form of sublegislation having the force of law.... In a private institution, any right to tenure is contractual rather than statutory."). The public university cases often involve situations in which there is no contract, or where no contract claim is alleged.

* * * *

Frequently, the only issue in these cases is whether, by taking certain disciplinary action, the university violated due process. By the very nature of such claims, the focus is on the reasonableness of the university's actions.

Here, in contrast, there is a contract to review, and it has been brought into issue by the appellant's legal complaint. The reasonableness of the University's actions is relevant only insofar as the actions are consistent with the parties' contract. It would make no sense for a court blindly to defer to a university's interpretation of a tenure contract to which it is an interested party. Moreover, the theory of deference to administrative action flows from prudential concepts of separation of powers, as well as statutory proscriptions on the scope of judicial review. Obviously, none of those factors apply here. The notion of treating a private university as if it

[2] We do not think that it is possible to argue that courts should view the Howard University termination procedures as a form of arbitration of tenure disputes. Although courts will often take a deferential posture in reviewing decisions made by arbitral bodies, this deference is premised on the fact that the arbitral remedy is one agreed upon by the parties and is fair. Even if it could be said that the parties "agreed" to make the Board of Trustees an arbitral body (as supplemented by the role of the Grievance Committee), we cannot say that this remedy would be a fair one. In *Manes v. Dallas Baptist College*, 638 S.W.2d 143 (Ct. App. Tex. 1982), the court rejected just such a claim: If the Board of Trustees was considered to be an arbitrator, the effect would be to allow one of the parties to act as judge in its own case. Such a result is totally inconsistent with the theory of arbitration. *Id.* at 145. We agree and reject the arbitration analogy.

were a state or federal administrative agency is simply unsupported where a contract claim is involved.[3]

* * * *

C. The Special Nature of the University

The appellee urges us to adopt the view of the District Court that "a federal court should hesitate before significantly intruding in the administration of university affairs, particularly in a three-cornered dispute between a professor, a student and a university." 621 F. Supp. at 330 n.13. We find no support for this argument in this case. This is not a "three-cornered dispute;" rather, what is at stake are the contractual rights of Dr. McConnell. However, taking the point more broadly, we do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many area of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the use of expert testimony. Moreover, even if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them. We find no precedent in the District of Columbia for the District Court's view, nor do we find persuasive precedent in any other jurisdiction.

* * * *

In a thoughtful examination of the role of the courts in reviewing claims involving dismissal determinations, Clark Byse and Louis Joughin have written:

> The role of the courts in reviewing dismissal determinations by institutions which have sound, written tenure plans should be quite conventional and relatively simple. It would be the court's responsibility to determine whether the requirements of the plan had been complied with. Was there failure to follow the stated procedure? Were the facts proved by a preponderance of the evidence? Did the proved facts constitute disqualifying conduct within the meaning of the

[3] It is beyond doubt that Howard University is not a public university. See *Sanford v. Howard Univ.*, 415 F. Supp. 23, 29 (D.D.C. 1976), aff'd mem. 549 F.2d 830 (D.C. Cir. 1977); see also *McConnell v. Howard Univ.*, 621 F. Supp. at 330 n.13.

plan? Byse & Joughin, "Tenure in American Higher Education: Specific Conclusions and Recommendations," reprinted in *Academic Freedom and Tenure* 210, 214 (L. Joughin ed. 1969).

We find no reason not to do here what courts traditionally do in adjudicating breach of contract claims: interpret the terms of the contract and determine whether the contract has been breached. On remand, we expect the District Court to fully consider Dr. McConnell's contract claims.

* * * *

V. CONCLUSION

We recognize that this is an important case. The termination of a tenured faculty member's appointment is a serious matter. In this appeal, Dr. McConnell has asked this court to determine his rights under his employment contract with Howard University. He does not ask for special treatment, but merely wishes Howard University to be made to account for its actions under its contract with him. We think that Dr. McConnell has raised a number of arguments that, if proved, would entitle him to relief under his contract. With the guidance provided in this opinion, we remand the case to the District Court so that Dr. McConnell will have an opportunity to prove his case.

As stated more fully above, this case is to be tried de-novo, just as with any other contract case. In order to prevail on the merits, Dr. McConnell must establish either that "cause" did not exist to terminate his appointment or that the prescribed internal procedures were not followed. As a matter of law, Howard University could only terminate Dr. McConnell's appointment under the contract if, in light of all the surrounding facts and circumstances and the prevailing professional norms, Dr. McConnell's failure to teach assigned classes constituted neglect of professional responsibility. Thus, Dr. McConnell may offer evidence that there were mitigating factors in his situation that would lead a reasonable professor to decide not to teach the classes. Dr. McConnell also may attempt to establish at trial that Howard University breached an obligation owed to him in the way it handled the incident involving Ms. McNeil, and that, under the contract, this breach would relieve Dr. McConnell of his duty to teach the classes.

Finally, Dr. McConnell can also seek to establish that the procedures used by Howard University did not comply with the contractual requirements.

* * * *

Notes and Questions

1. What is the source of the contractual terms or promises that the court is interpreting in this case? Could there be other sources of such contractual terms (see the Text Section 5.2.)? What methodology does the court employ in interpreting these contractual terms? Is it a methodology that is favorable to (protective of) faculty members' rights?

2. If you were responsible for the university's litigation planning for this case, what position(s) might you assert or what actions might you take on remand? Would you seek to settle the case? On what terms?

3. Note the appellate court's discussion concerning "deference," and the difference between the appellate court's and trial court's views on this point. What is the basis for the assertion that courts should be more deferential to the decisions of universities than to those of other parties in litigation? Is the appellate court correct in rejecting this assertion in this case? Are there other types of cases in which judicial deference to the institution's decision would be justifiable?

4. The appellate court judge who wrote the opinion in this case is a former university professor (law). He also is an established scholar in the fields of higher education law and labor and employment law. Do you think this background may have influenced the result in this case? Legitimately so? For the better?

SEC. 5.6.2. Termination of Tenure for Cause

San Filippo v. Bongiovanni
961 F.2d 1125 (3d Cir. 1992)

HUTCHINSON, *Circuit Judge*.

I.

In this certified interlocutory appeal, Rutgers, the State University of New Jersey (Rutgers or the University), its Board of Governors (Board) and the Board's individual members appeal an order of the United States District Court for the District of New Jersey. That order granted appellee, Joseph San Filippo, Jr.'s (Dr. San Filippo's) motion for partial summary judgment as to liability on one of several of his claims under 42 U.S.C.A. § 1983 (West 1981) that Rutgers violated his constitutional rights when it stripped him of academic tenure and discharged him from his position as a professor at that University. The order granting Dr. San Filippo partial summary judgment concerned his claim that the grounds set forth in the University's regulations for dismissing a tenured professor violated his Fourteenth Amendment due process right to fair notice that the acts he was charged with could lead to dismissal because they were void for vagueness.[1]

The sole question before us on this certified appeal is whether the University's regulations were indeed too vague to meet the fair notice requirement incorporated in the due process clause of the Fourteenth Amendment to the Constitution. Therefore, we cannot consider or decide Dr. San Filippo's other express or implied claims, or any implied claim that his discharge violated his constitutional right to substantive due process.[2]

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[1] Dr. San Filippo's void for vagueness claim is particularly set forth in paragraph twenty-seven of his Third Amended Complaint. It reads: The actions of defendants complained of (including the actual dismissal, as described above) violated plaintiff's due process rights under the 5th and 14th Amendments and the comparable provisions of the New Jersey Constitution in that the University regulations under which he was disciplined are vague and uncertain and did not fairly warn him that the acts of which he was accused were violations of University rules. Furthermore, the rules, by specifically mentioning radically different offenses for which dismissal was appropriate, did not give plaintiff fair warning that the type of offenses involved here were so serious that they could serve as the basis for dismissal.

[2] San Filippo's other express claims include violation of his rights to procedural due process, equal protection, and free speech under the United States and New Jersey Constitutions, and a New Jersey state law breach of contract claim. San Filippo's Third Amended Complaint does not include any express claim that the Board's action to revoke his tenure and discharge him for reasons the contract did not permit was a violation of substantive due process. Paragraphs seventeen and eighteen do, however, contain allegations from which it might be possible to infer a substantive due process claim. They state: .

The applicable dismissal regulations state that tenured professors may only be dismissed for adequate cause. Regulation 3.93. Adequate cause is defined as "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude . . . ." Regulation 3.94. These regulations are no less definite than provisions permitting discharge for immoral conduct, just cause or conduct unbecoming a teacher. Such provisions have been upheld against void for vagueness attacks in cases involving the discharge of teachers, professors and other public employees. Accordingly, we will vacate the district court's order granting Dr. San Filippo's motion for summary judgment as to liability on his 42 U.S.C.A. § 1983 void for vagueness claim and remand the case to the district court for further proceedings.

II.

Dr. San Filippo brought suit against the University in the United States District Court for the District of New Jersey. He based his federal claims on 42 U.S.C.A. § 1983. That statute states:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The University moved for summary judgment on several grounds, including Dr. San Filippo's claim that the University's regulations governing the dismissal of tenured faculty

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. . . "The relevant rule of dismissal is Rule 3.94 which mentions the following offenses: 'failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence or incapacitation, or conviction of a crime involving moral turpitude.' In such cases, and in only such cases, dismissal is appropriate. But none of the accusations against plaintiff fit within any of the categories mentioned in Rule 3.94 or are remotely covered by, or analogous to, such defined offenses. . . ."

* * * *

18. The conclusion is inescapable that defendants have violated their own standards by invoking as a basis for dismissal conduct which under its own rules do not justify dismissal.

members were so vague that they violated his right to due process. Dr. San Filippo filed a cross-motion for partial summary judgment as to liability on this same claim. After oral argument, the district court held that the University's discharge regulations, as applied to Dr. San Filippo, were void for vagueness, as they did not give him fair notice that the charges against him could lead to dismissal. Accordingly, it granted Dr. San Filippo's cross-motion.

Ancillary to its order granting Dr. San Filippo partial summary judgment on his void for vagueness claim, the district court denied the University's motions for summary judgment on the void for vagueness claim; to strike certain affidavits and exhibits; and to strike Dr. San Filippo's claim for loss of consulting fees. The district court granted the University's motions to strike Dr. San Filippo's claims for punitive damages, front and back pay, and research grants. It did not decide the remaining motions before it nor did it address the question whether the record before the Board was sufficient for it to find that Dr. San Filippo had committed the particular acts of misconduct that the Board had decided justified his dismissal.

Later, the University moved the district court to certify the void for vagueness question for interlocutory appeal, and to stay the action pending disposition of its petition for permission to appeal and pending appeal if permission is granted. The district court granted the motion . . . This Court then granted the University permission to appeal from the certified interlocutory order.

III.

Dr. San Filippo became a tenured professor of chemistry at the University in 1984. Before the University discharged him, he was highly respected by his peers for his professional achievements.

On January 6, 1986, the Dean of the Faculty of Arts and Sciences gave Dr. San Filippo written notice that various complaints had been made against him regarding his conduct towards visiting Chinese scholars brought to the University to work with him on research projects. The allegations included verbal abuse, harassment, exploitation, attempted exploitation, intimidation, fraud, deceit, and misrepresentation. Dr. San Filippo responded with a written denial.

Over the next several months, various administrative actions were taken to investigate and dispose of the charges against Dr. San Filippo. The investigative phase ended on October 1, 1986, when Rutgers President Edward J. Bloustein, issued a formal charging document pursuant to University Regulation 3.97. The document stated that Dr. San Filippo "violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, [Dr. San Filippo has] failed in [his] responsibilities to this University." Regulation 3.91 sets forth the Statement on Professional

Ethics adopted by the AAUP.* The document then stated the charges "meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 and constitute gross neglect of established university obligations appropriate to your appointment and evidence a failure to maintain standards of sound scholarship and competent teaching." Regulation 3.93 states that a tenured professor may be dismissed for "adequate cause" as defined in section 3.94. Regulation 3.94 defines adequate cause as "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime of moral turpitude ...."

Specifically, the document set forth the following charges:

1. Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to these individuals, as set forth more fully in the attached documents, is as follows:

a. You took advantage of your professional position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

b. You attempted to exploit Ms. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for you.

c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $ 700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage for Mr. Gao or Mr. Xiao.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her

* [Editor's footnote]. The AAUP *Statement on Professional Ethics* may be found at: http://aaup.org/report/statement-professional-ethics.

in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

2. On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

3. You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:

a. On or about August 1985, Ms. Abbie Lieber, a secretary who works solely under your supervision, submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had not performed any extra work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

4. You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows Chinese scholars who you knew did not have appropriate credential[s], and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact that clearly established that they did not have the credentials to be post-doctoral fellows.

5. During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4 above. One of the letters of reference submitted by you purportedly was written and signed

by Liu Guozhi. In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of that fact and did not make it known when you submitted the letter.

6. On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-Min He, and Peng Zhou to perform work in your laboratory.

The document concluded that the charges against Dr. San Filippo, if proven, could be a basis for his dismissal, and that if Dr. San Filippo did not exercise his preliminary right to a hearing before a panel of five members of the University Senate (the Panel), President Bloustein would recommend to the Board of Governors (the Board) that Dr. San Filippo be dismissed. Dr. San Filippo requested a hearing before the Senate Panel and his request was granted. The Panel hearing took 250 hours and lasted forty-six days. Following it, the Panel sustained charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5, and 6 after determining that the facts alleged within those charges were true.

The Panel sustained four of the five subparts of the first charge that Dr. San Filippo had "violated the standards of professional ethics required of all faculty members" through his abuse of visiting Chinese scholars at the University. With respect to charge 1a, the Panel found that Dr. San Filippo's verbal abuse and intimidation of the scholars created a climate in which they felt compelled to perform domestic services for Dr. San Filippo:

> Professor San Filippo took advantage of his professional position and exploited these visiting scholars in a manner that was demeaning and insensitive. Given his abusive and threatening treatment of Messrs. Gao and Xiao, their recent arrival in the United States, and his position as their supervisor, Messrs. Gao and Xiao had little choice in their response.

The Panel did not sustain charge 1b, which asserted that Dr. San Filippo "attempted to exploit" another Chinese visiting scholar by "attempting to make her perform domestic work" for him, because it found the evidence insufficient to support the charge. Charge 1c, which asserted that Dr. San Filippo had deducted money from the salary of two visiting scholars to cover health insurance premiums without obtaining any coverage for them, was sustained as to one visiting scholar, but not as to the other.

Charge 1d concerning Dr. San Filippo's use of threatening and abusive language toward the Chinese scholars was sustained as well. These outbursts concerned the scholars' work performance, a request by one to be taken to the hospital for an injury sustained while performing services for Dr. San Filippo at his home, and the failure of two scholars who had authorized deductions for health insurance premiums from their stipends to otherwise obtain and pay for health insurance from the Chinese consulate.

The Panel also sustained charge 1e concerning Dr. San Filippo's treatment of Zong Ping Chen. It did so after three witnesses testified that Dr. San Filippo had "used a loud, harsh, angry voice and yelled and used obscenities in his discussion with Ms. Chen." On this charge, the Panel found Dr. San Filippo's conduct unacceptable not only because he abused Ms. Chen but also because his interruption of her class "disrupted . . . the learning environment."

The Panel additionally sustained the second charge. While the Panel found that Dr. San Filippo did not necessarily "direct" Mr. Xiao to use Mr. Zhou's insurance card, it determined that this misrepresentation would not have occurred were it not for Dr. San Filippo's approval of the scheme. Further, while Dr. San Filippo paid Mr. Xiao's hospital bill, the Panel found his payment delinquent in that it only happened after the bill "was in the hands of a collection agency."

The Panel only sustained charge 3b concerning Dr. San Filippo's involvement with the submission of false time reports. The Panel sustained this charge because it found Dr. San Filippo had authorized Marilyn Brownawell, an employee working directly under his supervision, to submit time reports that resulted in pay from the chemistry department's mass spectrometer account for times when he knew she was on vacation. The Panel considered Dr. San Filippo's defense that he had an "informal" agreement with Ms. Brownawell regarding her compensation which explained the false time report but found that, even if true, it did not present a mitigating circumstance. It noted that this "informal" agreement resulted in less money being taken out of Dr. San Filippo's grant funds.

The Panel sustained the fourth charge as well. Among the sustained charges, this charge seems most closely related to the requirement stated in Regulations 3.91 and 3.94 that professors "maintain standards of sound scholarship and competent teaching." This charge concerned the appointment of two visiting scholars, Cong-Yuan Guo and Peng Zhou as postdoctoral fellows. The Panel did not sustain it with respect to Mr. Guo but did with respect to Mr. Zhou. Dr. San Filippo had received a memorandum from the University's Vice President for Academic Affairs before he appointed Mr. Zhou stating that only individuals with doctoral degrees could be postdoctoral fellows. Mr. Zhou did not have a doctoral degree. Dr. San Filippo had also been notified by the chair of the chemistry department that Mr. Zhou did not possess the qualifications necessary to hold the position of a postdoctoral fellow. The Panel noted that Mr. Zhou's

classification as a postdoctoral fellow gave Dr. San Filippo the advantage of a lower charge against his research grant.

The fifth charge, which asserted that Dr. San Filippo had submitted an individual's application to the University's graduate program knowing that it contained a recommendation letter of questionable integrity was also sustained. The recommendation was presented as an original letter from Liu Guozhi, a professor in China. In fact, it was the applicant's translation of a letter from Professor Guozhi which Dr. San Filippo had edited and on which translation the applicant had signed Professor Guozhi's name in the Chinese characters that represented the professor's signature. In sustaining this charge against Dr. San Filippo, the Panel noted there was "insufficient evidence to sustain a charge that there was no original letter of recommendation" from the professor who purportedly wrote the letter that was submitted.

Lastly, the Panel sustained the sixth and final charge, which asserted that Dr. San Filippo had allowed three graduate students, Cong-Yuan Guo, Zhen-min He, and Peng Zhou, to work in his laboratory after being specifically instructed in a memorandum from the chair of the chemistry department that he was not to allow them to work there pending investigation of the complaints lodged against him by visiting Chinese scholars. The Panel noted that the prohibition of Dr. San Filippo's use of graduate students was a "very strong action," but concluded it was not unreasonable given the gravity of the allegations against Dr. San Filippo and therefore should have been obeyed.[10]

Based on its determination that charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5, and 6 were true, the Panel concluded that "the matters charged and proved" met the standard for dismissal of a tenured professor set forth in the University Regulations and, after taking into consideration Dr. San Filippo's "previous record and his value to the University" pursuant to Regulation 3.99, recommended to the Board of Governors that he be stripped of tenure and discharged from his position of professor. The Panel Report stated:

> Professor San Filippo has exploited, threatened, and been abusive of individuals who have worked under him in a professional capacity. In addition, we find that Professor San Filippo has demonstrated a serious lack of integrity in his professional dealings. His excellent research record and his contribution to the University are laudatory, and were considered by the Panel in reaching its decision. The Panel

[10] The Panel reported Dr. San Filippo's response that he did not adhere to his department chair's order not to permit additional graduate students to work in his lab because Dr. San Filippo thought that it would have been "the death of his research program, and that [the] memo was unconstitutional, in violation of the principles of due process and academic freedom, and sections of the AAUP Bargaining Agreement."

unanimously recommends, however, that Professor San Filippo be dismissed from the University.

After reviewing the evidence and hearing oral argument as to each charge sustained by the Panel, the Board, one member dissenting, affirmed the Panel's conclusions and ordered Dr. San Filippo's immediate dismissal. It concluded that all the sustained charges evidenced "a failure to maintain standards of sound scholarship and competent teaching." In sustaining ethical charges 1a, 1d, and 1e with respect to Dr. San Filippo's abuse and exploitation of the visiting scholars, the Board relied in part on a portion of the AAUP's *Statement on Professional Ethics* set forth in University Regulation 3.91 concerning a professor's treatment of students.[11] The Board, however, did not expressly rely on the AAUP Statement in sustaining the other charges against Dr. San Filippo. The Board reasoned that, "although the conduct involved in each of these charges is not specifically enumerated in the national AAUP's *Statement on Professional Ethics*, all of these charges flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas."

* * * *

V.

Rutgers argues that its dismissal regulations incorporate the AAUP *Statement on Professional Ethics* that is set out in Regulation 3.91 and relied on in part by the Board in its decision to discharge Dr. San Filippo. We reject that argument and instead agree with the district court that the *Statement on Professional Ethics* that appears in Regulation 3.91 is not incorporated into Regulation 3.93, the regulation setting forth the permissible bases for the dismissal of tenured faculty. We do so essentially for the reasons that the district court set forth in its published opinion.

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[11] That portion of the AAUP's Statement in Regulation 3.91 states:

> As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

That conclusion, however, is not dispositive of Dr. San Filippo's void for vagueness claim. The question remains whether the dismissal standards set forth in Regulations 3.93 and 3.94, absent incorporation of the ethical standards set forth in Regulation 3.91, were void for vagueness. Our task in deciding this question is complicated by the way the parties have presented their arguments, both here and in the district court. In both fora they devoted most of their attention to the incorporation question. They devoted little attention to the remaining question, *i.e.*, whether the dismissal regulations absent 3.91 are void for vagueness.

The University, in the district court and in its appellate brief, did mention the argument that its general standard of "sound scholarship and competent teaching," absent incorporation of Regulation 3.91, could withstand a void for vagueness attack when considered in the context of the academic community's shared professional standards. Dr. San Filippo also argued this issue before the district court and devoted a section of his appellate brief to it. Thus, although the parties mainly focused on the incorporation issue, there is no unfairness to Dr. San Filippo in considering whether he has produced evidence that could show the University's dismissal standards, absent Regulation 3.91, are unconstitutionally vague.

Additionally, the district court had an opportunity to consider whether the University's discharge regulations absent Regulation 3.91 are void for vagueness and it did so. After concluding that Regulation 3.91 was not incorporated into the University's dismissal regulations so that purely ethical violations cannot be considered a dismissible offense, the district court also concluded that the dismissal regulations absent Regulation 3.91 were void for vagueness. This is evidenced by the district court's statement that "as applied to the conduct charged in this case, 'failure to maintain standards of sound scholarship and competent teaching' is void for vagueness."

Under these circumstances, we believe it is both fair and appropriate for us to consider whether the general dismissal standards in Regulations 3.93 and 3.94, absent incorporation of the ethical standards in Regulation 3.91, are unconstitutionally vague.

The due process clause of the Fourteenth Amendment says that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Due process requirements apply to Dr. San Filippo because his tenured faculty position is a property interest. In *Board of Regents v. Roth*, 408 U.S. 564, 571(1972), the Supreme Court of the United States said that in determining whether there is a property interest involved, and thus whether due process requirements apply, courts must look to the nature of the interest involved. "Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 572. Whenever a "person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," a property interest is involved and due process requirements apply. It follows from these

principles that a tenured university professor has a property interest in his position, and thus cannot be deprived of that position without due process.

Generally, cases involving dismissals in violation of the principles set out in *Roth* involve pure procedural due process challenges concerning unfairness in the manner of dismissal. The district court has yet to rule on Dr. San Filippo's pure procedural due process claim and that claim is not before us on this interlocutory appeal. Dr. San Filippo's void for vagueness claim, however, poses a different problem. It asserts a violation of procedural due process apart from the manner in which he was dismissed. He claims the standards in the University's dismissal regulations are so broad and general that they did not put him on notice that he could be dismissed for engaging in the conduct with which he was charged.

The void for vagueness doctrine arose as an aspect of Fourteenth Amendment due process in the context of criminal statutes because it was thought unfair to punish persons for conduct that they had no notice could subject them to criminal punishment. It has been further applied in civil cases involving the discharge of public employees. *See Arnett v. Kennedy*, 416 U.S. 134 (1974). Lesser degrees of specificity are required to overcome a vagueness challenge in the civil context than in the criminal context, however, because the consequences in the criminal context are more severe.

In the university context, First Amendment issues sometimes arise with respect to academic freedom. This, however, does not affect our decision today. Dr. San Filippo does not raise an overbreadth challenge to the University regulations. He was not dismissed, nor does he allege that he was dismissed, for any reason relating to anything that could be considered a free expression issue. We note that he does make a First Amendment retaliation claim unrelated to his void for vagueness claim. That claim has not yet been considered by the district court and is not presently before us.

The doctrine is based on the idea of fairness. Its purpose is only to give "fair warning" of prohibited conduct. *Colten v. Kentucky*, 407 U.S. 104 (1972). The relevant inquiry is whether the statute or standard is:

> sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally, 269 U.S. at 391 . . . It is well established the inquiry is undertaken on a case-by-case basis. The statute or standard is examined as to whether it is vague as applied to the affected party. *See United States v. Mazurie*, 419 U.S. 544, 550, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975).

In the criminal context, the Supreme Court has held that since vagueness attacks are based on lack of notice, "they may be overcome in any specific case where reasonable persons would know their conduct puts [them] at risk" of punishment under the statute. Thus, to be constitutional, criminal statutes need only give "fair warning" that certain conduct is prohibited. Simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. *United States v. Powell*, 423 U.S. 87, 94, 46 L. Ed. 2d 228, 96 S. Ct. 316 (1975). Certainly if such general standards in criminal statutes are sufficiently precise to withstand attack as void for vagueness, analogous standards in the civil context where less specificity is required satisfy due process.

In the public employment context, the Supreme Court has reiterated that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge. Such standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge. *Arnett*, 419 U.S. at 159. Accordingly, broad public employee dismissal standards have been upheld against void for vagueness attacks. . . .

* * * *

[W]hile Rutgers' dismissal regulations are broad and general, they are not unconstitutionally vague. Dismissal for failure to maintain "standards of sound scholarship and competent teaching" does not fail to specify *any* standard for dismissal but rather provides a standard which encompasses a wide range of conduct. We reject the district court's narrow reading of this standard based on the absence of a "catch-all" provision in Rutgers' dismissal regulations, and embrace the "common sense" approach of *Arnett* and its progeny. Professors at Rutgers can evaluate their behavior's conformity to the dismissal regulations. A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for "failure to maintain standards of sound scholarship and competent teaching." He would know that the standard did not encompass only actual teaching or research skills. Here, all of Dr. San Filippo's charged actions sprang from his role as a faculty member at the University. It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior's directive, and to be truthful and forthcoming in dealing

with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to "maintain standards of sound scholarship and competent teaching." We find further support for our holding in the following statement by the Panel:

> Through these proceedings, the Panel has felt particular concern for pressures on all of the Chinese scholars that have been involved in the matter before the Panel. Coming to a foreign land to study can be unsettling enough, but to become embroiled in a dismissal proceeding can do nothing to aid their scholarship or personal well being, or the reputation of the University. We urge the University to avail itself to the fullest to be supportive of foreign scholars and to be sensitive to the pressures that can be placed on them, both willingly and unwittingly, because of their inexperience with our culture and their dependence on their faculty sponsors and the University as a whole.

Thus, Rutgers' dismissal regulations are not void for vagueness, even though they do not incorporate the ethical standards set out in Regulation 3.91. The general standards of Regulations 3.93 and 3.94 are sufficient to survive a void for vagueness attack. Were we to accept Dr. San Filippo's argument that 3.93 and 3.94 were void for vagueness absent 3.91, the University could never discharge Dr. San Filippo, or any other tenured professor, for any conduct not directly involving teaching or research short of committing a crime of moral turpitude. We are unwilling to countenance such a result.

* * * *

VI.

We will reverse the district court's grant of partial summary judgment in favor of Dr. San Filippo on his void for vagueness claim and its denial of the University's motion on this same claim and remand this case for further proceedings consistent with this opinion.

Notes and Questions

1. How does the AAUP *Statement on Professional Ethics* differ from the dismissal standards in the Rutgers University regulations? Would the AAUP Statement provide grounds for discharging a professor if that Statement had been incorporated into the institution's regulations?

2. If you were given the opportunity to redraft the dismissal regulations discussed in this case, would you make them more specific? More general? What are the advantages and disadvantages of each approach?

3. The court compared the university regulations to state laws authorizing the dismissal of tenured school teachers for "conduct unbecoming a teacher" and concluded that the university regulations were at least as clear as that state law. Do the university regulations provide adequate warning to a professor of the standard of behavior that is required?

4. If the faculty panel had refused to sustain any of the charges against San Filippo, could the university still have discharged him? What information would you need in order to answer this question correctly?

5. On remand, the district court awarded summary judgment to the university on all of San Filippo's claims, including one involving First Amendment issues. The appellate court affirmed summary judgment for the university on San Filippo's due process claims, but reversed and remanded on the First Amendment claims [30 F.3d 424 (3d Cir. 1994)]. San Filippo had a history of complaining about the conduct of his chemistry department colleagues, and asserted that the dismissal was, in part, in retaliation for those complaints. How should a college or university deal with an individual who engages in serious misconduct, but who has also engaged in allegedly protected activity, such as whistleblowing or complaining about arguably unlawful or unethical conduct by colleagues?

SEC. 5.7.2. The Public Faculty Member's Right to Constitutional Due Process

Board of Regents of State Colleges v. Roth
408 U.S. 564 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law, a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, under Wisconsin law is entitled to nothing beyond his one-year appointment.[2] There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to

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[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department) Political Science this (Date:) first day of (Month:) September (Year:) 1968." The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "regulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

[2] Wis. Stat. § 37.31 (1) (1967), in force at the time, provided in pertinent part that:

> "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

certain procedures.[3] A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or nonretention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."[4]

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration,

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[3] Wis. Stat. § 37.31 (1) further provided that:

> "No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

[4] The Rules, promulgated by the Board of Regents in 1967, provide:

> "RULE I – February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."
>
> "RULE II – During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case."
>
> "RULE III – 'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only."
>
> "RULE IV – When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

and that it therefore violated his right to freedom of speech.[5] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.

I.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.[6] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977-979. Undeniably, the respondent's re-employment prospects were of major concern to him – concern that we surely cannot say was insignificant. And a weighing process has long been a part of any

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[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial....Summary judgment is inappropriate." 310 F. Supp. 972, 982.

[6] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379. "While 'many controversies have raged about...the Due Process Clause,'...it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e. g., *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566; *Phillips v. Commissioner*, 283 U.S. 589, 597; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594.

determination of the form of hearing required in particular situations by procedural due process.[8] But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. See *Morrissey v. Brewer*, ante, at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "great [constitutional] concepts...purposely left to gather meaning from experience....They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

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[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut, supra*, at 378. See, e. g., *Goldberg v. Kelly*, 397 U.S. 254, 263; *Hannah v. Larche*, 363 U.S. 420. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra*.

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey v. Richardson*, 86 U. S. App. D. C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374. See, e. g., *Morrissey v. Brewer*, *ante*, at 482; *Bell v. Burson*, *supra*, at 539; *Goldberg v. Kelly*, *supra*, at 262; *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6; *Pickering v. Board of Education*, 391 U.S. 563, 568; *Sherbert v. Verner*, 374 U.S. 398, 404.

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497, 499. See, e. g., *Stanley v. Illinois*, 405 U.S. 645.

II.

"While this Court has not attempted to define with exactness the liberty...guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.

There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Wieman v. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *United States v. Lovett*, 328 U.S. 303, 316-317; *Peters v. Hobby*, 349 U.S. 331, 352 (Douglas, J., concurring). See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury...."*Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 185 (Jackson, J., concurring).

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[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

* * * *

To be sure, the respondent has alleged that the non-renewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.[14]

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers v. McElroy, supra*, at 895-896.

III.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254. See *Flemming v. Nestor*, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court

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[14] *See* n. 5, *supra*. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's non-retention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll v. Princess Anne*, 393 U.S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717. See *Freedman v. Maryland*, 380 U.S. 51; *Bantam Books v. Sullivan*, 372 U.S. 58. See generally Monaghan, First Amendment "Due Process," 83 *Harv. L. Rev.* 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that

secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV.

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * * *

[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment; see *Perry v. Sindermann*, *post*, at 602, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

[17] See, e. g., "Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 *AAUP Bulletin* No. 1, p. 21 (Spring 1970).

SEC. 5.7.2. The Public Faculty Member's Right to Constitutional Due Process

Perry v. Sindermann
408 U.S. 593 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969, the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the co-chairman of his department.

During the 1968-1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status – a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the non-renewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the non-renewal.

The respondent then brought this action in Federal District Court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners – members of the Board of Regents and the president of the college – denied that their decision was made in retaliation for the respondent's

[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three brief affidavits filed by the respondent, the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."

The Court of Appeals reversed the judgment of the District Court. 430 F.2d 939. First, it held that, despite the respondent's lack of tenure, the non-renewal of his contract would violate the Fourteenth Amendment if in fact it was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id*., at 942-943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943-944. We granted a writ of certiorari, 403 U.S. 917, and we have considered this case along with *Board of Regents v. Roth*, *ante*, p. 564.

I.

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

* * * *

II.

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents v. Roth*, *ante*, p. 564, that the Constitution does not require opportunity for a hearing before the non-renewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[3] Nor did it amount to a showing of a loss of property.

But the respondent's allegations – which we must construe most favorably to the respondent at this stage of the litigation – do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official *Faculty Guide* for many years:

> "Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[4] Thus, the respondent offered to prove that a teacher

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[3] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he asserts to college officials that their decision was based on his constitutionally protected conduct. 430 F.2d, at 944. We have rejected this approach in *Board of Regents v. Roth, ante*, at 575 n. 14.

[4] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

> "A. Tenure
>
> "Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, supra*, at 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid*.

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3 A. *Corbin on Contracts* §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

> "A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:
>
> > "(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).
> >
> > . . . .
> >
> > "(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service – and from other relevant facts – that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, *Tenure in American Higher Education* 17-28 (1959).[5]

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F.2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency. Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this case to the District Court is affirmed.

Affirmed.

* * * *

[5] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "property interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth, supra*, at 577. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Notes and Questions

(for both *Roth* and *Perry*)

1. In *Roth*, the Court refuses to find a protected liberty interest because the plaintiff was "simply not rehired." Does the Court mean to suggest that the plaintiff was not injured by the non-renewal? What are the implications of non-renewal for a faculty member's career path?

2. What institutional practices or policies may create a constitutionally protected property interest in one's job? May faculty members in private institutions have such a property interest in their jobs?

3. Would it have made a difference in *Roth* if the plaintiff had previously been granted tenure and the university had sought to terminate tenure? If the faculty member had been dismissed at the end of the first year of an initial two-year appointment?

4. How is *de facto* tenure acquired? How can colleges and universities avoid situations in which faculty acquire *de facto* tenure?

SECS. 5.2. and *5.7. Faculty Contracts* and *Procedures for Faculty Employment Decisions*

Problem 8

Oxford College is a four-year liberal arts college at which excellence in both research and teaching are important criteria for promotion and tenure. The faculty are not represented by a union, but there is an active AAUP chapter on campus.

Mary Smith is an untenured assistant professor of political science. She is in her fifth year on the tenure track, and will be evaluated for tenure beginning next month (it is now late June). Unbeknownst to you, although the faculty handbook requires that all nontenured faculty members be evaluated at the end of each academic year, Mary's department chair has evaluated her twice – once at the end of her first year, and once at the end of the last academic year. In both cases, the written evaluation says that Mary is "making good progress toward tenure" but includes no specific discussion of strengths or weaknesses. Student evaluations of Mary's teaching have been quite negative. The comments say that, in the sections of Political Science 101 that she teaches, she discusses her personal life at great length, bristles when students express conservative political viewpoints, and required all of her students to write a paper, worth half of the course grade, on "Why Bill Clinton was our Greatest President."

On June 27, the Dean of Arts and Sciences calls you for advice. She has just learned from the chair of the Political Science Department that he has received an anonymous letter accusing Mary of plagiarizing her doctoral dissertation. The chair has told the dean that he doesn't think Mary will receive tenure anyway – her departmental colleagues don't like her, her student evaluations are poor, and despite the fact that she has published more than anyone else in the department in the past two years, he now wonders whether those publications are suspect as well, and thinks that this would be another reason to deny her tenure.

The faculty handbook states that the tenure review must commence on July 1 of the faculty member's last probationary year and must be completed by February 1. The handbook has a separate policy addressing allegations of plagiarism that does not involve the department and has no deadlines. The dean wants your advice as to how to proceed.

Would your advice differ depending on whether Oxford College were a public or a private institution?

SECS. 5.6.2., 5.7.2. and *6.2. Standards and Criteria for Faculty Personnel Decisions; Procedures for Faculty Personnel Decisions;* and *Faculty Academic Freedom*

Problem 9

The Dean of the arts and sciences college at a public university has recommended that a professor in the college be denied tenure.

The tenured faculty in the professor's department, the Department of Social Sciences, has voted 4-1 to deny tenure. Before voting, they reviewed the professor's qualifications and performance at the university and met together with the department chair to discuss the case. After the vote, they met with the professor at his request for an exchange of views about his candidacy for tenure, but after this meeting they declined to reconsider their earlier vote. The department chair forwarded the tenured faculty's vote, and his own recommendation that the professor be denied tenure, to the Dean of the college. The chair explained that the faculty had decided, and he agreed, that the professor did not fit into the "multi-disciplinary approach" followed by the department and "was better suited to a single discipline department such as economics." The Dean added her own recommendation to deny tenure.

The professor whose case is under consideration joined the faculty two years ago. Previously, he had been a tenured professor of economics at another university. He came to the university without tenure on the understanding he would be reviewed for tenure in his second year. The professor has been very critical of the curriculum prescribed by his department. To further his views, he ran for and was elected to his department's "Advisory Committee." Animosity developed between the professor and several "old" committee members who had not been re-elected. One of these replaced committee members accused the professor of leading a "conspiracy of new faculty members against those of us who have been here" and called it "a rotten or stinking fish." As this controversy brewed, the professor submitted his tenure application.

The case is now before the President. He may either: (1) affirm the recommendation to deny tenure and submit it to the Board of Trustees, (2) disagree with the recommendation and submit his own recommendation to grant tenure to the Board, or (3) return the case to the department with instructions for reconsideration. The professor has written the President requesting that he reject the department's and Dean's negative recommendations. The professor argues that "I am being ostracized because of my views," that "I have been denied every

semblance of due process," and that "I will take every legal avenue open to me to right this egregious wrong."

Does the law constrain the President in his decision making on this tenure application? How so? What steps should the President take next and why? What are the most major legal and policy considerations that should guide the ultimate decision in this case?

F.

CHAPTER VI: FACULTY ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION

Sec. 6.1. General Concepts and Principles

Salaita v. Kennedy
118 F. Supp. 3d 1068 (N.D. Ill. 2015)

The case is set out in Part I (E) of these materials.

Notes and Questions

1. Why is it relevant that the court determined that Salaita's tweets dealt with a matter of public concern for purposes of its First Amendment anlaysis?

2. At this stage of litigation, the court declined to engage in a full balancing test under *Pickering*? Under such a balancing test, which factors would weigh in favor of the university? Which would weigh in favor of Salaita?

6.1.5. The Foundational Constitutional Law Cases

Porter v. Bd. Of Trustees of N.C. State Univ.
72 F.4th 573 (4th Cir. 2023)

OPINION BY: THACKER

Stephen Porter ("Appellant") filed suit alleging that he suffered adverse employment action in retaliation for unpopular protected speech. The district court dismissed Appellant's complaint. Upon review, we affirm the dismissal because we find that Appellant has failed to allege a causal connection between the only communication that is arguably protected under the First Amendment and the alleged adverse employment action.

I.

A.

Appellant has been a tenured professor at North Carolina State University ("NCSU") since 2011. He teaches courses in graduate-level statistics and research methods in the Department of Educational Leadership, Policy, and Human Development ("the Department"), within the College of Education. At the time Appellant was hired, he joined the Department's Higher Education Program Area ("HEPA"). The HEPA is one of several degree programs within the Department. The Department offers both a master's degree and a doctoral ("Ph.D.") program. There are no undergraduate students in the Department. Appellant has limited involvement with the master's degree program; no master's degree advisees; and does not attend events related solely to the master's degree. Instead, [**3] Appellant alleges that, prior to suffering adverse employment action, he spent considerable time on Higher Education Ph.D. activities, including advising HEPA Ph.D. students; serving on HEPA Ph.D. committees; and actively recruiting prospective Ph.D. students.

In 2015, the College of Education created a Scholar Leader Ph.D. program. As part of this change, each Ph.D. program within the College of Education became part of the Ph.D. Program Area of Study, which is distinct from a Program Area. Appellant alleges that the change created,

"in theory . . . two separate tracks, with [m]aster's degrees and certificates located within the . . . Program Areas, and all Ph.D. programs located within the new Ph.D. Program Areas of Study." J.A. 11. But Appellant alleges that, in practice, the new distinctions were ignored and both master's degree and Ph.D. program matters continued to fall within the parameters of the original Program Areas.

B.

Appellant's Complaint alleges that he has been outspoken in recent years concerning the focus on "so-called 'social justice' affecting academia in general" and "his concern that the field of higher education study is abandoning rigorous methodological analysis in favor of results-driven work aimed at furthering a highly dogmatic view of 'diversity,' 'equity,' and 'inclusion.'" In this vein, Appellant identifies three statements or communications he made between 2016 and 2018 which, in his view, are protected speech. According to Appellant, he was eventually subject to adverse employment actions in retaliation for these three communications. Appellant brings his claims against the Board of Trustees of NCSU; the Chancellor of NCSU; Mary Ann Danowitz, former Dean of the College of Education; John K. Lee, current head of the Department; Penny A. Pasque, former head of the Department; and Joy Gaston Gayles, Professor in the Department and Program Coordinator (collectively, "Appellees").

The first communication occurred in spring 2016. Appellant attended a Department meeting regarding a proposal to add a question about diversity to student course evaluations. Appellant expressed his concern about the proposed question (the "survey question incident") and suggested that the proposal had been made without proper research. According to Appellant, the discussion "was amicable in tone, although perhaps embarrassing" to the presenter. In May 2017, NCSU's Office of Institutional Equity and Diversity issued a report which referenced the survey question incident and labeled Appellant as a "bully." Appellee Pasque became head of the Department at the beginning of 2017-2018 academic year and discussed the report with Appellant during a meeting in November 2017. In January 2018, Appellee Pasque emailed Appellant to restate her concerns regarding "bullying" and invited Appellant to respond. Appellee Pasque's email was later included in Appellant's personnel file without his knowledge.

The second communication relates to an April 2018 article published in the journal *Inside Higher Ed*. *See* Colleen Flaherty, *Questions About Job Candidate's Past*, Inside Higher Ed (Apr. 11, 2018), https://perma.cc/U22C-NKKB; https://www.insidehighered.com/news/2018/04/11/anonymous-faculty-members-nc-state-object-job-candidate-who-was-ousted-ohio-state (last visited July 5, 2023). The article criticized a faculty search committee at NCSU chaired by Alyssa Rockenbach, one of Appellant's colleagues in the Department. The day the article was published, Appellant sent an email (the "faculty hiring email") to all of the Department faculty. The email linked the article and said, "Did you all see this? . . . This kind of publicity will make sure we rocket to number 1 in the rankings. Keep up the good work, Alyssa!"

Appellee Pasque met with Appellant about the faculty hiring email the next week and asked him about his intent in sending the email. Appellant alleges he was concerned that Rockenbach had "cut corners" in vetting a candidate "out of a desire to hire a Black scholar whose work focused on racial issues." Appellant later learned that Appellee Gayles had forwarded the faculty hiring email to Appellee Pasque and expressed her dissatisfaction. Appellant also learned that Rockenbach had forwarded the faculty hiring email to Appellees Pasque and Danowitz, as well as to the Associate Vice Provost for Equal Opportunity and Equity. During a follow up meeting with Appellee Pasque on April 24, 2018, Appellant alleges Appellee Pasque told him "she had spoken with the administration to find ways to exclude [Appellant] from critical aspects of his job. Specifically, she inquired whether [Appellant] had to remain a member of the [HEPA] or whether he could be a member of the department without a Program Area." Nonetheless, Appellant received a good annual evaluation that year, albeit with a notation that he, and all faculty, were expected to be collegial.

The final communication occurred on September 3, 2018, when Appellant published a post on his personal blog entitled "ASHE Has Become a Woke Joke." Appellant's "Woke Joke" post mentioned research his colleague had gathered about the topics for discussion at an upcoming ASHE conference. According to Appellant, this research demonstrated that the focus of the conference had shifted from general, post-secondary research to social justice. Appellant's post concluded with his commentary, "I prefer conferences where 1) the attendees and presenters are

smarter than me and 2) I constantly learn new things. That's why I stopped attending ASHE several years ago . . ." Appellant's blog post generated controversy on social media.

As the 2018-2019 academic year began, Appellee Danowitz met with the HEPA faculty about potentially hiring a new faculty member. Instead of discussing the candidate as planned at a HEPA faculty meeting, Appellee Pasque invited Appellant to a virtual meeting on October 15, 2018, with herself, Appellee Gayles, and two others. In that meeting, Appellee Pasque proposed that Appellant leave the HEPA and join a new program area, the Higher Education Policy Program Area, where Appellee Pasque, Appellant, and the new hire would be the only faculty members. Taken together with their April 24, 2018 meeting, Appellant alleges this was the second time in six months that Appellee Pasque had suggested he leave the HEPA. Appellant asserts that the meeting then focused on his refusal to leave the HEPA and the impact it had on [the Department's] ability to bring in the new faculty member. "In frustration at this apparent ambush, [Appellant] said 'Give me a f***ing break, folks. I was the one who said [the potential hire] should come. And now I'm the bad guy because I don't want to leave Higher Ed for a non-existent program area.'" Appellant received a letter from Appellee Pasque on October 18, 2018, chastising him for his use of profanity and expression of frustration at the meeting.

On November 7, 2018, Appellant received another letter from Appellee Pasque expressing concerns about Appellant's collegiality. The letter highlighted three things: (1) the 2017 report that referenced the survey question incident and labeled Appellant a bully; (2) the faculty hiring email; and (3) Appellant's use of profanity in response to being asked to leave the HEPA. The letter made no mention of Appellant's "Woke Joke" blog post. Rather, Appellee Pasque's letter indicated that if Appellant "fail[s] to repair the relationships among faculty in the Higher Education program" or displays a "lack of collegiality" again, Appellant would be removed from the HEPA.

One week later, Appellant learned that his "Woke Joke" blog post had been criticized by the president of ASHE during her keynote address at the ASHE conference. On November 19, 2018, Appellant received an email from Appellee Pasque informing him that students in the Department "were having 'strong reactions' to the keynote and that the department 'need[ed] to pay attention to' them." Appellee Pasque proposed a "community conversation about ASHE"

where Appellant would be expected to address students' concerns about his blog. The purpose of the meeting would be "to help graduate students reconcile the 'great teacher' they knew from NCSU with what they had heard about [Appellant] from the president of ASHE." According to Appellant, Appellee Pasque eventually stated that "only two out of about 60 doctoral students spoke with her about the matter." On February 19, 2019, Appellant met with Appellee Pasque to discuss the issue further. During that meeting, Appellee Pasque "repeatedly expressed her frustration that [Appellant] had not proactively addressed student and faculty concerns about 'what happened at ASHE.'" Appellee Pasque indicated that this failure to act was another example of Appellant's lack of collegiality.

On July 5, 2019, Appellant received his annual evaluation which notified him that Appellee Pasque had removed him from the HEPA because "the Higher Education faculty were not able to make concerted progress" on resolving issues within the Program Area. And because being removed from the HEPA "reduced [Appellant's] departmental workload," Appellant was notified that he "would be expected to teach a fifth course."

In July 2019, Appellee Pasque left NCSU and was replaced by Appellee Lee. After Appellant filed an internal grievance on August 28, 2019 regarding his removal from the HEPA and the added course requirement, Appellee Lee informed Appellant that he would not be required to teach the extra course. But the requirement was not removed from Appellant's personnel file. Appellant alleges that, as a consequence of being removed from the HEPA, he was barred from attending the HEPA orientation for new Ph.D. students, the HEPA welcome cookout, and the HEPA retreat. Appellant also alleges that he was excluded from the Diagnostic Advisement Procedure ("DAP") process for second-year Ph.D. students, including for his own advisees. According to Appellant, this exclusion negatively impacted his ability to advise his students.

In October 2019, Appellant met with Appellee Lee to discuss his ongoing concerns about his exclusion from HEPA Ph.D. activities. Appellant was told he could continue to advise Ph.D. students, but that because of his removal from the HEPA, he would likely not be able to participate in meetings concerning the DAP process or in reviewing his students' dissertation prospectuses. Appellant expressed concern that students would not choose him as their advisor if

he could not participate in the DAP process or review prospectuses. Appellee Lee responded that this was something Appellant would have to talk to students about. Appellant also voiced concern that "the process is being set up so that when I go up for my post-tenure review a couple of years from now, I'm not going to have any advisees. And then you and Dean Danowitz can say well, we need to strip [Appellant] of tenure and fire him because he's not fulfilling his job duties." Appellee Lee replied, "Right, I hear you."

In December 2019, Appellant was prohibited from attending the Ph.D. program admissions meeting, which is when advisees are assigned. And in Spring 2020, Appellant was barred from attending a Ph.D. student recruitment weekend. Finally, in October 2020, some faculty in the Department proposed a new Ph.D. Program Area of Study in Higher Education Access, Equity, and Justice. Appellant was not asked whether he would be interested in participating in this new Program Area of Study, and all faculty members with the exception of Appellant were invited to join. One faculty member who was invited declined to join the new Program Area of Study and remained in the Higher Education Program Area of Study with Appellant. Appellant and the other faculty member were informed in March 2021 that they could make offers of admission to doctoral candidates they wanted to advise but that those candidates would be encouraged to switch to the new Program Area of Study once they arrived.

C.

Appellant filed his Complaint on September 14, 2021. The Complaint alleges, pursuant to 42 U.S.C. § 1983, Appellant's First and Fourteenth Amendment rights were violated when Appellees removed him from the HEPA, excluded him from HEPA events, and did not invite him to join the new Program Area of Study in Higher Education Access, Equity, and Justice. In Appellant's view, the survey question incident, the faculty hiring email, and the "Woke Joke" blog post were all protected speech. He argues that Appellees unlawfully retaliated against him for those communications.

Appellant claims that, with the creation of the new Program Area of Study in Higher Education Access, Equity, and Justice -- from which he was excluded -- he has been effectively siloed into a Program Area of Study that is drained of students and resources. According to Appellant, this has severely compromised his ability to perform critical job duties, such as advising Ph.D. students, leaving his future at NCSU in jeopardy. Appellees moved to dismiss the complaint in its entirety for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

The district court held -- and Appellant does not dispute -- that his claims for damages against the Board of Trustees and the individual defendants in their official capacities are barred by sovereign and Eleventh Amendment immunity. The court also determined that Appellant's "requests for injunctive relief regarding his permission to join the new Higher Education Opportunity, Equity, and Justice Program Area of Study and the removal of the requirement that he teach a fifth course are not prospective, and *Ex Parte Young* does not provide an exception to Eleventh Amendment immunity." Finally, the district court held that while Appellant's request for reinstatement may state a claim for prospective injunctive relief, Appellant has failed to state a First Amendment retaliation claim. And, even if Appellant had plausibly alleged a First Amendment retaliation claim, the district court held that the individual defendants would be entitled to qualified immunity.

II.

We review a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) de novo.

We review "a qualified immunity-based grant of a motion to dismiss *de novo*." *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). "To determine whether a complaint should survive a qualified immunity-based motion to dismiss, we exercise 'sound discretion' in following the two-prong inquiry set forth by the Supreme Court, analyzing (1) whether a constitutional violation occurred and (2) whether the right violated was clearly established."

III.

We begin with the district court's determination that Appellant's complaint failed to state a claim for First Amendment retaliation.

"When a government employee claims that he was disciplined because of his speech, we use a three-prong test to determine if the employee's rights under the First Amendment were violated." *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017). ("The first prong asks whether the employee 'was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest.'" The first prong can be further "divided into two inquiries: whether the speech was made as a citizen or pursuant to the employee's duties, *Garcetti* [*v. Ceballos*, 547 U.S. 410, 421 (2006)], and whether the content of the speech addressed 'a matter of interest to the community' rather than 'complaints over internal office affairs.' *Connick* [*v. Myers*, 461 U.S. 138, 149 (1983)]." *Crouse*, 848 F.3d at 583.

The general rule is that "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. But when it comes to public employees who, as here, are public university professors, the analysis is more nuanced. As this Court has repeatedly recognized, the *Garcetti* rule does not extend to speech by public university faculty members, acting in their official capacity, that is "related to scholarship or teaching," *see Adams v. Trustees of the Univ. of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011.Thus, if we determine that Appellant was speaking as a public employee, we must then determine whether his speech related to "scholarship or teaching." If it did not, then it is unprotected pursuant to *Garcetti*.

On the other hand, "[i]f the speech was made as a citizen and addressed a matter of public concern, the second prong of the test requires a court to balance the interest of the employee in speaking freely with the interest of the government in providing efficient services" (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty. Ill.*, 391 U.S. 563, 568 (1968)). Thereafter, if the "court determines that the employee's interest outweighed the government employer's interest, the third prong requires a determination that the employee's speech caused the disciplinary action." *Crouse*, 848 F.3d at 583. "In order to establish this causal connection, a plaintiff in a retaliation case must show, at the very least, that the defendant was

aware of her engaging in protected activity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005). "Knowledge alone, however, does not establish a causal connection." *Price v. Thompson*, 380 F.3d 209, 213 (4th Cir. 2004). Though not necessarily required, temporal proximity may create the inference of causation. In any event, the "causal requirement is 'rigorous.'" *Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015) "'[I]t is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that '*but for*' the protected expression the [state actor] would not have taken the alleged retaliatory action.'" (alterations in original) (emphasis supplied).

The district court held Appellant "failed to plausibly allege a First Amendment retaliation claim" because he failed to "plausibly allege that he ha[d] suffered adverse action or that any allegedly protected speech was the 'but for' cause of any alleged adverse employment action." In doing so, the district court assumed, but did not decide, that the three communications identified by Appellant were protected. Upon review, we have no trouble concluding that at least the survey question incident and the faculty hiring email were unprotected speech.

As to the survey question incident, Appellant's complaint gives no detail as to the content of the speech. Rather, it only alleges that "[c]iting the validity standards of the American Educational Research Association, [Appellant] asked [the presenter] about what work had gone into the design of the question. Survey methodology is one of [Appellant's] areas of research, and he was concerned that . . . [the question] might be harmful to faculty without yielding useful information." This amounts to a description of Appellant's perspective as to his duties as an employee. Indeed, Appellant himself describes the survey question incident as "nothing more than doing his job." This clearly does not equate to a matter of public concern. Therefore, because Appellant was speaking as an employee, we must determine whether his speech related to scholarship and teaching. We readily conclude that it did not. Appellant was not teaching a class nor was he discussing topics he may teach or write about as part of his employment. Though Appellant mentioned that survey methodology was his personal area of study, this is not enough to convert the speech, in the context of merely "doing his job," into a matter of scholarship. In excluding "speech related to scholarship and teaching," the court recognized a concern that "the teaching of a public university professor" could become the basis for adverse action if it was unprotected pursuant to the general rule. *See Garcetti*, 547 U.S. at 425,

438. While Appellant's speech here was in his capacity as an employee, it was not a product of his teaching or scholarship. Therefore, it is unprotected.

The same is true for the faculty hiring email. There, Appellant's speech consisted of asking, "Did you all see this," linking the *Inside Higher Ed* article, and sarcastically saying, "This kind of publicity will make sure we rocket to number 1 in the rankings. Keep up the good work Alyssa!" The faculty hiring email expressed no viewpoint and made no mention of policy or anything else that might be of public concern. Instead, it was an unprofessional attack on one of Appellant's colleagues, sent only to other faculty members within the Department. And it plainly was unrelated to Appellant's teaching or scholarship.

On these facts, we are convinced that both the survey question incident and the faculty hiring email are not protected speech. Both instances were wholly internal communications and the facts as Appellant alleges them demonstrate that he was speaking "as an employee" rather than a citizen. Appellant's communications addressed "matter[s] of personal interest" and "complaints over internal office affairs," rather than matters of public concern. And, Appellant's speech was not related to his scholarship or teaching. Therefore, neither the survey question incident nor the faculty hiring email are protected speech.

As to the "Woke Joke" blog post, even assuming, as the district court did, that it amounted to protected speech, Appellant fails to allege a sufficient causal connection to state a claim for retaliation. As to temporal proximity, Appellant published the blog post on September 3, 2018. NCSU made no mention of the post until November 19, 2018, when Appellee Pasque emailed Appellant about students' reactions to the ASHE conference. And Appellant was not removed from the HEPA until July 5, 2019 -- ten months after the blog post was published and nearly eight months after Appellee Pasque first emailed Appellant regarding the post. Under these circumstances, temporal proximity is lacking.

Beyond this, the complaint itself fails to allege that the blog post was the "but for" cause of the alleged adverse employment action. Appellant's complaint makes clear that he was removed from the HEPA because of his ongoing lack of collegiality -- not because of the content of his blog post. For example, Appellant was labeled as a bully because of the survey question

incident. And the complaint admits that Appellee Pasque "implied there were other claims about [Appellant] in the [2017 report]" beyond the survey question incident. The complaint also alleges that in the meeting where Appellant was asked to join a new Program Area, he became "frustrated" and said "Give me a f***ing break, folks. . . ." The complaint alleges that after this meeting, Appellant received letters from Appellee Pasque "chastising him for his use of profanity and his expressions of frustration" and again "expressing concern about his 'collegiality.'" Continuing on, the complaint admits that Appellant was warned that if he "'fail[ed] to repair the relationships among faculty in the Higher Education program' or display[ed] a 'lack of collegiality' again," he would be removed from the HEPA.

Even as to the "Woke Joke" blog post, the complaint makes clear that Appellee Pasque's concerns were not with the content of the post, but rather with Appellant's failure to "proactively address[] student and faculty concerns about 'what happened at ASHE.'" And finally, the complaint alleges that Appellant was removed from the HEPA "because 'the Higher Education faculty were not able to make concerted progress' on resolving issues within the Program Area."

Taking all of this together, we cannot conclude that Appellant has sufficiently [**23] alleged that the "Woke Joke" blog post was a "but for" cause of his removal from the HEPA.

IV.

Appellant's complaint fails to sufficiently allege a First Amendment retaliation claim. We hold that the survey question incident and the faculty hiring email were not protected speech. Even assuming the "Woke Joke" blog post was protected speech, Appellant has failed to allege that it was a "but for" cause for any alleged adverse employment action. Therefore, the district court's order dismissing Appellant's complaint for failure to state a claim is

AFFIRMED.

Dissent by: RICHARDSON

Stephen Porter, a professor at North Carolina State University, says that the University retaliated against him for his protected speech. My friends in the majority say otherwise. They hold that

much of Porter's speech was not protected at all, and that—for his speech that was protected—Porter has not drawn a plausible link to the adverse action that he suffered. My friends err at both steps. Porter was indeed speaking as a citizen on a matter of public concern. And—based on his complaint's allegations—it is plausible that the University retaliated against him because of it. The University thus must put forth evidence to justify its action. But, at this early stage of litigation, the government has not made that showing. So we should allow Porter's suit to proceed.

I. Background

Stephen Porter has been a tenured professor at North Carolina State University for over a decade. His home within the University is the College of Education—specifically, the Department of Educational Leadership, Policy, and Human Development—where he advises doctoral students and teaches graduate-level research-methods courses.

Over the past several years, Porter has been increasingly critical of the direction that his academic field has taken. And his criticisms, he says, have not endeared him to the University's administrators. This case specifically is about three instances when Porter says that he engaged in protected speech, for which he claims that the University retaliated against him: (1) comments that he made at a faculty meeting, (2) an email that he sent to fellow faculty members, and (3) a blog post that he wrote.

* * * * *

B. The University's response

Porter's blog post immediately created a stir online. And the University's own reaction to it would come soon enough. But that was just the tipping point. By that time, the University had already responded at each step along the way.

Unbeknownst to Porter, his faculty-meeting comments earned him a demerit in the University's 2016-2017 academic year report, which had labeled him a "bully" based on his comments. That accusation came up again during the fall semester of the 2017-2018 academic year, when the

new Department head—Penny Pasque—came by Porter's office under the guise of a get-to-know-you meeting. During the meeting, she accused Porter of "bullying" his colleagues—a charge that she repeated in an email that she sent him a few months later. When Porter asked for examples of his alleged "bullying," she cited only his faculty-meeting comments.

Porter's faculty-hiring email from that spring engendered a similar response. Both Rockenbach—the email's subject—and another of Porter's colleagues forwarded Pasque a copy. The next week, Pasque again requested to meet with him. At the meeting, she "repeatedly asked him" why he sent his email. And it was only two weeks later, at a follow-up meeting, when she first suggested that Porter leave his program area within the Department. Porter was "dismayed" and "disturbed," as he thought that being removed from his program area would "severely marginalize" him from the other faculty and his Ph.D. advisees. Though his annual evaluation that year was good, it cautioned Porter to be "collegial."

Things came to a head the following fall after Porter's blog post. A little over a month after the post—and in the wake of the controversy that it generated—Pasque once again suggested removing him from his program area, this time in front of his colleagues at another faculty meeting in October. This was the second time in six months that she'd made this suggestion: first, after Porter's email, and second, after Porter's blog post. Although the meeting was ostensibly about whether to hire a new professor, Porter says that its focus quickly shifted to why he would not leave his program area. In frustration, Porter responded: "Give me a fucking break folks. I was the one who said [the new professor] should come. And now I'm the bad guy because I don't want to leave Higher Ed for a non-existent program area."

Pasque sent Porter a letter a few days later, "chastising" him "for his use of profanity" during the meeting. And the next month, in November, she sent him another letter, once again criticizing Porter's "collegiality." According to Porter, as evidence of his "collegiality" problem, Pasque's November letter specifically cited his faculty-meeting comment and his email, along with his "response to being asked to leave [his program area]" a month earlier. Pasque concluded her letter by saying that, if Porter did not "repair the relationships among faculty," then she would remove him from the program area against his will.

She followed through on this promise at the end of the school year. In Porter's annual evaluation that summer, Pasque said that she was removing him from the program area because "'the Higher Education faculty were not able to make concerted progress' on resolving issues."

This decision followed a long disagreement about how Porter ought to respond to the controversy that his blog post had generated. A week after Pasque sent her November letter criticizing Porter's "collegiality," she suggested that he conduct a "community conversation" about his blog post since it had supposedly provoked "strong reactions" from the graduate students. When Porter pressed her on how many students had concerns, she told him that it was only two out of the sixty doctoral students.So he demurred on having a public event, but offered to speak privately with any students who had concerns. And he suggested that the Department's faculty discuss further whether a public event was warranted when they met after the holidays.

But the topic did not make the agenda. Instead, Pasque met privately with Porter in February, where she "repeatedly expressed her frustration that [he] had not proactively addressed student and faculty concerns about 'what happened at ASHE'"—the conference that Porter's blog post had criticized—and "cited [Porter's] lack of proactive action as a further example of" the "lack of collegiality" that she had described in her November letter. J.A. 22.

C. Porter's lawsuit

After the University removed Porter from his program area, his worst fears were realized. For the following school year, he found that his removal resulted in his "near-total exclusion from Ph.D. activities," which meant that he could not recruit, or be assigned, any new doctoral advisees. And he was even prohibited from participating in key evaluations of his then-existing advisees.

Porter's exclusion continued the next year when the Department formed a new program area for doctoral students. All the previous program area's members were invited to join except for Porter. He saw this as yet another impediment to getting new Ph.D. advisees. And the University confirmed his suspicions when the Department head told Porter that he "could make offers of admission to doctoral candidates," but that "those candidates would be encouraged to switch away from [him] . . . to the new [program area]." By then, it was clear to Porter that recruiting

new doctoral advisees would be nearly impossible. Since advising doctoral candidates was one of the "core requirements of his job," this jeopardized his tenure.

So Porter sued the University, seeking damages and injunctive relief. After the University moved to dismiss, the district court sided with the University and dismissed Porter's claims. Porter timely appealed.

II. Discussion

* * * * *

First, we must make a "threshold inquiry" into whether the employee engaged in protected speech. *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc). Although the majority blurs the lines, this initial inquiry involves two distinct questions: (1) was the plaintiff speaking as an employee; and (2) was he speaking about a matter of public concern? The first question—whether he was speaking as an employee—boils down to whether the plaintiff made his speech pursuant to his "official duties." If so, then he was acting as a governmental mouthpiece and is not entitled to First Amendment protection. Such speech was effectively the government's speech, and the government may "exercise . . . control over what [it] itself has commissioned or created." *Garcetti*, 547 U.S. at 422. But, if the plaintiff did not speak pursuant to his official duties, then he spoke as a citizen and we must ask the second question: whether the content of his speech addressed "matters of public concern."

If the answer to both questions is yes—*i.e.*, the plaintiff spoke as a citizen upon a matter of public concern, and thus engaged in protected speech—then we move on to the second step: did the government restrict that speech? In other contexts, this question is easy. For example, prior restraint obviously restricts speech. But retaliation is more nuanced, since the government is not regulating speech directly. Instead, the censorship is indirect. The employee can speak, but only under threat of government punishment. So the employee often chooses not to speak at all.

Thus, in the public employment retaliation context, indirect censorship takes the form of an adverse employment action. And, to show that their speech has been indirectly censored, employee-plaintiffs must demonstrate "a sufficient causal nexus between the protected speech

and the retaliatory employment action." Generally, such a plaintiff must show that, "but for" his protected speech, he would not have suffered the adverse action.

If the plaintiff's claim passes these two steps, then we proceed to the third and final step, where the government must justify its restriction using means-end scrutiny. The form of scrutiny that we use to evaluate retaliation claims by public employees is the so-called *Pickering-Connick* interest balancing. That test requires us to weigh three interests. On one side of the ledger are the employee's interest in speaking and the "public interest in having free and unhindered debate on matters of public importance." We weigh those interests against the university's interest as an employer in "promoting the efficiency of the public services it performs through" that employee.

Throughout our three-step inquiry, we cannot forget that Porter's suit was dismissed at the pleading stage. We thus must take all the facts that he alleged in his complaint as true, drawing all reasonable inferences in his favor. And, in the end, our question is simply whether his claims can *plausibly* survive at each step.

A. Porter engaged in protected speech

Contrary to the majority's terse conclusions, each one of Porter's three speech instances—his faculty-meeting comments, his faculty-hiring email, and his blog post—constitutes protected speech. That is because, in each instance, he was speaking as a citizen on a matter of public concern.

Start with what's easiest: Porter's blog post. The [**37] majority wisely does not contest that it is protected speech under *McVey*. Writing a post in your own time, on your personal blog, is speaking as a citizen rather than pursuant to your official duties as an employee. And the blog post's subject was doubtless a matter of public concern. After all, Porter alleged that the blog post generated controversy on Twitter, at the conference that it criticized, and at the University itself. That's little surprise. Just searching the terms "woke college" on Google would confirm that Porter's blog post fell well within a lively public debate.

Porter's faculty-meeting comments and his faculty-hiring email are slightly closer calls. But only slightly. As to the former, it is true that Porter made his comments at an internal faculty meeting where the public was not present. Yet the mere fact that a plaintiff chooses to speak "inside his office, rather than publicly," does not mean that he is speaking as an employee instead of a private citizen. And, though Porter's question had to do with a topic within his professional expertise—survey design—it is also irrelevant that the "subject matter" of his speech was "related to [his] job." *Garcetti*, 547 U.S. at 421.

Instead, the "critical question" in distinguishing speech made as an employee from speech made as a citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties." In other words, we ask whether Porter "was fulfilling a responsibility imposed by his employment" when he objected to the diversity question that a colleague proposed adding to student surveys. And it is hard to believe that Porter had a *duty* or a *responsibility* to make his objection.

Indeed, "[t]he majority engages in no meaningful inquiry into [Porter's] official duties" as a professor. If my friends claim that Porter was acting pursuant to his official duties, then "there must have been some job duty" that he was "supposedly carrying out." Yet the majority points to none. The closest that they get is by noting that Porter, in his complaint, described his faculty-meeting comment as "nothing more than doing his job." But this is a common figure of speech. Superman deflects praise by saying that he's "just doing his job," even though the citizens of Metropolis never cut him a paycheck. Reading Porter's complaint in the light most favorable to him—as we are required to do at this stage—it is *plausible* that he had no official responsibility to lodge his objection. Accordingly, when he did so, he was speaking as a citizen, not as an employee.

Moving to the next question at this threshold step, Porter's faculty-meeting comment also addressed a matter of public concern. Again, he made it in response to a colleague's proposal to "add a question on diversity to student course evaluations." Porter's worry was that, "in response to social pressure, the department was rushing to include a question that had not been properly designed." So he asked about the testing that went into the diversity question.

Unquestionably there has been a growing, and wide-ranging, public debate about how colleges ought to emphasize diversity, equity, and inclusion. Though the exact words Porter used in the faculty meeting are not in the record, reading his complaint in the light most favorable to him shows that its subject matter was well within the realm of this public debate. And anything that "involves an issue of social, political, or other [**40] interest to a community" involves a matter of public concern. Thus, because Porter made his faculty-meeting comment as a citizen, and because it was on a matter of public concern, it is protected speech.

The same is true of Porter's faculty-hiring email. This time, we do have the exact words that he used. He linked to an article criticizing a colleague's hiring decisions, saying, "Did you all see this," before sarcastically adding: "This kind of publicity will make sure we rocket to number 1 in the rankings. Keep up the good work, Alyssa!" As with his faculty-meeting comment, there are no grounds to think that he had a duty to send this email; the very notion strains credulity. So, as with the faculty-meeting comment, he sent his email in his capacity as a citizen, not as an employee.

His email, like his faculty-meeting comment, was also on a matter of public concern. The article that he linked to apparently criticized his colleague for conducting her hiring process with "unusual secrecy," and for including among the finalists a former professor who was fired from his previous job after allegations emerged that he was misusing the university's staff for personal business, and that he had "an inappropriate relationship with a student.".

Even were we to set aside Porter's concern that his colleague "cut corners [in] vetting" the finalist "out of a desire to hire a Black scholar whose work focused on racial issues," news that the University almost hired someone who faced these serious allegations would alone interest the public. And the public has also increasingly scrutinized relationships between two parties who are subject to a power imbalance (like a professor and a student). Indeed, the very fact that the topic of Porter's speech was the subject of a news article may alone render it a matter of public concern—after all, what media company would publish a news article about something that wasn't newsworthy?

The majority counters with two retorts: Porter's email (1) was "sent only to other faculty members" and (2) "was an unprofessional attack on one of [his] colleagues." Both are irrelevant. As discussed above, when asking whether a person spoke as an employee or as a citizen, it makes no difference whether the speech reached the public. And that question is also inapposite to deciding whether the speech's *subject matter* addressed the sort of thing that the public would find interesting. While the venue might be relevant when we balance the interests at stake, it does not bear on the threshold inquiry of whether Porter was speaking as a citizen on a matter of public concern.

So too with the charge that Porter's email was an "unprofessional attack." The Supreme Court has been clear: "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387. Instead, it is canon that "debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Court went so far as to hold in *Snyder v. Phelps*, 562 U.S. 443 (2011), that picketing a military funeral with signs reading "Thank God for 9/11," "God Hates Fags," and "You're Going to Hell" was still speaking on a matter of public concern. To call those messages "particularly hurtful," as the Court did, is a gross understatement. And Porter's sardonic email does not come remotely close to those messages. But even if it did, it would not matter at this stage. A message's form is distinct from its subject matter. In *Snyder*, the protestors' vitriol made no difference to the fact that their message addressed a matter of public concern. The same is true here.

B. Porter plausibly alleged that he suffered retaliation because of that speech

Since Porter engaged in protected speech, we turn to whether he suffered retaliation because of it. The retaliatory act, Porter says, was removing him from his old program area, and then refusing to admit him to the new one, thus interfering with his ability to interact with his current advisees, making it almost impossible to recruit new ones, and putting his tenure in jeopardy. And he easily satisfies the causation requirement, since—according to his complaint—Pasque explicitly mentioned both his faculty-meeting comment and his faculty-hiring email in her November letter threatening to remove him. So when she followed through on her threat the following summer, it's reasonable to conclude that the reasons that she listed in her initial

letter—which included two instances of protected speech—were all but-for causes of her later decision.

For much the same reason, Porter's blog post was also a but-for cause of his removal from the program area, even if the connection is somewhat more attenuated. When Pasque made her November threat, she cited his "collegiality" as her concern, and said that she would remove him if he did not "repair relationships among faculty" in the Department. After her November letter, there was—at least, according to the complaint—only one other instance of "un-collegiality" that Pasque cited: Porter's hesitation to hold a "community conversation" discussing his blog post. In February, she met with Porter and "expressed her frustration that [he] had not proactively addressed student and faculty concerns" about the controversy that his post had caused at ASHE, the conference that it had criticized. So, taking Porter's complaint at its word, and drawing all reasonable inferences in his favor: But for his blog post, Pasque would not have asked Porter to hold a "community conversation," and but for his hesitation to do so, she would not have removed him from his program area. That's but-for cause, even with the blog post standing alone.

C. The University has not produced sufficient evidence to justify its action

Having concluded (1) that all three instances of Porter's speech were protected, and (2) that the University restricted his speech by retaliating against him because of it, the University must show (3) that its decision to remove him from his old program area (and to bar him from the new program area) was justified under *Pickering-Connick* interest balancing. Again, that balancing test requires us to weigh Porter's interest in speaking (alongside the public's interest in his speech) against the government's interest in restricting it.

Consider first the government's interest in providing efficient services to the public. In doing so we recognize that the government's "interests as an employer" differ from its interests in regulating "the citizenry in general." When acting as an employer, the government must have "discretion and control over the management of its personnel and internal affairs," including "the prerogative to remove employees whose conduct hinders efficient operation." *Connick*, 461 U.S.

at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974). To evaluate this interest, we have pointed to an array of potentially relevant factors.

Critically, the government's interest as an employer varies with context: A police department has different interests in controlling its employees than a public university does. So here we must look through the lens of a university and its mission. A police force is "paramilitary," but dispute and disagreement are integral, not antithetical, to a university's mission.

In any event, we need not conduct a full contextual analysis of the government's asserted interests at this stage. Whenever the government restricts protected speech, it must justify those restrictions with *evidence* that they furthered its legitimate interests. The University can point to "common sense and caselaw to establish . . . a valid interest," but "'mere conjecture' is inadequate."

Here, there is scant evidence to support the University's asserted interest. That is unsurprising, since we are at the Rule 12(b)(6) stage, and so are limited to the allegations in Porter's complaint. And we must read those factual allegations in a light most favorable to him, drawing all inferences in his favor. After doing so, the University's interest in regulating his speech seems limited.

* * * * *

Against whatever governmental interest we can glean from this record, we must weigh Porter's and the public's interest in his speech. Again, the university setting forms the stage on which we perform this balancing. And, at the university, the scales are tipped in favor of more speech: "Our Nation is deeply committed to safeguarding academic freedom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

Why? Because the freedom for professors to discuss or investigate controversial problems without interference or penalty plays a "vital role in [our] democracy." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." A robust marketplace of ideas in our society requires an even more robust marketplace in our schools. All

are entitled to it; and none needs it more than the teacher. The public school is in most respects the cradle of our democracy.") And professors have valuable perspectives on how a university should foster that marketplace. While discovery may shed light on how these constitutional truths apply to Porter and his specific university, Porter has surely alleged a weighty interest in his speech.

* * * * *

Our job, however, is not to appraise the value of Porter's speech or his personal virtue. It's to take the facts as alleged in the complaint, read them in a light most favorable to Porter, and then decide whether he's plausibly stated a claim for relief. And, drawing all reasonable inferences in Porter's favor, the University threatened his tenure by removing him from his program area because of his protected speech. The University has not yet produced evidence to justify its decision. And no such evidence springs forth from the face of the complaint. So Porter's claims ought to survive, and the district court's contrary decision ought to be reversed. This is not a close call.

My friends in the majority apparently seek to return to the days of Justice Holmes. But only for certain plaintiffs. In doing so, they have developed a new "bad man" theory of the law: identify the bad man; he loses. *But see* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). The majority's threadbare analysis willfully abandons both our precedent and the facts in search of its desired result. Even for a Holmesian, that cynicism breaks new ground.

I thus respectfully dissent.

Notes and Questions

1. This case was decided on a motion to dismiss, which means that full discovery very likely did not occur at this stage of the litigation. The dissent makes much of this fact. Do you think the court should have denied dismissal of this case in order to require the parties to produce more evidence related to whether Porter’s speech was Constitutionally protected?

2. Note that the plaintiff has not alleged an academic freedom claim. Such a claim might have relied on a breach of contract allegation (NC State policies promise academic freedom protections to faculty-see their policy at https://policies.ncsu.edu/policy/pol-04-25-01/). Do you think a breach of contract claim might have been more successful for Porter?

3. The majority found that two of Porter's three communications were unprotected because they were not related to his teaching or his scholarship—the two functions noted in the *Adams* case that were exempt from *Garcetti*'s rule that public employee speech related to job duties is not protected by the First Amendment. This suggests that the majority's view on the *Garcetti* exception relates only to the faculty member's individual speech either in class or in written publications, but not with respect to speech related to governance matters, such as faculty recruitment or curriculum decisions. This suggests a narrower exception than courts in other circuits have created. See, in particular, *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), which is included in this collection of cases.

4. The majority opinion focuses in part on Porter's faculty colleagues' concern about his alleged lack of collegiality. Collegiality has been used as a sometimes unwritten criterion in making promotion and tenure decisions. For a discussion of judicial reactions to faculty claims that collegiality is an inappropriate criterion for making faculty employment decisions, see M.A. Connell, K.B. Melear, and F.G. Savage, "Collegiality in Higher Education Employment Decisions: The Evolving Law." 37 *Journal of College & University Law* 529 (2011) (courts have consistently upheld the use of collegiality in making promotion and tenure decisions).

SEC. 6.2. Academic Freedom in Teaching

Demers v. Austin
746 F.3d 402 (9th Cir. 2014)

W. FLETCHER, Circuit Judge:

David Demers is a tenured associate professor at Washington State University. He brought suit alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book. The district court granted summary judgment for the defendants, finding that the pamphlet and draft were distributed pursuant to Demers's employment duties under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Alternatively, the court held that the pamphlet was not protected under the First Amendment because its content did not address a matter of public concern.

We hold that *Garcetti* does not apply to "speech related to scholarship or teaching." *Id.* at 425, 126 S.Ct. 1951. Rather, such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In Demers's case, we conclude that the short pamphlet was related to scholarship or teaching, and that it addressed a matter of public concern under *Pickering.* We remand for further proceedings. We conclude, further, that there is insufficient evidence in the record to show that the in-progress book triggered retaliation against Demers. Finally, we conclude that defendants are entitled to qualified immunity, given the uncertain state of the law in the wake of *Garcetti.*

I. Background

David Demers is a member of the faculty in the Edward R. Murrow College of Communication ("Murrow School" or "Murrow College") at Washington State University ("WSU"). He joined the faculty in 1996. He was granted tenure as an associate professor in 1999. Demers also owns and operates Marquette Books, an independent publishing company.

Demers brought suit alleging First Amendment violations by WSU Interim Director of the Murrow School Erica Austin, Vice Provost for Faculty Affairs Frances McSweeney, Dean of the College of Liberal Arts Erich Lear, and Interim WSU Provost and Executive Vice President Warwick Bayly. Demers contends that defendants retaliated against him, in violation of his First Amendment rights, for distributing a pamphlet called "The 7–Step Plan" ("the Plan") and for distributing a draft introduction and draft chapters of an in-progress book titled "*The Ivory Tower of Babel* " ("*Ivory Tower* "). Demers contends that defendants retaliated by giving him negative

annual performance reviews that contained falsehoods, by conducting two internal audits, and by entering a formal notice of discipline. Demers contends in his brief that over a three-year period he "went from being a popular teacher and scholar with high evaluations to a target for termination" due to the actions of defendants.

The Plan is a two-page pamphlet Demers wrote in late 2006 and distributed in early 2007. Demers distributed the Plan while he was serving on the Murrow School's "Structure Committee," which was actively debating some of the issues addressed by the Plan. At that time, the Murrow School was part of the College of Liberal Arts at WSU, but the faculty had voted unanimously in favor of becoming a free-standing College. (It became a College in July 2008.) The Murrow School had two faculties. One faculty was Mass Communications, which had a professional and practical orientation. The other was Communications Studies, which had a more traditional academic orientation. Faculty members held appointments in either Mass Communications or Communications Studies. The Structure Committee was considering whether to recommend, as part of the restructuring of the Murrow School, that the two faculties of the School be separated. There was serious disagreement at the Murrow School on that question.

Demers is a member of the Mass Communications faculty. Demers's Plan proposed separating the two faculties. It proposed strengthening the Mass Communications faculty by appointing a director with a strong professional background and giving more prominent roles to faculty members with professional backgrounds. For four years, early in his career, Demers had himself been a professional reporter.

On January 16, 2007, Demers sent the Plan to the Provost of WSU. In his cover letter, he stated that the purpose of the Plan is to show how WSU "can turn the Edward R. Murrow School of Communication into a revenue-generating center for the university and, at the same time, improve the quality of the program itself." Demers's letter also stated, "To initiate a fund-raising campaign to achieve this goal, my company and I would like to donate $50,000 in unrestricted funds to the university." Demers signed the letter "Dr. David Demers, Publisher/ Marquette Books LLC." A footnote appended to the signature line specified, "Demers also is associate professor of communications at Washington State University. Marquette Books LLC is a book/journal publishing company that he operates in his spare time. It has no ties with nor does it use any of the resources at Washington State University." The cover of the Plan states that it was "prepared by Marquette Books LLC." The Provost did not respond to Demers's letter and Plan. On March 29, 2007, Demers sent the Plan to the President of WSU. The cover letter was identical to the letter he had sent to the Provost, except that he increased the offered donation to $100,000.

In his declaration, Demers states that he sent the Plan "to members of the print and

broadcast media in Washington state, to administrators at WSU, to some of my colleagues, to the Murrow Professional Advisory Board, and others." Demers also posted the Plan on the Marquette Books website. In his deposition, Demers stated that he could not remember the names of the individuals to whom he had sent the Plan. Demers did not submit the Plan to the Structure Committee or to Interim Director Austin. In her deposition, Austin stated that alumni and members of the professional community contacted faculty members to ask about the Plan.

During the period relevant to his suit, Demers had completed drafts of parts of what would eventually become "*Ivory Tower.*" The book was not published until after the actions about which Demers complains took place. In his self-prepared 2006 "Faculty Annual Report," submitted in early 2007, Demers described the in-progress book as "partly autobiographical and partly empirical. It will involve national probability surveys of social scientists, governmental officials and journalists." Demers attached a copy of the draft introduction and the first chapter to his November 2007 application for a sabbatical. In his application, he described the planned book as follows:

> [T]he book examines the role and function of social science research in society.... Today most social scientists believe very strongly that the research they conduct is important for solving social problems, or at least has some impact on public policy. However, empirical research in political science and public policy shows just the opposite. Social scientific research generally has little impact on public policy decisions and almost never has a direct impact on solving social problems. Instead, social movements play a much more important role....

Demers also wrote in the application, "The book contains information that is critical of the academy, including some events at Washington State University." In his self-prepared 2008 Annual Activity Report, Demers reported that he had completed 250 of a planned 380 pages of the book.

Demers did not put any of the drafts of the book in the record. Interim Director Austin recalled in her deposition that she had seen parts of the book in connection with Demers's application for sabbatical. Vice Provost McSweeney stated in her deposition that she read some draft chapters that had been posted online, in particular chapters written about her and about "anything that [she] was directly involved in."

Demers contends that defendants retaliated against him for circulating the Plan and drafts of *Ivory Tower*. He claims that Austin and others knowingly used incorrect information to lower his performance review scores for 2006, 2007, and 2008. He contends that some defendants falsely stated that he had improperly canceled classes and that he had not gone through the proper university approval process before starting Marquette Books. He contends that specific

acts of retaliation included spying on his classes, preventing him from serving on certain committees, preventing him from teaching basic Communications courses, instigating two internal audits, sending him an official disciplinary warning, and excluding him from heading the journalism sequence at the Murrow School. Demers claims that these acts affected his compensation and his reputation as an academic. Demers argues on appeal that the Plan is protected, despite *Garcetti*, because it was not written and distributed as part of his employment. He contends further that the Plan and *Ivory Tower* are protected because *Garcetti* does not apply to academic speech.

Defendants respond that changes in Demers's evaluations and the investigations by the university were warranted, and were not retaliation for the Plan or *Ivory Tower*. Defendants contend that Demers reoriented his priorities away from academia after receiving tenure, that Demers's attendance at faculty committee meetings was sporadic, and that Demers gave online quizzes instead of appearing in person to teach his Friday classes despite repeated requests to comply with university policies that required him to appear in person. Defendants contend that the legitimate reasons for Demers's critical annual reviews include his post-tenure failure to publish scholarship in refereed journals, his failure to perform his appropriate share of university service, and his failure to report properly his activities at Marquette Books. Defendants contend, further, that Demers's lower marks under Interim Director Austin were partly attributable to an overall adjustment of the annual review scale for the faculty as a whole.

Defendants contend that the Plan was written and circulated pursuant to Demers's official duties and so is not protected under *Garcetti*, and that, in any event, the Plan does not address a matter of public concern. They contend that because Demers failed to place any of the drafts of *Ivory Tower* in the record, there is insufficient evidence upon which to sustain Demers's retaliation claim based on those drafts. Finally, defendants contend that they are entitled to qualified immunity from any damages based on the uncertain status of teaching and academic writing after *Garcetti*.

The district court granted summary judgment to defendants. It held that the Plan and *Ivory Tower* were written and distributed in the performance of Demers's official duties as a faculty member of WSU, and were therefore not protected under the First Amendment. The district court held, alternatively, with respect to the Plan, that it did not address a matter of public concern. Demers timely appealed.

II. Standard of Review

We review a district court's grant of summary judgment *de novo*. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1131 (9th Cir.2003). Summary judgment is

appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." . . .

III. Discussion

Demers makes two arguments. First, he argues that writing and distributing the Plan were not done pursuant to his official duties, and thus do not come within the Court's holding in *Garcetti*. Second, he argues that even if he wrote and distributed the Plan (as well as *Ivory Tower*) pursuant to his official duties, *Garcetti*'s holding does not extend to speech and academic writing by a publicly employed teacher. We disagree with his first argument but agree with his second.

A. Speech Pursuant to Official Duties

The district court found that Demers wrote and distributed the Plan and *Ivory Tower* pursuant to his duties as a professor at WSU. We agree with the district court. "[A]fter *Garcetti,* ... the question of the scope and content of a plaintiff's job responsibilities is a question of fact." *Dahlia v. Rodriguez,* 735 F.3d 1060, 1072 (9th Cir.2013) (en banc) (citation and internal quotation marks omitted).

While he was preparing the Plan, Demers sent an email to his fellow faculty members at the Murrow School, soliciting ideas and comments. He wrote:

> As you know, I'm preparing a proposal for splitting the School back into two separate units, a Communications Studies department and a professional/mass communication school.

In his self-prepared 2007 Annual Activity Report, Demers listed under the heading "Murrow School of Communication Service Activities":

> Developed a 7–Step Plan for reorganizing the Murrow School to improve the quality of the professional programs and attract more development funds. The plan recommends that the communications studies program be separated from the four professional programs (print journalism, broadcasting, public relations, and advertising), the School hire more professionals and give them more authority, seek accreditation for the professional programs, and develop stronger partnerships with the business community.

Demers prepared and sent the Plan to the Provost and President while he was serving as a member of the Murrow School "Structure Committee," which was deciding, among other things, whether to recommend separating the Mass Communications and Communications Studies faculties.

Demers points out that the cover of the Plan indicates that it was prepared by Marquette Books, that he did not sign his cover letters to the Provost and the President as a professor, and that he included a footnote in the letter stating that he was not acting as a professor. He contends that this, along with his private donation offer, shows that he was not acting pursuant to his duties as a professor when he wrote and distributed the Plan. However, it is impossible, as a realworld practical matter, to separate Demers's position as a member of the Mass Communications faculty, and as a member of the Structure Committee, from his preparation and distribution of his Plan. Further, we note that when it was to his advantage to do so, Demers characterized his development of the Plan as part of his official duties in his 2007 Annual Activities Report. Demers may not have been acting as a team player in sending his Plan directly to the top administrators at WSU, rather than working with and through his fellow committee members. But we conclude that in preparing the Plan, in sending the Plan to the Provost and President, in posting the Plan on the Internet, and in distributing the Plan to news media, to selected faculty members and to alumni, Demers was acting sufficiently in his capacity as a professor at WSU that he was acting "pursuant to [his] official duties" within the meaning of *Garcetti*. 547 U.S. at 421, 126 S.Ct. 1951. We thus turn to the question whether *Garcetti* applies to academic speech.

B. Academic Speech Under the First Amendment

Until the Supreme Court's 2006 decision in *Garcetti*, public employees' First Amendment claims were governed by the public concern analysis and balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *Garcetti*, however, changed the law. The plaintiff in *Garcetti* was a deputy district attorney who had written a memorandum concluding that a police affidavit supporting a search warrant application contained serious misrepresentations. *Garcetti*, 547 U.S. at 413–14, 126 S.Ct. 1951. The plaintiff contended that his employer retaliated against him in violation of the First Amendment for having written and then defended the memorandum. *Id.* at 415, 126 S.Ct. 1951. The Court held in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421, 126 S.Ct. 1951.

However, *Garcetti* left open the possibility of an exception. In response to a concern expressed by Justice Souter in dissent, the Court reserved the question whether its holding applied to "speech related to scholarship or teaching." *Id.* at 425, 126 S.Ct. 1951. Justice Souter had expressed concern about the potential breadth of the Court's rationale, writing, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic

freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.' " *Id.* at 438, 126 S.Ct. 1951 (Souter, J., dissenting) (alteration in original).

Demers presents the kind of case that worried Justice Souter. Under *Garcetti,* statements made by public employees "pursuant to their official duties" are not protected by the First Amendment. 547 U.S. at 421, 126 S.Ct. 1951. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are "a special concern of the First Amendment." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. One of our sister circuits agrees. *See Adams v. Trs. of the Univ. of N.C.–Wilmington,* 640 F.3d 550, 562 (4th Cir.2011) ("We are ... persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case.").

The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. It wrote in *Keyishian:*

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 603, 87 S.Ct. 675 (quoting *Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). It had previously written to the same effect in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident.... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). More recently, the Court wrote in *Grutter v. Bollinger*, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *see also Rust v. Sullivan,* 500 U.S. 173, 200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) ("[T]he university is ... so fundamental to the functioning of

our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering.* The *Pickering* test has two parts. First, the employee must show that his or her speech addressed "matters of public concern." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731; *see Connick,* 461 U.S. at 146, 103 S.Ct. 1684. Second, the employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731; *see Cockrel v. Shelby Cnty. Sch. Dist.,* 270 F.3d 1036, 1048 (6th Cir.2001); *Leary v. Daeschner,* 228 F.3d 729, 737 (6th Cir.2000).

In *Pickering,* a public high school teacher wrote a letter to a local newspaper complaining about budgetary decisions made by the school district. *Pickering,* 391 U.S. at 564, 88 S.Ct. 1731. The Court wrote that teachers have a First Amendment right "to comment on matters of public interest in connection with the operation of the public schools in which they work," but that, at the same time, the rights of public school teachers are not independent of the interest of their employing school district. *Id.* at 568, 88 S.Ct. 1731. The task of a court is "to arrive at a balance between the interests of the teacher, as a citizen, ... and the interest of the State, as an employer." *Id.* The Court held in *Pickering* that "the question whether a school system requires additional funds is a matter of legitimate public concern," *id.* at 571, 88 S.Ct. 1731, and that the school district did not have a sufficient interest in preventing the teacher from speaking out on this question to deprive him of his First Amendment rights. *Id.* at 572–74, 88 S.Ct. 1731.

In *Connick v. Myers,* the Court returned to the question whether an employee's speech addressed a matter of public concern. The employee in *Connick* was an assistant district attorney who objected to being transferred to prosecute cases in a different section of the criminal court. 461 U.S. at 140, 103 S.Ct. 1684. She circulated a questionnaire within the district attorney's office raising questions about "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141, 103 S.Ct. 1684. The Court held that all but one of the topics in the questionnaire were not matters of public concern. With the exception of the question about pressure to work on political campaigns, the "questions reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre." *Id.* at 148, 103 S.Ct. 1684. The Court held that the question about political campaigns, however,

addressed "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 149, 103 S.Ct. 1684.

The Court in *Connick* refined the *Pickering* analysis in two ways. First, perhaps recognizing the artificiality of characterizing an employee's speech about matters relating to his employment as merely speech "as a citizen," the Court did not insist on characterizing the *Connick* plaintiff's protected question about political campaigns as speech "as a citizen." While her question may in some sense have been speech as a citizen, it was much more directly and obviously speech as an employee. Not only did the employee circulate her questionnaire exclusively within her workplace. In addition, the clear implication from the record is that she was herself subject to pressure to work on campaigns, and that her fellow employees, to whom she sent the questionnaire, were subject to that same pressure. Second, the Court emphasized the subtlety of the balancing process, writing that "the State's burden in justifying a particular [discipline] varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.* at 150, 103 S.Ct. 1684.

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

The nature and strength of the interest of an employing academic institution will also be difficult to assess. Possible variations are almost infinite. For example, the nature of classroom discipline, and the part played by the teacher or professor in maintaining discipline, will be different depending on whether the school in question is a public high school or a university, or on whether the school in question does or does not have a history of discipline problems. Further, the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor. Still further, the evaluation of a professor's writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world,

such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.

With the foregoing in mind, we turn to what Demers wrote.

C. *Ivory Tower*

We put to one side Demers's *Ivory Tower*. For reasons best known to himself, Demers did not put the draft introduction or any of the draft chapters of *Ivory Tower* into the record. The only information we have about those drafts are the brief descriptions Demers provided when he applied for sabbatical and when he described his academic activities for purposes of his annual reviews, and the acknowledgments by Austin and McSweeney that they saw or read parts of those drafts. . . . . Even assuming for the moment that defendants retaliated against Demers, he has provided insufficient information about the drafts of *Ivory Tower* to support a claim that any such retaliation resulted from those drafts. We therefore conclude that Demers has failed to establish a First Amendment violation with respect to *Ivory Tower*.

D. The Plan

1. "Speech Related to Scholarship or Teaching" Under *Garcetti*

We conclude that The 7–Step Plan prepared by Demers in connection with his official duties as a faculty member of the Murrow School was "related to scholarship or teaching" within the meaning of *Garcetti*. *See* 547 U.S. at 425, 126 S.Ct. 1951. . . .

The Plan proposed seven steps that would increase the influence of professionals and reduce the influence of Ph.D.s within the Murrow School. Those steps were:

1. Separate the mass communication program from the communication studies program at WSU—i.e., create two separate units....
2. Hire a director of the Edward R. Murrow School of Communication who ***415** has a strong professional background....
3. Create an Edward R. Murrow Center for Media Research that conducts joint research projects with the professional community....
4. Give professionals an active (rather than the current passive) role in the development of the curriculum in the School....
5. Give professional faculty a more active role in the development of the undergraduate curriculum for mass communication students....
6. Seek national accreditation for the "new" mass communication program....
7. Hire more professional faculty with substantial work experience....

In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech "related to scholarship or teaching" within the meaning of *Garcetti*. But this is not such a case. The 7–Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.

2. Matter of Public Concern Under *Pickering*

The first step in determining whether the Plan is protected under the First Amendment is to determine whether it addressed a matter of public concern. . . .

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.' " *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir.1995) (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684). The "essential question is whether the speech addressed matters of public as opposed to personal interest." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir.2009) (internal quotation marks and citation omitted). Public interest is "defined broadly." *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 978 (9th Cir.2002). . . .

We begin by noting two obvious points. First, not all speech by a teacher or professor addresses a matter of public concern. Teachers and professors, like other public employees, speak and write on purely private matters. If a publicly employed professor speaks or writes about what is "properly viewed as essentially a private grievance," *Roe*, 109 F.3d at 585, the First Amendment does not protect him or her from any adverse reaction. Second, protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*. Indeed, in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district. The Court in *Pickering* noted that the letter addressed "the preferable manner of

operating the school system," which "clearly concerns an issue of general public interest." 391 U.S. at 571, 88 S.Ct. 1731. Further, the Court wrote that "the question whether a school system requires additional funds is a matter of legitimate public concern." *Id.*

Demers described his Plan on its cover as a "7–Step Plan for Making the Edward R. Murrow School of Communication Financially Independent." The first page of the Plan gave an abbreviated history of "mass communications programs ... and the academy in general," and placed the communications program at WSU in the broader context of similar programs at other universities. The second page recommended seven steps for improving the communications program at WSU. Demers's Plan did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow "bureaucratic niche." *Tucker v. Cal. Dep't of Educ.,* 97 F.3d 1204, 1210 (9th Cir.1996) (citation omitted); *see Desrochers,* 572 F.3d at 713. Nor did the Plan address the role of particular individuals in the Murrow School, or voice personal complaints. Rather, the Plan made broad proposals to change the direction and focus of the School. *See Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1263 (10th Cir.2005) (holding that a professor's critiques of a plan to move the medical school "addressing the use of public funds and regarding the objectives, purposes and mission of the University of Colorado and its medical school fall well within the rubric of 'matters of public concern' "). The importance of the proposed steps in Demers's Plan is suggested by the fact that the Murrow School had appointed a "Structure Committee," of which Demers was a member, to address some of the very issues addressed in Demers's Plan.

The manner in which the Plan was distributed reinforces the conclusion that it addressed matters of public concern. If an employee expresses a grievance to a limited audience, such circulation can suggest a lack of public concern. *See Desrochers,* 572 F.3d at 713–14. But limited circulation is not, in itself, determinative, as may be seen in *Connick* where the questionnaire was distributed only within the employee's office. *See* 461 U.S. at 141, 103 S.Ct. 1684. Here, Demers sent the Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other faculty members, to alumni, to friends, and to newspapers. He posted the Plan on his website, making it available to the public.

There may be some instances in which speech about academic organization and governance does not address matters of public concern. *See, e.g., Brooks v. Univ. of Wis. Bd. of Regents,* 406 F.3d 476, 480 (7th Cir.2005) (objections by professors against the closing of their laboratories and study programs represented "a classic personnel struggle—infighting for control of a department—which is not a matter of public concern"); *Clinger v. N.M. Highlands Univ., Bd. of Regents,* 215 F.3d 1162, 1166 (10th Cir.2000) (no matter of public concern where professor publicly disagreed with the Board of Trustees "on the internal process they followed in selecting a president and reorganizing the University"). But this is not such a case. Demers's

Plan contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions. We therefore conclude that the Plan addressed a matter of public concern within the meaning of *Pickering.*

* * * *

Conclusion

We hold that there is an exception to *Garcetti* for teaching and academic writing. We affirm the district court's determination that Demers prepared and circulated his Plan pursuant to official duties, but we reverse its determination that the Plan does not address matters of public concern. We hold that defendants are entitled to qualified immunity. We remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

Notes and Questions

1. For public employee speech claims, what is the importance of the "official duties" inquiry following the U.S. Supreme Court's decision in *Garcetti v. Ceballos* (see Text, pp. 307-309, for discussion of *Garcetti*)?

2. What types of faculty speech are covered in the exception to the *Garcetti* standards recognized by the court in *Demers*? Does the exception apply to faculty speech beyond teaching and research, such as participation in department meeting or serving on university committees?

3. How does the *Demers* decision compare with how other federal courts have applied the *Garcetti* standards to faculty speech claims? For examples, see the discussion of *Renken v. Gregory* (Text, pp. 333-368), *Gorum v.* Sessoms (Text, pp. 381), and *Adams v. University of North Carolina at Wilmington* (Text, p. 381-382). While a pre-*Garcetti* decision, consider how the court in *Urofsky v. Gilmore* (Text, pp. 396-401) analyzed

faculty speech for First Amendment purposes compared to the court in *Demers*.

4. What are reasons for recognizing an exception under the *Garcetti* standards for faculty speech? What are reasons for treating faculty speech as no different than that of any other public employees for First Amendment purposes, including in relation to academic freedom claims?

SEC. 6.2.2. Academic Freedom in the Classroom

Martin v. Parrish
805 F.2d 583 (5th Cir. 1986)

OPINION: EDITH HOLLAN JONES, Circuit Judge:

Whether a publicly employed college teacher is constitutionally protected in the abusive use of profanity in the classroom is the most significant issue presented by this appeal. We hold that the constitution does not shield him and therefore AFFIRM the judgment of the district court.

I. BACKGROUND

Appellant Martin was an economics instructor at Midland College in Midland, Texas. Appellees are the president, vice president, dean and trustees of the college. The dean and vice president originally disciplined Martin in 1983, following a formal student complaint regarding Martin's inveterate use of profane language, including "hell," "damn," and "bullshit," in class. Martin was warned orally and in writing that should his use of profanity in the classroom continue, disciplinary action requiring suspension, termination or both would be recommended. Heedless of the administrators' concerns, Martin continued to curse in class, using words including "bullshit," "hell," "damn," "God damn," and "sucks." Two students filed written complaints concerning Martin's speech in the classroom on June 19, 1984, which included the following statements: "the attitude of the class sucks," "[the attitude] is a bunch of bullshit," "you may think economics is a bunch of bullshit," and "if you don't like the way I teach this God damn course there is the door." Following notice of this outburst, the dean initiated actions to terminate Martin, which culminated, following several administrative steps, in approval by the college's board of trustees.

* * * *

II. ANALYSIS

Appellant asserts his language was not obscene, *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), but only profane and as such enjoys constitutional protection unless it caused disruption.[6] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). We find this argument an incomplete and erroneous expression of pertinent first amendment jurisprudence.

The constitution protects not simply words but communication, which presupposes a speaker and a listener, and circumscribes this protection for purposes which enhance the functioning of our republican form of government. The "rights" of the speaker are thus always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his speech. Appellant's argument, by ignoring his audience and the lack of any public purpose in his offensive epithets, founders on several fronts.

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), recently explained the limits of first amendment protection of speech afforded public employees like Martin. The Supreme Court reiterated that the goal of such protection is to prevent suppression of such employees' participation in public affairs and "chilling" of their freedom of political association. 461 U.S. at 145-46, 103 S. Ct. at 1689. It is limited to speech on matters of "public concern," otherwise, government would be hobbled in its regulation of employment conditions, and public employees would enjoy immunity from the consequences of their speech not shared by anyone in the private sector. If the offending speech does not bear upon a matter of public concern, "it is unnecessary for us to scrutinize the reasons for [the] discharge." *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690. Moreover, "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement...." *Id*.[7]

There is no doubt that Martin's epithets did not address a matter of public concern. One student described Martin's June 19, 1984, castigation of the class as an explosion, an unprovoked, extremely offensive, downgrading of the entire class. In highly derogatory and indecent terms, Martin implied that the students were inferior because they were accustomed to taking courses from inferior, part-time instructors at Midland College. The profanity described

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[6] Appellant also argues vigorously that he has a first amendment right to "academic freedom" that permits use of the language in question. It is, however, undisputed that such language was not germane to the subject matter in his class and had no educational function. Thus, as in *Kelleher v. Flawn*, 761 F.2d 1079, 1085 (5th Cir. 1985), we find it unnecessary to reach this issue.

[7] Only if the speech passes this first test of protection does the court "balance" the employee's rights against any disruptive effect on the employer's mission. *Connick*, 461 U.S. at 151-55, 103 S. Ct. at 1692-94.

Martin's attitude toward his students, hardly a matter that, but for this lawsuit, would occasion public discussion. Appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress – to "motivate" them – and has thereby impliedly conceded his case under *Connick*.

* * * *

The judgment of the district court is AFFIRMED.

ROBERT MADDEN HILL, Circuit Judge, concurring in the judgment.

I concur in the judgment because I believe that *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), controls this case.

* * * *

Connick states that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690. Whether an employee's speech addresses a matter of public concern must be determined "by the content, form and context of a given statement, as revealed by the whole record." *Id*. at 147-48, 103 S. Ct. at 1690.

The majority indicates that the profane nature of Martin's words preclude a finding that a matter of public concern is involved. The use of profane words by themselves, in my opinion, does not preclude a finding that an employee's speech addresses a matter of public concern. Instead, as *Connick* indicates, the record as a whole must be examined. Looking at Martin's comments as a whole, I agree with the majority's conclusion that they do not address a matter of public concern. While some of Martin's comments in isolation could be construed as challenging the attitude of the class in its approach to economics, the derogatory nature of the comments overall convinces me that no matter of public concern is involved. For the same reason, I agree with the majority that the question of Martin's first amendment right to "academic freedom" does not need to be reached in this case. While some of the comments arguably bear on economics and could be viewed as relevant to Martin's role as a teacher in motivating the interest of his students, his remarks as a whole are unrelated to economics and

devoid of any educational function. Thus, I agree with the majority that Martin's discharge did not violate his first amendment rights.

* * * *

Notes and Questions

1. The majority in *Martin v. Parrish* also set out an alternative basis for its decision, relying on U.S. Supreme Court cases involving regulation of "indecent" speech in high schools and over the public airwaves. In a separate opinion, one judge concurred with the majority opinion insofar as it relied on *Connick*, but disagreed with the majority's attempt to apply the Supreme Court indecent speech cases to higher education.

2. In order for the speech of a public institution's faculty member to be protected under the *Pickering*/*Connick* line of cases (which now also includes *Garcetti v. Ceballos*, 547 U.S. 410 (2006); see the Text Section 6.1.1, pp. 348-52), what criteria must be satisfied? Do these criteria suitably balance the interests of faculty members and the institution in the higher education context? Can principled distinctions between matters of public concern and matters of private concern be made in the higher education context? In the classroom context? Can principled distinctions between speaking as an employee and speaking as a citizen be made in these contexts? For recent debate on these issues, see text note 6 after *Urofsky v. Gilmore* in Section 6.3 of this volume of materials.

3. Specifically, what was the fatal flaw in the instructor's speech? Was it the profanity itself? Or was it the belittling nature of the speech? Or something else? Suppose the instructor had used the same profanity in the course of a lecture on the shortcomings of Communist economic systems; would the result have been different? Or suppose the instructor had made comments sharply derogatory of the students' attitudes but had used words like "heck" and "bull" rather than "hell" and "bullshit"; would the result have been different? Would the faculty member's free speech claim be decided any differently under *Garcetti* (see note 2 above)?

4. Could the instructor's speech have been considered "hate speech" (see the Text Section 9.5)? If so, why would it not be protected under the First Amendment, even though student hate speech often does receive such protection?

5. For a faculty member, would a claim based on the *Pickering/Connick* line of cases and a claim based on academic freedom be one and the same? Must a faculty member's speech be on a matter of public concern, under the *Connick* criteria, before any academic freedom protection may be claimed under the First Amendment? In this respect, compare *Martin v. Parrish* with *Hardy v. Jefferson Community College,* 260 F.3d 671 *(*6th Cir. *2*001), discussed in the Text Section 6.2.2, pp.379-82. Or, under *Garcetti,* must a faculty member's speech be "private citizen speech" rather than "employee speech" before any academic freedom protection may be claimed under the First Amendment?

6. For discussion of how the *Garcetti* case could affect the analysis in classroom academic freedom cases, including examples of post-*Garcetti* cases, see the Text Section 6.2.1 and Section 6.2.2.

SEC. 6.2 Academic Freedom in Teaching

6.6.2.2 The classroom

Meriwether v. Hartop

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

OPINION BY: THAPAR

Traditionally, American universities have been beacons of intellectual diversity and academic freedom. They have prided themselves on being forums where controversial ideas are discussed and debated. And they have tried not to stifle debate by picking sides. But Shawnee State chose a different route: It punished a professor for his speech on a hotly contested issue. And it did so despite the constitutional protections afforded by the First Amendment. The district court dismissed the professor's free-speech and free-exercise claims. We see things differently and reverse.

I.

The district court decided this case on a motion to dismiss, so we construe the complaint in the light most favorable to the plaintiff. That means we must accept the complaint's factual allegations as true and draw all reasonable inferences in Meriwether's favor. Under this standard, we must reverse the district court's dismissal unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

A.

Nicholas Meriwether is a philosophy professor at Shawnee State University, a small public college in Portsmouth, Ohio. Shawnee State began awarding bachelor's degrees just thirty years ago. And for twenty-five of those years, Professor Meriwether has been a fixture at the school. He has served in the faculty senate, designed a bachelor's degree program in Philosophy and Religion, led study-abroad trips, and taught countless students in classes ranging from Ethics to

the History of Christian Thought. Up until the incident that triggered this lawsuit, Meriwether had a spotless disciplinary record.

Professor Meriwether is also a devout Christian. He strives to live out his faith each day. And, like many people of faith, his religious convictions influence how he thinks about "human nature, marriage, gender, sexuality, morality, politics, and social issues." Meriwether believes that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that he cannot "affirm as true ideas and concepts that are not true." *Id.* Being faithful to his religion was never a problem at Shawnee State. But in 2016, things changed.

At the start of the school year, Shawnee State emailed the faculty informing them that they had to refer to students by their "preferred pronoun[s]." Meriwether asked university officials for more details about the new pronoun policy, and the officials confirmed that professors would be disciplined if they "refused to use a pronoun that reflects a student's self-asserted gender identity." What if a professor had moral or religious objections? That didn't matter: The policy applied "regardless of the professor's convictions or views on the subject."

When Meriwether asked to see the revised policy, university officials pointed him to the school's existing policy prohibiting discrimination "because of . . . gender identity." That policy applies to all of the university's "employees, students, visitors, agents and volunteers"; it applies at both academic and non-academic events; it applies on all university property (including classrooms, dorms, and athletic fields); and it sometimes applies off campus.

Meriwether approached the chair of his department, Jennifer Pauley, to discuss his concerns about the newly announced rules. Pauley was derisive and scornful. Knowing that Meriwether had successfully taught courses on Christian thought for decades, she said that Christians are "primarily motivated out of fear" and should be "banned from teaching courses regarding that religion." In her view, even the "presence of religion in higher education is counterproductive."

Meriwether continued to teach students without incident until January 2018. On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political

Philosophy. When using that method, he addresses students as "Mr." or "Ms." He believes "this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor" and "foster[s] an atmosphere of seriousness and mutual respect." He "has found that addressing students in this fashion is an important pedagogical tool in all of his classes, but especially in Political Philosophy where he and [the] students discuss many of the most controversial issues of public concern." In that first class, one of the students Meriwether called on was Doe. According to Meriwether, "no one . . . would have assumed that [Doe] was female" based on Doe's outward appearances. Thus, Meriwether responded to a question from Doe by saying, "Yes, sir." This was Meriwether's first time meeting Doe, and the university had not provided Meriwether with any information about Doe's sex or gender identity.

After class, Doe approached Meriwether and "demanded" that Meriwether "refer to [Doe] as a woman" and use "feminine titles and pronouns." This was the first time that Meriwether learned that Doe identified as a woman. So Meriwether paused before responding because his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false. He explained that he wasn't sure if he could comply with Doe's demands. Doe became hostile—circling around Meriwether at first, and then approaching him in a threatening manner: "I guess this means I can call you a cu--." Doe promised that Meriwether would be fired if he did not give in to Doe's demands.

Meriwether reported the incident to senior university officials, including the Dean of Students and his department chair, Jennifer Pauley. University officials then informed their Title IX office of the incident. Officials from that office met with Doe and escalated Doe's complaint to Roberta Milliken, the Acting Dean of the College of Arts and Sciences.

Dean Milliken went to Meriwether's office the next day. She "advised" that he "eliminate all sex-based references from his expression"—no using "he" or "she," "him" or "her," "Mr." or "Ms.," and so on. Meriwether pointed out that eliminating pronouns altogether was next to impossible, especially when teaching. So he proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe using only Doe's last name. Dean Milliken accepted this compromise, apparently believing it followed the university's gender-identity policy.

Doe continued to attend and participate in Meriwether's class. But Doe remained dissatisfied and, two weeks into the semester, complained to university officials again. So Dean Milliken paid Meriwether another visit. This time, she said that if Meriwether did not address Doe as a woman, he would be violating the university's policy.

Soon after, Meriwether accidentally referred to Doe using the title "Mr." before immediately correcting himself. Around this time, Doe again complained to the university's Title IX Coordinator and threatened to retain counsel if the university didn't take action. So Dean Milliken once again came to Meriwether's office. She reiterated her earlier demand and threatened disciplinary action if he did not comply.

Trying to find common ground, Meriwether asked whether the university's policy would allow him to use students' preferred pronouns but place a disclaimer in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." Dean Milliken rejected this option out of hand. She insisted that putting a disclaimer in the syllabus would itself violate the university's gender-identity policy.

During the rest of the semester, Meriwether called on Doe using Doe's last name, and "Doe displayed no anxiety, fear, or intimidation" while attending class. In fact, Doe excelled and participated as much or more than any other student in the course. At the end of the semester, Meriwether awarded Doe a "high grade." This grade reflected Doe's "very good work" and "frequent participation in class discussions."

B.

As the semester proceeded, Meriwether continued to search for an accommodation of his personal and religious views that would satisfy the university. But Shawnee State was not willing to compromise. After Dean Milliken's final meeting with Meriwether, she sent him a formal letter reiterating her demand: Address Doe in the same manner "as other students who identify themselves as female." The letter said that if Meriwether did not comply, "the University may

conduct an investigation" and that he could be subject to "informal or formal disciplinary action."

Then, just a few days later—and without waiting for a response from Meriwether—Milliken announced that she was "initiating a formal investigation." She claimed that she was doing so because she received "another complaint from a student in [Meriwether's] class." The complaint was again from Doe. When Meriwether again asked whether an accommodation might be possible given his sincerely held beliefs, Milliken shot him down. She said he had just two options: (1) stop using *all* sex-based pronouns in referring to students (a practical impossibility that would also alter the pedagogical environment in his classroom), or (2) refer to Doe as a female, even though doing so would violate Meriwether's religious beliefs.

Dean Milliken referred the matter to Shawnee State's Title IX office. Over the coming months, the university's Title IX staff conducted a less-than-thorough investigation. They interviewed just four witnesses—Meriwether, Doe, and two other transgender students. They did not ask Meriwether to recommend any potential witnesses. And aside from Doe and Meriwether themselves, none of the witnesses testified about a single interaction between the two.

Shawnee State's Title IX office concluded that "Meriwether's disparate treatment [of Doe] ha[d] created a hostile environment" in violation of the university's nondiscrimination policies. Those policies prohibit "discrimination against any individual because of . . . gender identity." They define gender identity as a "person's innermost concept of self as male or female or both or neither." And they define a hostile educational environment as "any situation in which there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint. The Title IX report concluded that because Doe "perceives them self as a female," and because Meriwether has "refuse[d] to recognize" that identity by using female pronouns, Meriwether engaged in discrimination and "created a hostile environment." The report did not mention Meriwether's request for an accommodation based on his sincerely held religious beliefs.

After the Title IX report issued, Dean Milliken informed Meriwether that she was bringing a "formal charge" against him under the faculty's collective bargaining agreement. She then issued

her own report setting forth her findings: "Because Dr. Meriwether repeatedly refused to change the way he addressed [Doe] in his class due to his views on transgender people, and because the way he treated [Doe] was deliberately different than the way he treated others in the class, . . . he effectively created a hostile environment for [Doe]." Milliken's whole explanation of how Meriwether violated university policy spanned just one paragraph. Finally, to create a "safe educational experience for all students," Dean Milliken concluded that it was necessary to discipline Meriwether. She recommended placing a formal warning in his file.

Provost Jeffrey Bauer was tasked with reviewing Milliken's disciplinary recommendation before it was imposed. Meriwether wrote Provost Bauer a letter stating that he treated Doe exactly the same as he treated all male students; that he began referring to Doe without pronouns and by Doe's last name as an accommodation to Doe; and that Doe's "access to educational benefits and opportunities was never jeopardized." Meriwether further explained that he could not use female pronouns to refer to Doe due to his "conscience and religious convictions." He asked Provost Bauer to allow "reasonable minds . . . to differ" on this "newly emerging cultural issue." Provost Bauer rejected Meriwether's request, stating that he "approve[d] Dean Milliken's recommendation of formal disciplinary action." Bauer did not address Meriwether's arguments to the contrary, nor did he grapple with Meriwether's request for a religious accommodation.

Shawnee State then placed a written warning in Meriwether's file. The warning reprimanded Meriwether and directed him to change the way he addresses transgender students to "avoid further corrective actions." What does "further corrective actions" mean? Suspension without pay and termination, among other possible punishments.

C.

The Shawnee State faculty union then filed a grievance on Meriwether's behalf. It asked the university to (1) vacate the disciplinary action, and (2) allow Meriwether to keep speaking in a manner consistent with his religious beliefs.

Provost Bauer, who had already rejected Meriwether's claim once, was tasked with deciding the grievance. A union representative, Dr. Chip Poirot, joined Meriwether to present the grievance at

a hearing. From the outset, Bauer exhibited deep hostility. He repeatedly interrupted the representative and made clear that he would not discuss the academic freedom and religious discrimination aspects of the case. The union representative tried to explain the teachings of Meriwether's church and why Meriwether felt he was being compelled to affirm a position at odds with his faith. At one point during the hearing, Provost Bauer "openly laughed." Indeed, Bauer was so hostile that the union representative "was not able to present the grievance." Bauer denied the grievance.

The next step in Shawnee State's grievance process involved an appeal to the university's president. In a twist of fate, the president turned out to be Bauer. Shortly after Provost Bauer denied the grievance, he was appointed interim university president. Bauer designated two of his representatives, Shawnee State's Labor Relations Director and General Counsel, to meet with Meriwether and Poirot on his behalf.

The officials agreed with the union that Meriwether's conduct had not "created a hostile educational environment." But they recommended ruling against Meriwether anyway. This was, they said, not a hostile-environment case; instead, it was a "differential treatment" case. This change in theory contradicted the Title IX investigation and Dean Milliken's disciplinary recommendation (which Provost Bauer approved)—both of which accused Meriwether of violating university policy by "creat[ing] a hostile environment for [Doe]." The officials justified the university's refusal to accommodate Meriwether's religious beliefs by equating his views to those of a hypothetical racist or sexist. Since the university would not accommodate religiously motivated racism or sexism, it ought not accommodate Meriwether's religious beliefs. Bauer adopted his representatives' findings and denied the grievance again.

That was the end of the grievance process at Shawnee State. Because Meriwether now fears that he will be fired or suspended without pay if he does not toe the university's line on gender identity, he alleges he cannot address "a high profile issue of public concern that has significant philosophical implications." He steers class discussions away from gender-identity issues and has refused to address the subject when students have raised it in class. The warning letter in Meriwether's file will also make it "difficult, if not impossible," for him to obtain a position at another institution once he retires from Shawnee State.

D.

Out of options at Shawnee State, Meriwether filed this lawsuit. He alleged that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the First Amendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

The district court referred the case to a magistrate judge. Doe and an organization, Sexuality and Gender Acceptance, then moved to intervene, and the magistrate granted their motion. Next, the defendants and intervenors filed separate motions to dismiss under Rule 12(b)(6). The magistrate recommended dismissing all of Meriwether's federal claims and declining to exercise supplemental jurisdiction over his state-law claims. Meriwether then objected to the magistrate's report and recommendation. But the district court adopted it in full.

Meriwether now appeals the district court's decision, except for its dismissal of his equal-protection claim. We first address Meriwether's free-speech claim before turning to his free-exercise and due-process claims.

II.

"Universities have historically been fierce guardians of intellectual debate and free speech." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019). But here, Meriwether alleges that Shawnee State's application of its gender-identity policy violated the Free Speech Clause of the First Amendment. The district court rejected this argument and held that a professor's speech in the classroom is never protected by the First Amendment. We disagree: Under controlling Supreme Court and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors. Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed.

A.

1.

Start with the basics. The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

It should come as little surprise, then, "that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." Why? Because free speech is "essential to our democratic form of government." Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish.

Courts have often recognized that the Free Speech Clause applies at public universities. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 732-33 (6th Cir. 2012). Thus, the state may not act as though professors or students "shed their constitutional rights to freedom of speech or expression at the [university] gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Government officials violate the First Amendment whenever they try to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," and when they "force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To be sure, free-speech rules apply differently when the government is doing the speaking. And that remains true even when a government employee is doing the talking. Thus, in *Garcetti v. Ceballos*, the Supreme Court held that normally "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

2.

Here, the threshold question is whether the rule announced in *Garcetti* bars Meriwether's free-speech claim. It does not.

Garcetti set forth a general rule regarding government employees' speech. But it expressly declined to address whether its analysis would apply "to a case involving speech related to scholarship or teaching." Although *Garcetti* declined to address the question, we can turn to the Supreme Court's prior decisions for guidance. Those decisions have "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

* * * * *[8]

As a result, our court has rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.

In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth.[9] . . . One final point worth considering: If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as "comrades." That cannot be.

3.

Shawnee State and the intervenors raise several arguments in response.

First, they suggest that we ought not apply the Supreme Court's academic-freedom cases that preceded *Garcetti*. But our job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. And here, the Supreme Court has not overruled its academic-freedom cases. *Garcetti* expressed no view on this issue and even recognized that "expression related to . . . classroom instruction" might not fit within the Court's "customary

[8] The court then discusses the *Sweezy* and *Keyishian* cases; see sec. 6.1.5 of the text.
[9] The court here cites the *Adams*, *Buchanan*, and *Demers* cases, all of which created exceptions to *Garcetti* for speech related to a faculty member's teaching and scholarship. See section 6.2.

employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425. Thus, we remain bound by prior Supreme Court and Sixth Circuit precedent in this area.

Second, they argue that even if there is an academic-freedom exception to *Garcetti*, it does not protect Meriwether's use of titles and pronouns in the classroom. As they would have it, the use of pronouns has nothing to do with the academic-freedom interests in the substance of classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because Meriwether's choices touch on gender identity—a hotly contested matter of public concern that "often" comes up during class discussion in Meriwether's political philosophy courses.

By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion. Under the First Amendment, "the mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam). Rather, the lesson of *Pickering* and the Court's academic-freedom decisions is that the state may do so only when its interest in restricting a professor's in-class speech outweighs his interest in speaking.

Remember, too, that the university's position on titles and pronouns goes both ways. By defendants' logic, a university could likewise *prohibit* professors from addressing university students by their preferred gender pronouns—no matter the professors' own views. And it could even impose such a restriction while denying professors the ability to explain to students why they were doing so. But that's simply not the case. Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints. .

Thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything but speech by an ordinary government employee. Indeed, in the college classroom there are three critical interests at stake

(all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints. Because the First Amendment "must always be applied 'in light of the special characteristics of the . . . environment' in the particular case, public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. Thus, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character."

Of course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment. Shawnee State says that the rule at issue is similarly ministerial. But as we discuss below, titles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth. But Meriwether does not agree with that message, and he does not want to communicate it to his students. That's not a matter of classroom management; that's a matter of academic speech.

Finally, defendants argue that academic freedom belongs to public universities, not professors. But we've held that university professors "have . . . First Amendment rights when teaching" that they may assert against the university. *Hardy*, 260 F.3d at 680; *see Bonnell*, 241 F.3d at 823. So this arguments fails.

B.

Although *Garcetti* does not bar Meriwether's free-speech claim, that is not the end of the matter. We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment. Under that framework, we ask two questions: First, was Meriwether speaking on "a matter of public concern"? And second, was his interest in doing so greater than the

university's interest in "promoting the efficiency of the public services it performs through" him?

1.

To determine whether speech involves a matter of public concern, we look to the "content, form, and context of a given statement, as revealed by the whole record." When speech relates "to any matter of political, social, or other concern to the community," it addresses a matter of public concern. Thus, a teacher's in-class speech about "race, gender, and power conflicts" addresses matters of public concern. "The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives."

Meriwether did just that in refusing to use gender-identity-based pronouns. And the "*point* of his speech" (or his refusal to speak in a particular manner) was to convey a message. Taken in context, his speech "concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." That is, his mode of address *was* the message. It reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and "has become an issue of contentious political . . . debate."

From courts to schoolrooms this controversy continues. Recently, the Fifth Circuit rejected an appellant's motion to be referred to by the appellant's preferred gender pronouns—over an "emphatic[] dissent." And, on the other side, a Texas high school generated controversy when it permitted its students to display preferred gender pronouns on their online profiles. Further examples abound. In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.

* * * * *

And even the university appears to think this pronoun debate is a hot issue. Otherwise, why would it forbid Meriwether from explaining his "personal and religious beliefs about gender identity" in his syllabus? No one contests that what Meriwether proposed to put in his syllabus

involved a matter of public concern. In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.

2.

Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us "to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Here, that balance favors Meriwether.

Start with Meriwether's interests. We begin with "the robust tradition of academic freedom in [**33] our nation's post-secondary schools." That tradition alone offers a strong reason to protect Professor Meriwether's speech. After all, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. And the First Amendment interests are especially strong here because Meriwether's speech also relates to his core religious and philosophical beliefs. Finally, this case implicates an additional element: potentially compelled speech on a matter of public concern. And "[w]hen speech is compelled . . . additional damage is done."

Those interests are powerful. Here, the university refused even to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus disclaimer. That ban is anathema to the principles underlying the First Amendment, as the "proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Indeed, the premise that gender identity is an idea "embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."

And this is particularly true in the context of the college classroom, where students' interest in hearing even contrarian views is also at stake. "Teachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding."

On the other side of the ledger, Shawnee State argues that it has a compelling interest in stopping discrimination against transgender students. It relies on *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* in support of this proposition. But *Harris* does not resolve this case. There, a panel of our court held that an employer violates Title VII when it takes an adverse employment action based on an employee's transgender status. The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern. Doing so would reduce *Pickering* to a shell. And it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Purportedly neutral non-discrimination policies cannot be used to transform institutions of higher learning into "enclaves of totalitarianism." *Tinker*, 393 U.S. at 511.

Turning to the facts, the university's interest in punishing Meriwether's speech is comparatively weak. When the university demanded that Meriwether refer to Doe using female pronouns, Meriwether proposed a compromise: He would call on Doe using Doe's last name alone. That seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive. Thus, on the allegations in this complaint, it is hard to see how this would have "create[d] a hostile learning environment that ultimately thwarts the academic process." It is telling that Dean Milliken at first approved this proposal. And when Meriwether employed this accommodation throughout the semester, Doe was an active participant in class and ultimately received a high grade.

As we stated in *Hardy*, "a school's interest in limiting a teacher's speech is not great when those public statements 'are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.'" The mere "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." At this stage of the litigation, there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits. Without such a showing, the

school's actions "mandate[] orthodoxy, not anti-discrimination," and ignore the fact that "[t]olerance is a two-way street." Thus, the *Pickering* balance strongly favors Meriwether.

Finally, Shawnee State and the intervenors argue that Title IX compels a contrary result. We disagree. Title IX prohibits "discrimination under any education program or activity" based on sex. The requirement "that the discrimination occur 'under any education program or activity' suggests that the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." But Meriwether's decision not to refer to Doe using feminine pronouns did not have any such effect. As we have already explained, there is no indication at this stage of the litigation that Meriwether's speech inhibited Doe's education or ability to succeed in the classroom. Bauer even admitted that Meriwether's conduct "was not so severe and pervasive that it created a hostile educational environment." Thus, Shawnee State's purported interest in complying with Title IX is not implicated by Meriwether's decision to refer to Doe by name rather than Doe's preferred pronouns.

In sum, "the Founders of this Nation . . . 'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.'" Shawnee State allegedly flouted that core principle of the First Amendment. Taking the allegations as true, we hold that the university violated Meriwether's free-speech rights.[10]

* * * * *

IV.

For the reasons set forth above, we affirm the district court's due-process holding, reverse its free-speech and free-exercise holdings, vacate its dismissal of the state-law claims, and remand for further proceedings consistent with this opinion.

[10] The court also ruled that the university had violated Meriwether's rights under the Free Exercise Clause by disciplining him for refusing to follow a policy that he viewed as contrary to his religious beliefts.

Notes and Questions

1. The appellate court stated that Meriwether's practice of calling students by honorifics (Mr. or Ms.) that are not gender neutral was part of his pedagogical approach to teaching. Do you agree?

2. Is there evidence in the court's opinion that the administration had considered whether certain faculty would have religious objections to the language of the nondiscrimination policy, and had a process to deal with those objections?

3. Please evaluate the behavior of the various administrators involved in the Meriwether situation as the court describes it. What could have been done differently, and would have made a difference in legal terms?

4. What are a college's options when religious freedom and the college's nondiscrimination policy are in conflict?

SECS. 6.1.7. and 6.2. "Institutional" Academic Freedom and *Academic Freedom in Teaching*

Problem 10

Sam Spade is a tenured associate professor of political science at State University. The voters of the state in which State Univerity is located just elected a governor who has vowed to "eliminate all of those woke professors at State Univerity and put this university back on the right track." Professor Spade has critized the governor very harshly while teaching the first-year political science course, and has also made very negative comments about the governor on social media as well, identifying himself as a faculty member at State University. Professor Spade has given his students access to his social media account.

One of the students in Professor Spade's class is an intern in the governor's office, and has repeated Professor Spade's negative comments to the governor's chief of staff, who repeated them to the governor. The governor called the university president, demanding that she fire Professor Spade immediately or he will make sure that the legislature will "punish" the university by cutting its appropriation by 30 percent every month until Spade is gone.

1. If the President decides to dismiss Spade, what rationale would she use?

2. If the president dismisses Professor Sharp, does Professor Spade have any viable legal claims?

3. Does the university have any protection under the doctrine of "institutional academic freedom"?

SEC. 6.2. Academic Freedom in Teaching

Problem 11

Martin Fletcher is a doctoral student in the history department at State College. He has been asked to teach a course called "Survey of New Democracies and their Foundations" for the department. The course has been offered before, so Martin has been given the syllabus used by previous instructors. The only guidance he has been given is "be sure that you update this to include the recent developments in Libya and Egypt." The readings include a textbook that is approximately ten years old and a series of articles, the most recent of which is five years old.

Martin spends two months preparing to teach the course, replacing the old text with a series of articles, newspaper articles, and website blogs. After the first two weeks of class, the department chair asked to see Martin's syllabus. After reviewing it, the chair said "this won't do at all—there is insufficient material in the course, it doesn't include the historical roots of emerging democratic movements, and your assignments are insufficient for an upper level undergraduate course." Martin refuses to change the syllabus, saying that he has "academic freedom" to teach the course the way he wishes. The chair says that if Martin does not modify the readings and assignments, he will "take the course away" from Martin, even if it is in the middle of the semester.

What are Martin's rights? What are the department's rights? What would you advise Martin to do?

SEC. 6.2.3. Academic Freedom in Grading

Parate v. Isibor
868 F.2d 821 (1989)

OPINION: KEITH, Circuit Judge.

Plaintiff Natthu S. Parate ("Parate"), whose contract to teach at Tennessee State University ("TSU") was not renewed, brought this civil rights action against defendants, various officials of TSU and the State University and Community College System of Tennessee.

* * * *

I.

Parate, a native of India, was appointed associate professor in the TSU Civil Engineering Department for the 1982-83 academic year, effective August 23, 1982. Parate received his Bachelor of Engineering degree from a university in India; his Master's degree from a university in England; and his Doctorate degree from a university in France. He also has done post-doctoral work in both France and Canada. Parate was appointed to a tenure-track position, which was subject to renewal on an annual basis. At all relevant times, Edward I. Isibor, a Nigerian, served as Dean of the School of Engineering and Technology, and Michael Samuchin served as Head of the Department of Civil Engineering.

In his first semester at TSU, Parate taught the course "Groundwater and Seepage" ("GWS"). At the beginning of the semester, Parate informed the class of his grading criteria. Students who earned 90 to 100 percent of the total coursework points would receive an "A" grade, and students who earned 80 to 90 percent would receive a "B" grade. The percentages were derived from points assigned to homework, class discussion, and examinations. Parate also stated that when awarding grades, he would consider individual students' extenuating circumstances.

After Parate distributed final grades in the "GWS" course, two students in the class, Students "X" and "Y," approached Parate and requested grade changes. Students "X" and "Y" had received final grades of 86.1 and 86.4, respectively. Student "X" contended that his grade should be changed because he had been involved in a serious legal matter while enrolled in the course. To support his argument, Student "X" showed Parate a court summons for a date in January, the month after the final exam. Parate reviewed Student "X's" performance and noted

that he had fared better on the midterm examination than he had on the final examination. On the basis of Student "X's" overall course work and his extenuating personal circumstances, Parate agreed to change his grade to an "A." Parate discussed the matter with Samuchin, who concurred in the grade change.

Student "Y" also requested a grade change. However, because Student "Y" had cheated on the final examination and presented false medical excuses, Parate declined to change his grade. Parate explained that he personally observed Student "Y" cheating on the final examination; confronted him; and refused to give him credit for plagiarized answers. In addition, Parate recalled that Student "Y" had previously offered medical excuses lacking in credibility. On one occasion, Student "Y's" note said that he was indisposed by a headache, but on a day when no class was scheduled. Another note submitted by Student "Y" had been altered with "white-out" and was written over to state the student "was not prepared for exam." After hearing Parate's explanation, Samuchin concurred in his decision not to change Student "Y's" grade. When advised by Parate that his grade would not be changed, Student "Y," also a Nigerian, said that he would get his grade changed "through the Dean."

On February 14, 1983, Student "Y" contacted Isibor and appealed for a grade change in the "GWS" course. On February 26, 1983, Parate met with Mohan Malkani, the Associate Dean of the School of Engineering and Technology. After hearing Parate's explanation, Malkani agreed that there was no valid reason to change Student "Y's" grade to an "A." Isibor insisted that Parate meet with him, Malkani and Samuchin on March 3, 1983. At the meeting, Isibor instructed Parate to change Student "Y's" grade to an "A." Isibor also insisted that Parate sign a memorandum changing his official grading distribution for the "GWS" course so that a grade of 86 would be an "A" instead of a "B." When Parate refused, Isibor began to insult and berate him. Isibor said that Parate did not know how to teach, asked him where he got his degree, and stated that it would be very difficult to renew Parate's contract at TSU.

On the following day, Samuchin again met with Parate. Samuchin had prepared memoranda for Parate's signature that referred to the purported change in the grading criteria for the "GWS" course. The memoranda also requested grade changes for both Students "X" and "Y." Although Parate signed the memoranda, he added a notation to each copy: "as per instructions from Dean and Department Head at meeting." Later the same day, Samuchin returned with retyped memoranda and explained to Parate that there was to be no notation referring to Isibor's instructions. Samuchin then warned Parate that if he failed to sign the retyped memoranda, then Isibor would "mess up" his evaluation. Parate signed the second set of memoranda, but to signify his protest, used a signature different from his normal one. Samuchin then returned with a third set of retyped memoranda, which Parate ultimately signed due to his fear of future reprisals from Isibor.

During both the 1983-84 and the 1984-85 academic years, Samuchin and Isibor engaged in a variety of retaliatory acts against Parate due to the "GWS" course incident. Samuchin and Isibor challenged Parate's grading criteria in other courses; sent him a letter critical of his teaching methods; and penalized him with low performance evaluations. By refusing Parate's requests for authorized professional travel and appropriate reimbursements, Samuchin and Isibor impeded Parate's research efforts and his presentation of papers at professional conferences. Ultimately, Samuchin and Isibor recommended the non-renewal of Parate's teaching contract.

On March 19, 1985, the President of TSU sent Parate a letter indicating that his tenure track appointment would not be renewed beyond the 1985-86 academic year. The letter stated that Parate could request from Samuchin a statement of reasons for non-renewal. Samuchin, however, never responded to Parate's request for such a statement. To resolve his differences with Isibor, Parate arranged a meeting on September 16, 1985. During this meeting, Isibor said that if Parate's performance improved, consideration would be given to the renewal of his teaching contract. Isibor concluded by telling Parate "you must obey and never disobey your Dean."

In late September 1985, one of Parate's classes was interrupted by a graduate student. This student demanded that Parate change his final grade in a course that had ended the previous year. On October 2, 1985, two Nigerian students complained about the grades they had received on a "Statics" course examination just returned by Parate. These students demanded "As" on the exam; questioned Parate's teaching competence in front of his other students; and threatened to go to Isibor. These students also stated that they would insure that Parate would not teach the "Statics" course in following semesters.

Two days later, on October 4, 1985, Parate held his "Statics" class as scheduled. Isibor and Samuchin, however, had preceded him into the classroom unannounced. After Parate began to call the roll, he was immediately interrupted. Isibor shouted from the back of the room: "Stop the roll call, don't waste time; circulate the paper for a roll call." Adhering to Isibor's directive, Parate began to teach his class, but was again interrupted by Isibor's shouts. Isibor next ordered Parate to complete one of the problems from the textbook. After Parate began to work out the problem on the blackboard and explain it to the students, Isibor again interrupted him. Isibor demanded that Parate complete the problem on the blackboard without addressing the students; that the students complete the problem on paper; and that Samuchin copy Parate's work from the board. Isibor soon approached the blackboard himself and began to work on the same problem that Parate and the students were completing. After severely criticizing Parate's teaching skills in front of his students, Isibor collected the students' papers and left the classroom.

After this class, Parate was summoned to a meeting with Isibor, Samuchin, Malkani, and a professor from the TSU Department of Industrial Arts and Technology. Isibor again began to

berate Parate. He said that some of Parate's students were more intelligent than their teacher, and that Parate's salary could be stopped at any time. Isibor then removed Parate from his post as instructor of the "Statics" course, but directed Parate to attend the class as a student. Parate attended the class for five or six sessions, but was then told that Isibor no longer wanted him to attend. During that semester, Parate was never reinstated as the instructor of the "Statics" class. In the remainder of Parate's final academic year, 1985-86, Isibor and Samuchin continually sent faculty observers to his classroom.

II.

On April 4, 1986, Parate brought this civil action pursuant to 42 U.S.C. § 1983....

* * * *

In his complaint, Parate asserted causes of action for violations of his right to academic freedom under the First Amendment, and his liberty and due process interests under the Fourteenth Amendment. He also alleged state law claims for defamation, interference with his property right to work, retaliatory discharge, and intentional infliction of emotional distress. Parate then sought preliminary and injunctive relief, as well as an award of damages.

* * * *

In an order entered June 5, 1986, the district court denied Parate's motion for preliminary injunction and the defendants' motion to dismiss. Defendants Isibor and Samuchin, in their individual capacities, filed a motion for summary judgment on October 7, 1986. All of the defendants, in their official capacities, filed motions for summary judgment. . . .

* * * *

III.

Judge Posner of the Seventh Circuit has explained that the term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government...and the freedom of the individual teacher...to pursue his ends without interference from the academy; and these two freedoms are in conflict." *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007, 88 L. Ed. 2d 460,

106 S. Ct. 528 (1985). Other commentators have identified the problems inherent in resolving clashes between the academy and individual academics when both parties claim a constitutional right to academic freedom. See, e.g., Mertz, "The Burden of Proof and Academic Freedom: Protection for Institution or Individual?," 82 *Nw. U.L. Rev*. 492, 493 (1988); "Developments in the Law – Academic Freedom," 81 *Harv. L. Rev*. 1045 (1968).

Academic freedom thrives not only on the robust and uninhibited exchange of ideas between the individual professor and his students, but also on the "autonomous decision making [of]...the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n. 12, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). Justice Frankfurter summarized the "four essential freedoms" of the university:

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (concurring in result), quoted in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). Thus, while the Supreme Court has often expressed a reluctance to intervene in the prerogatives of state and local educational institutions, it has remained committed to the protection of their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967).

The administration of the university rests not with the courts, but with the administrators of the institution. A nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades. See *Megill v. Board of Regents of the St. of Fla*., 541 F.2d 1073 (5th Cir. 1976). University officials remain free to review a professor's classroom activities when determining whether to grant or deny tenure. The university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. *Hetrick v. Martin*, 480 F.2d 705, 708 (6th Cir.), *cert. denied*, 414 U.S. 1075, 38 L. Ed. 2d 482, 94 S. Ct. 592 (1973). The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself. See *Lovelace v. Southeastern Mass. Univ*., 793 F.2d 419, 426 (1st Cir. 1986).

* * * *

Although judicial concern has been expressed for the academic freedom of the university, the courts have also afforded substantial protection to the First Amendment freedoms of individual university professors. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), the Supreme Court concluded that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Thus, "that a teacher does have First Amendment protection under certain circumstances cannot be denied." *Fowler v. Board of Educ.*, 819 F.2d 657, 662 (6th Cir.), *cert. denied*, 484 U.S. 986, 108 S. Ct. 502, 98 L. Ed. 2d 501 (1987).

The individual university professor may claim that his assignment of an examination grade or a final grade is communication protected by the First Amendment. As does any communicative act, assigning a letter grade sends a message to the recipient. The message communicated by the letter grade "A" is virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." Both communicative acts represent symbols that transmit a unique message.

Because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection.

* * * *

The freedom of the university professor to assign grades according to his own professional judgment is of substantial importance to that professor. To effectively teach her students, the professor must initially evaluate their relative skills, abilities, and knowledge. The professor must then determine whether students have absorbed the course material; whether a new, more advanced topic should be introduced; or whether a review of the previous material must be undertaken. Thus, the professor's evaluation of her students and assignment of their grades is central to the professor's teaching method.

* * * *

Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign. In the context of

protected speech, the difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. National Fed'n. of the Blind of N.C.*, 487 U.S. 781, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (1988). . . .

* * * *

Thus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity.

In *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), the Supreme Court held that an individual could not be compelled to display the slogan "Live Free or Die" on his automobile license plate. In so holding, the Court relied on the principle that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id*. at 714 (quoting *Barnette*, 319 U.S. at 637). Similarly, the university professor must remain free to exercise his independent professional judgment in the assignment of grades and the evaluation of his students' academic progress.

If the speech of a nontenured professor is compelled by a university administrator, then the professor is not without redress for this violation of her constitutional rights. If a nontenured professor claims that she was not rehired in violation of a First Amendment right, she must first establish that her conduct was constitutionally protected, and then that this conduct was the motivating factor in her not being rehired. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

In the present appeal, we consider the claim of the individual professor, Parate. He argues that his First Amendment right to academic freedom was violated during the March 3, 1983 grading incident.

* * * *

The district court held that Parate's constitutional right to academic freedom does not permit him to override administrative authority; to ignore TSU grading policies; or to escape the supervision of the defendants over his grade assignments. In rebuttal, Parate correctly contends that even as a nontenured professor, he retains the right to review each of his students' work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades that his

students ultimately receive. If the defendants had changed Student "Y's" "GSW" course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered Parate to change Student "Y's" original grade. The actions of the defendants, who failed to administratively change Student "Y's" grade themselves, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student "Y."

* * * *

Relying on *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.), *cert. denied*, 457 U.S. 1106, 73 L. Ed. 2d 1315, 102 S. Ct. 2906 (1982), the district court concluded that Parate's First Amendment claims should be dismissed. In *Hillis*, however, the plaintiff nontenured professor's contract was not renewed, in part, because he refused to give a student a "B" grade as directed by the head of his department. See *id*. at 549. Unlike the present defendants, the Hillis university administrators changed the student's grade. Unlike Parate, the *Hillis* professor was not forced, in violation of his own professional judgment, to personally change his student's grade. Because the *Hillis* professor's speech was not compelled in violation of the First Amendment, as was Parate's, the *Hillis* case is inapplicable here.

* * * *

The district court also relied on *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), *cert. denied*, 414 U.S. 1075, 38 L. Ed. 2d 482, 94 S. Ct. 592 (1973). In *Hetrick,* this Court found that no First Amendment interests were implicated when a state university did not renew the contract of a nontenured professor because her pedagogical style and teaching methods did not conform to the university's standards. See *id*. at 708. In the present appeal, however, defendants did not try to alter Parate's pedagogical style, but compelled his speech by demanding that he change, against his own professional judgment, a grade previously assigned.

We believe that the acts of the defendants deserve exacting First Amendment scrutiny. First, we consider Parate's First Amendment right to academic freedom and his interest in eliminating the defendants' arbitrary interference in the assignment of his course grades. Second, we consider Parate's First Amendment right to be free from compelled speech. By insisting that Parate sign the grade change memoranda without including his reservations or the notation "per the instruction of the Dean," the defendants compelled Parate to conform to a belief and a communication to which he did not subscribe. We then balance Parate's interests against defendants' interest in having Parate personally change Student "Y's" grade. Arguing from their

First Amendment right to academic freedom, the defendants assert an interest in supervising and reviewing the grading policies of their nontenured professors. If they deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing Student "Y's" grade. We conclude that by forcing Parate to change, against his professional judgment, Student "Y's" grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.

IV.

Parate next claims that the defendants' actions on October 4, 1985, violated his First Amendment right to academic freedom. Parate contends that the defendants not only precluded him from teaching his "Statics" course, but humiliated him before his students. Parate also alleges that because his contract had not been renewed prior to the classroom incident, the defendants did not intend to evaluate his teaching competence and illegitimately exercised their supervisory functions.

The district court found that the requisite test for evaluating the classroom incident is whether the defendants "cast a pall of orthodoxy over the classroom," and thereby violated Parate's First Amendment rights. *Keyishian,* 385 U.S. at 603. We agree with the district court's conclusion that the defendants' actions on October 4, 1985 did not rise to the level of a constitutional violation.

It has long been recognized that the purpose of academic freedom is to preserve the "free marketplace of ideas" and protect the individual professor's classroom method from the arbitrary interference of university officials. See *id*. University administrators, however, are free to observe, review, or evaluate a nontenured professor's competence. See e.g., *Hetrick,* 480 F.2d at 709. Moreover, because public education in America is committed to the control of local and state authorities, the courts cannot intervene to resolve educational conflicts that do not "sharply implicate basic constitutional values." *Epperson,* 393 U.S. at 104. Although defendants' behavior was unprofessional, their actions on October 4, 1985 did not violate Parate's First Amendment right to academic freedom. First, Parate alleges that the defendants interfered with his classroom teaching on only one occasion. Thus, defendants' incidental conduct could not have resulted in a "pall of orthodoxy" being cast over Parate's "Statics" classroom. Second, Parate failed to allege that the defendants consistently denied him a free and open exchange with his students. Third, because Parate is a nontenured professor, he can allege no First Amendment right to teach a particular class or to be free from the supervision of university officials. See, e.g., *Hetrick,* 480 F.2d at 709.

As the district court correctly noted, the defendants' actions on October 4, 1985 rise at most to the level of a tort of defamation, which is not cognizable under 42 U.S.C. § 1983. See *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976).

V.

In addition to his claims under the First Amendment, Parate raises a Fourteenth Amendment claim that the defendants arbitrarily and unreasonably interfered with his substantive due process liberty interest in the free and full pursuit of his profession as a TSU professor. Parate also contends that the defendants maliciously, unreasonably, and arbitrarily terminated his employment with TSU in violation of his Fourteenth Amendment rights. We agree, however, with the district court's conclusion that Parate's claims under the Fourteenth Amendment guarantee of substantive due process should be dismissed.

This Court has long held that the "freedom to choose and pursue a career, 'to engage in any of the common occupations of life,' *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), qualifies as a liberty interest which may not be arbitrarily denied by the State." *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983).

* * * *

The district court considered two additional factors in analyzing Parate's claim that the defendants interfered with his freedom to pursue an occupation: (1) the nature and seriousness of the alleged governmental interference; and (2) the strength of the justification given. See *Wilkerson*, 699 F.2d at 328. The district court rejected Parate's claim and found that, as a nontenured professor, he was subject to discharge without cause and was justifiably terminated at the end of his one-year contract. Parate was not denied the choice of his career, but remains free to pursue his chosen profession at another university. Moreover, Parate has failed to demonstrate that the defendants brought false charges against him that "might seriously damage his standing and associations in his community" or that impose a "stigma or other disability" that prevents him from securing other employment. *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

* * * *

In *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976), this Court held that the transfer of a tenured teacher did not implicate her liberty interest under the Fourteenth Amendment because

no constitutional right to teach a specific class exists. Thus, Parate cannot claim a Fourteenth Amendment right to teach at TSU; nor can he claim a constitutional right to teach a specific class. When the defendants removed Parate from the "Statics" class, no constitutional violation occurred.

* * * *

Parate next argues that a liberty interest may be created by state regulations or administrative rules that place substantive limits on official discretion. See *Hewitt v. Helms,* 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983); *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054, 88 L. Ed. 2d 767, 106 S. Ct. 788 (1986). He then posits the Tennessee Board of Regents' Policy, No. 5:02:03:00, which states that "'the faculty member is entitled to freedom in the classroom in discussing his or her subject, being careful not to introduce into the teaching controversial matter which has no relation to the subject....'" *Id*., quoted in *Brief of Plaintiff-Appellant* at 33. Parate next contends that the Board of Regents' policy statement creates a liberty interest protected by the Fourteenth Amendment. Parate concludes that the defendants severely burdened this liberty interest when they berated him before his students and removed him from his "Statics" class.

In *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988), this Court concluded that:

> In determining whether state-enacted rules create a protected liberty interest, the key is "whether or not the state has imposed 'substantive limitations' on the discretion of [officers]...or, in other words, whether the state has used language of an unmistakably mandatory character." The mandatory nature of the regulation is the key, as a plaintiff "must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it."

Id. at 349 (citations omitted). In the present appeal, the language of the Regents' policy statement is not of a mandatory character, but merely articulates broadly stated TSU goals. Because we have determined that the Regents' policy statement is not sufficiently mandatory to establish a liberty interest, we find Parate's arguments unpersuasive.

Parate finally contends that the defendants' actions so "shock the conscience" that they constituted official acts that are unconstitutional regardless of the procedural protections provided. See *Wilson*, 770 F.2d at 586. This Court has held, however, that "[a] citizen does not suffer a constitutional deprivation every time he is subject to the petty harassment of a state agent." *Vasquez v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985). Moreover, Parate has

failed to prove that the defendants' conduct on October 4, 1985 was so severe, so disproportionate to the need presented, and such an abuse of authority "as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights." *McClary v. O'Hare*, 786 F.2d 83, 88 (2d Cir. 1986). We, therefore, agree with the district court's characterization of the defendants' behavior as unprofessional, but we find no deprivation of Parate's right to substantive due process.

* * * *

VII.

After careful review of the record, we reverse the judgment of the district court dismissing Parate's First Amendment claims resulting from the March 3, 1983, grading incident. On this issue, we remand to determine damages and whether Parate was discharged due to the exercise of his First Amendment right to academic freedom. We affirm the judgment of the district court dismissing Parate's First Amendment claims resulting from the October 4, 1985, classroom incident; dismissing his Fourteenth Amendment claims; and denying his application for a preliminary injunction.

* * * *

Notes and Questions

1. The court in *Parate* suggested that the university, as well as the professor, had an academic freedom interest at stake in this case. See the Text Section 6.1.7. What is the university's academic freedom interest? Do the facts reveal that the university's interest in determining "who may teach" or "how [a subject] shall be taught," as described by Justice Frankfurter in *Sweezy*, is legitimately at stake in the *Parate* case? Must such determinations be based "on academic grounds," as Justice Frankfurter suggests, before a court should consider them to implicate the institution's academic freedom?

2. The professor's academic freedom interest in grading, according to the court, is based on the free speech clause of the First Amendment. In extending free speech protection to the professor, is the court implying that the evaluation of individual student performance is a

"matter of public concern?" Should the court have applied the *Pickering/Connick* public concern test or the *Pickering/Connick* balancing test (see the Text Section 6.1.1) in this case? If the *Garcetti* case had already been decided at the time the court decided the *Parate* case, should the court have applied the employee speech test? Or should these tests not apply to situations where a university has compelled a faculty member to speak?

3. The court's resolution of the grading issue does serve to extend faculty academic freedom protections into the classroom and into the area of teaching methods. How extensive is the protection provided by the *Parate* case? How significant?

4. Might this case be extended to cover other aspects of grading? For instance, could the court's reasoning serve to protect a professor who refused the dean's order to allow a student to retake a math exam? Or to base course grades on a paper rather than exam? Or to maintain a particular grade distribution or grading mean?

5. The court quickly rejected the professor's claim based on the October 4, 1985 classroom incident. Is the court's view of this matter persuasive? Suppose the October 4 incident were not viewed in isolation but as part of the continuing pattern of retaliation, described in the court's review of the case's facts that began after the 1983 grading incident and extended beyond the October 4, 1985 classroom incident. Might this pattern of events then constitute a violation of academic freedom?

6. What remedy may the professor obtain upon remand of this case? Note very carefully the remand instructions at the end of the opinion.

7. Regarding the "liberty interest" type of analysis in part V of the court's opinion, see generally the Text Section 5.7.2.

8. Subsequent to *Parate*, another U.S. Court of Appeals, in *Brown v. Armenti*, disagreed with the *Parate* case's reasoning and result. *Parate* and *Brown* are discussed and compared in the Text Section 6.2.3.

SEC. 6.3. Academic Freedom in Research and Publication

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

WILKINS, Circuit Judge:

Appellees, six professors employed by various public colleges and universities in Virginia, brought this action challenging the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state. *See* Va. Code Ann. §§ 2.1-804 to -806 (Michie Supp.1999) (the Act). The district court granted summary judgment in favor of Appellees, reasoning that the Act unconstitutionally infringed on state employees' First Amendment rights. *See Urofsky v. Allen,* 995 F. Supp. 634 (E.D.Va.1998). A panel of this court reversed that decision, holding that our prior en banc opinion in *Boring v. Buncombe County Board of Education,* 136 F.3d 364, 368-69 (4th Cir.1998) (en banc), compelled the conclusion that the restriction on state employees' access to sexually explicit material on computers owned or leased by the state is constitutional because the Act regulates only state employees' speech in their capacity as state employees, as opposed to speech in their capacity as citizens addressing matters of public concern. *See Urofsky v. Gilmore,* 167 F.3d 191 (4th Cir.1999). A majority of the active circuit judges thereafter voted to hear this appeal en banc. We now hold that the regulation of state employees' access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment. Accordingly, we reverse the decision of the district court.

I.

The central provision of the Act states:

"Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act." Va. Code Ann. § 2.1-805.[2]

[2] Another provision of the Act defines "agency" and "information infra-structure": "Agency" means any agency, authority, board, department, division, commission, institution, institution of higher education, bureau, or like governmental entity of the Commonwealth, except the Department of State Police.

Another section of the Act defines "sexually explicit content." When the district court ruled, and when the panel initially considered this appeal, the Act defined "sexually explicit content" to include:

"(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism." Va. Code Ann. § 2.1-804 (Michie Supp.1998). Following our panel decision, the Virginia General Assembly amended the definition of "sexually explicit content" to add the italicized language: "*content having as a dominant theme* (i) any *lascivious* description of or (ii) any *lascivious* picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism." Va. Code Ann. § 2.1-804 (Michie Supp.1999) (emphasis added). [3] Va. Code Ann. § 18.2-390(2) to -390(5) (Michie 1996) (emphasis omitted).

As its language makes plain, the Act restricts access by state employees to lascivious sexually explicit material on computers owned or leased by the state. But, the Act does not prohibit all access by state employees to such materials, for a state agency head may give permission for a state employee to access such information on computers owned or leased by the state if the agency head deems such access to be required in connection with a bona fide research project or other undertaking. Further, state employees remain free to access sexually explicit materials from their personal or other computers not owned or leased by the state. Thus, the Act

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"Information infrastructure" means telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, online systems, and telephone networks. Va. Code Ann. § 2.1-804 (emphasis omitted).

[3] Section 18.2-390 provides in pertinent part:

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a persons clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed

prohibits state employees from accessing sexually explicit materials only when the employees are using computers that are owned or leased by the state and permission to access the material has not been given by the appropriate agency head. None of the Appellees has requested or been denied permission to access sexually explicit materials pursuant to the Act. Indeed, the record indicates that no request for access to sexually explicit materials on computers owned or leased by the state has been declined.

Appellees maintain that the restriction imposed by the Act violates the First Amendment rights of state employees. Appellees do not assert that state employees possess a First Amendment right to access sexually explicit materials on state-owned or leased computers for their personal use; rather, Appellees confine their challenge to the restriction of access to sexually explicit materials for work-related purposes. Appellees' challenge to the Act is twofold: They first maintain that the Act is unconstitutional as to all state employees; failing this, they argue more particularly that the Act violates academic employees' right to academic freedom.

II.

It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. *See United States v. National Treasury Employees Union,* 513 U.S. 454, 465 (1995) [hereinafter *NTEU*]; *Connick v. Myers,* 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. *See Waters v. Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion) (recognizing that "the government as employer . . . has far broader powers than does the government as sovereign"); *Pickering,* 391 U.S. at 568 (explaining that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick,* 461 U.S. at 142 (alteration in original) (quoting *Pickering,* 391 U.S. at 568). This balancing involves an inquiry first into whether the speech at issue was that of a private citizen speaking on a matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace. *See Pickering,* 391 U.S. at 568.

The threshold inquiry thus is whether the Act regulates speech by state employees in their capacity as citizens upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection.[5] *See Connick,* 461 U.S. at 146 (explaining that if a plaintiff's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary to scrutinize the reasons for [the] discharge"). Whether speech is that of a private citizen addressing a matter of public concern is a question of law for the court and, accordingly, we review the matter de novo. *See Connick,* 461 U.S. at 148 n. 7.

To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. *See Connick,* 461 U.S. at 147-48. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. *See id.* at 146. An inquiry into whether a matter is of public concern does not involve a determination of how interesting or important the subject of an employee's speech is. *See Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362 (5th Cir.1986). Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. *Compare Rankin v. McPherson,* 483 U.S. 378, 388-92 (1987) (holding public employee's discharge was violative of First Amendment when based on comment by employee as a private citizen on a matter of public concern made at work), *with DiMeglio v. Haines,* 45 F.3d 790, 805 (4th Cir.1995) (recognizing that speech by a public employee outside the workplace was made in the employee's official capacity).

The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, in its decisions determining speech to be entitled to First Amendment protection, the Court has emphasized the unrelatedness of the speech at issue to the speaker's employment duties. *See NTEU,* 513 U.S. at 465 (concluding that balancing test applied to employees' "expressive activities in their capacity as citizens, not as Government employees" and noting that "[w]ith few exceptions, the content of [employees'] messages [had] nothing to do with their jobs"); *Pickering,* 391 U.S. at 574 (explaining that when "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by [the employee], … it is necessary to regard the [employee] as the member of the general public he

[5] When a public employee's speech as a private citizen does not touch upon a matter of public concern, that speech is not "totally beyond the protection of the First Amendment," but "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick,* 461 U.S. at 147.

seeks to be"). Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1362. . . . .

This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties frequently will involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. For example, suppose an assistant district attorney, at the District Attorney's direction, makes a formal statement to the press regarding an upcoming murder trial – a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement. In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern.

* * * *

Judge Wilkinson and Judge Murnaghan fail to recognize the importance of the role of the speaker in determining whether speech by a public employee is entitled to First Amendment protection. Under their respective analyses, the assistant district attorney in the above hypothetical would have a First Amendment right to challenge his employer's directions regarding the press conference. It is difficult to imagine the array of routine employment decisions that would be presented as constitutional questions to this court under this view of the law. *See Connick*, 461 U.S. at 143 (recognizing that "government offices could not function if every employment decision became a constitutional matter").

The speech at issue here – access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties – is clearly made in the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. *Cf. Waters*, 511 U.S. at 675 (explaining that restrictions on speech may be necessary when "the government is employing someone for the very purpose of effectively achieving its goals"); *id.* at 672 (noting that "even many of the most fundamental maxims of . . . First Amendment jurisprudence cannot reasonably be applied to speech by government employees") . . . . The

essence of Appellees' claim is that they are entitled to access sexually explicit material in their capacity as state employees by using equipment owned or leased by the state. Because, as Appellees acknowledge, the challenged aspect of the Act does not affect speech by Appellees in their capacity as private citizens speaking on matters of public concern, it does not infringe the First Amendment rights of state employees.

III.

Alternatively, Appellees maintain that even if the Act is valid as to the majority of state employees it violates the First Amendment academic freedom rights of professors at state colleges and universities,[8] and thus is invalid as to them.[9] In essence, Appellees contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching. Appellees maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.

* * * *

"Academic freedom" is a term that is often used, but little explained, by federal courts. *See* W. Stuart Stuller, *High School Academic Freedom*: *The Evolution of a Fish Out of Water*,

[8] For ease of reference, we will refer to public institutions of higher learning generally as "universities." This designation includes neither private institutions of higher learning nor public and private primary and secondary schools, as constitutional considerations applicable to such institutions are not pertinent to this appeal.

[9] Appellees assert that the Act infringes on academic freedom by hindering professors' ability to perform their employment duties, particularly teaching and research. The facts alleged in the complaint illustrate the type of restrictions with which Appellees are primarily concerned. Melvin I. Urofsky, the lead plaintiff in the district court, alleged that he had declined to assign an online research project on indecency law because he feared he would be unable to verify his students' work without violating the Act. Appellee Terry L. Meyers contended that he is affected by the Act because his ability to access Virginia's database to research sexually explicit poetry in connection with his study of Victorian poets is restricted by the policy. Appellee Paul Smith's website has been censored as a result of the Act. And, appellees Dana Heller, Bernard H. Levin, and Brian J. Delaney maintained that they were hesitant to continue their Internet research of various aspects of human sexuality.

77 Neb. L. Rev. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); *see also* J. Peter Byrne, "Academic Freedom: A "Special Concern of the First Amendment,"" 99 Yale L.J. 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.") As a result, decisions invoking academic freedom are lacking in consistency, *see* Stuller, *supra* at 303, and courts invoke the doctrine in circumstances where it arguably has no application, *see* Byrne, *supra* at 262-264.

Accordingly, we begin with a brief review of the history of the concept of academic freedom in the United States. Prior to the late nineteenth century, institutions of higher education in this country were not considered centers of research and scholarship, but rather were viewed as a means of passing received wisdom on to the next generation. *See* Richard Hofstadter & Walter P. Metzger, *The Development of Academic Freedom in the United States* 278-79 (1955); Stuller, *supra,* at 307-08. "Faculty performed essentially fixed if learned operations within a traditional curriculum under the sanction of established truth . . . . [A]cademic freedom as we know it simply had no meaning." Byrne, *supra,* at 269. Additionally, American universities during this period were characterized by "legal control by non-academic trustees; effective governance by administrators set apart from the faculty by political allegiance and professional orientation; [and] dependent and insecure faculty." *Id.* at 268-69. This began to change, however, as Americans who had studied at German universities sought to remodel American universities in the German image. *See* Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," 66 Tex. L.Rev. 1265, 1269 (1988).

The German notion of academic freedom was composed primarily of two concepts: *Lehrfreiheit* and *Lernfreiheit. See generally* Hofstadter & Metzger, *supra,* at 386-91 (discussing German understanding of academic freedom). *Lehrfreiheit,* or freedom to teach, embodied the notion that professors should be free to conduct research and publish findings without fear of reproof from the church or state; it further denoted the authority to determine the content of courses and lectures. *See id.* at 386-87. *Lernfreiheit* was essentially a corollary right of students to determine the course of their studies for themselves. *See id.* at 386.

In 1915, a committee of the American Association of University Professors (AAUP) issued a report on academic freedom that adapted the concept of *Lehrfreiheit* to the American university. *See generally* Metzger, *supra,* at 1267-85 (examining the factors influencing the AAUP's definition of academic freedom). In large part, the AAUP was concerned with obtaining for professors a measure of professional autonomy from lay administrators and

trustees.[10] *See* Byrne, *supra,* at 273-78; Metzger, *supra,* at 1275-76. The AAUP defined academic freedom as "a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution." Stuller, *supra,* at 309 (internal quotation marks omitted). Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights. *See* Hofstadter & Metzger, *supra,* at 398-400; Byrne, *supra,* at 277-78. The principles adopted in the 1915 report were later codified in a *1940 Statement of Principles on Academic Freedom and Tenure* promulgated by the AAUP and the Association of American Colleges . . . . The *1940 Statement* since "has been endorsed by every major higher education organization in the nation," Byrne, *supra,* at 279 . . . .[12]

Additionally, we note that we are not here called upon to decide the wisdom of the Act as a matter of policy. That an enactment may be utterly unnecessary, or even profoundly unwise, does not affect its validity as a matter of constitutional law.

Appellees' insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right.[13] We disagree. It is true, of course, that homage has been paid to the ideal

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[10] The AAUP was not concerned with interference from the federal or state governments, which at that time "largely refrained from any involvement in internal university affairs." Byrne, *supra,* at 273; *see* Metzger, *supra,* at 1277-79.

[12] In view of this history, we do not doubt that, as a matter of professional practice, university professors in fact possess the type of academic freedom asserted by Appellees. Indeed, the claim of an academic institution to status as a "university" may fairly be said to depend upon the extent to which its faculty members are allowed to pursue knowledge free of external constraints. *See* Metzger, *supra,* at 1279 (explaining that the authors of the 1915 AAUP report believed "that any academic institution that restrict[ed] the intellectual freedom of its professors ⋯ cease[d] to be a true university"). Were it not so, advances in learning surely would be hindered in a manner harmful to the university as an institution and to society at large. However, Appellees fail to appreciate that the wisdom of a given practice as a matter of policy does not give the practice constitutional status. *See Minnesota State Bd. for Community Colleges v. Knight,* 465 U.S. 271, 288 (1984) (concluding that "[f]aculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution").

[13] Irrespective of the validity of this claim as a matter of constitutional law, we note that the argument raises the specter of a constitutional right enjoyed by only a limited class of citizens. See David M. Rabban, "Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment," 53 Law & Contemp. Probs. 227, 238 (1990). Indeed, the audacity of Appellees' claim is revealed by its potential impact in this litigation. If Appellees are correct that the First Amendment provides special protection to academic speakers, then a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitutionally

of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. *See, e.g., Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n. 12 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978) (opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); (1957) (plurality opinion); *id.* at 261-63, Frankfurter, J., concurring in the result). Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom . . . .

Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

We begin our examination of the cases with *Sweezy*, in which Appellees claim "[t]he Supreme Court first adopted the principle of academic freedom." Brief of the Appellees at 21. *Sweezy* arose from an investigation of "subversive activities" by the New Hampshire Attorney General. Paul Sweezy, a target of the investigation, refused to answer certain questions regarding a guest lecture he had given at the University of New Hampshire. His refusal to answer these and other questions ultimately resulted in his incarceration for contempt. On certiorari review of the decision of the New Hampshire Supreme Court affirming the conviction, a plurality of four justices indicated that the action of the state "unquestionably" infringed Sweezy's "liberties in the areas of academic freedom and political expression" [and that] "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [*Sweezy*, 354 U.S. at 250.]

This paean to academic freedom notwithstanding, the plurality did not vacate Sweezy's contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process. *See id.* at 254-55.

Justice Frankfurter, who along with Justice Harlan provided the votes necessary to reverse, relied explicitly on academic freedom in concluding that Sweezy's contempt conviction offended the Constitution. The right recognized by Justice Frankfurter, however, was not the individual right claimed by Appellees, but rather an institutional right belonging to the University of New Hampshire: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life *of a university*, [the] justification for compelling

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be precluded from accessing the very same materials. Such a result is manifestly at odds with a constitutional system premised on equality.

a witness to discuss the contents of his lecture appears grossly inadequate." *Id.* at 261, (Frankfurter, J., concurring in the result) (emphasis added). Justice Frankfurter emphasized "the dependence of a free society on free universities" and concluded by enumerating "the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-63 (internal quotation marks omitted). Significantly, at no point in his concurrence does Justice Frankfurter indicate that *individual* academic freedom rights had been infringed; in his view, the constitutional harm fell entirely on the university as an institution.[14]

In light of this review of the actual holding and rationale in *Sweezy,* it is difficult to understand how that case can be viewed as clearly "adopting" any academic freedom right, much less a right of the type claimed by Appellees. At best, it can be said that six justices agreed that the First Amendment protects values of academic freedom. However, the justices were plainly of very different minds as to the nature of this "right."

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Other cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual. For example, in *Keyishian* the Court considered a renewed challenge to a New York statute and regulations, certain provisions of which were upheld in *Adler,* designed "to prevent the appointment or retention of 'subversive' persons in state employment." *Keyishian,* 385 U.S. at 592. *Keyishian,* like the cases discussed above, involved the right of a professor to speak and associate in his capacity as a private citizen, and thus is not germane to Appellees' claim. Moreover, in the course of reaching its conclusion that the provisions were unconstitutionally vague, the Court discussed the detrimental impact of such laws on academic freedom, which the Court characterized as "a special concern of the First Amendment." *Id.* at 603. The discussion by the Court indicates, however, that it was not focusing on the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions: The vice of the New York provisions was that they impinged upon the freedom of the university as an institution. *See University of Pa. v. EEOC,* 493 U.S. 182, 198 (1990) (noting that *Keyishian* was a case involving governmental

[14] Justice Frankfurter's reasoning, if controlling, would dictate that we uphold the Act on the basis that it does not infringe the academic freedom of the university. As explained *infra* note 17, the Act places with the university authority to approve or disapprove access to sexually explicit materials on computers owned or leased by the state. Because the Act does not subject university decision making to outside interference by the state, the Act would pass constitutional muster under Justice Frankfurter's understanding of academic freedom.

infringement on the right of an institution "to determine for itself on academic grounds who may teach" (internal quotation marks omitted)).

This emphasis on institutional rights is particularly evident in more recent Supreme Court jurisprudence. For example, in *Bakke*, Justice Powell discussed academic freedom as it related to a program of admissions quotas established by a medical school. Relying on *Keyishian* and on Justice Frankfurter's concurrence in *Sweezy*, Justice Powell characterized academic freedom as "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). Similarly, in *Ewing* the Court described academic freedom as a concern of the institution. *See Ewing*, 474 U.S. at 226.

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Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.[17]

IV.

We reject the conclusion of the district court that Va. Code Ann. §§ 2.1-804 to -806, prohibiting state employees from accessing sexually explicit material on computers owned or leased by the state except in conjunction with an agency-approved research project, infringes upon the First Amendment rights of state employees. We further reject Appellees' contention that even if the Act is constitutionally valid as to the majority of state employees, it is invalid to the extent it infringes on the academic freedom rights of university faculty. Accordingly, we reverse the judgment of the district court.

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[17] In reaching this conclusion, we note that the Act places the authority to approve or disapprove research projects with the agency, here the university. Thus, the Act leaves decisions concerning subjects of faculty research in the hands of the institution. And, while a denial of an application under the Act based upon a refusal to approve a particular research project might raise genuine questions-perhaps even constitutional ones-concerning the extent of the authority of a university to control the work of its faculty, such questions are not presented here.

LUTTIG, Circuit Judge, concurring:

I join in Judge Wilkins' fine opinion for the court. I agree that the Commonwealth of Virginia may regulate its employees' access to "bestiality, lewd exhibition of nudity, . . . sexual excitement, sexual conduct or sadomasochistic abuse, . . . coprophilia, urophilia, or fetishism," on the public's computers, in the public's offices, on the public's time, and at the public's expense, without infringement on any First Amendment right of those employees. The Supreme Court's precedents would not countenance the contrary conclusion reached by Judge Wilkinson and the dissent.

Judge Wilkinson reaches his conclusion, writing, as he understands it, in support of academic freedom. Because of its analytical flaws and the pyrrhic victory it offers the academy, however, I believe that the true academic will understand that Judge Wilkinson's opinion [see below] ultimately will be of little service to the real cause of academic freedom, despite its superficial appeal.

From time to time, even within the confines of an Article III case or controversy, jurists express their general and personal views on subjects related (and, to be honest, often unrelated) to the particular legal issues before them. It is best that we do so infrequently, and ideally we would never do so, because such naturally gives rise to the legitimate question whether, when we do write opinions only of law, our personal views have influenced or even supplanted the dispassionate, reasoned analysis that defines the Judiciary in our constitutional scheme. At points, what Judge Wilkinson writes in his opinion might fairly be understood as more in the nature of a general statement of personal viewpoint because he comments on a range of matters legal and non-legal, including: the aggregate social impact of "subjects touching our physical health, our mental well-being, our economic prosperity, and ultimately our appreciation for the world around us and the different heritages that have brought that world about"; the asserted perniciousness of affirmative action and college speech codes to our cultural progress; the need for intolerance of sexual harassment in every setting; the "exponential growth of freedom" for society in general that comes with the "modern technological development" of the Internet; the importance of federalism in our system of governance – and even the imperative for judicial restraint.

But he does also express the opinion on the issue that is before us, that there is a First Amendment right of "academic freedom" and that other public employees do not possess an analogous First Amendment right to pursue matters that they believe are important to performance of their public responsibilities. Because he writes separately and does not join in either of the court's principal opinions, Judge Wilkinson's is an opinion of significance to our court. Accordingly, even though it be that of only a single judge, it is right that that analysis be

subjected to the rigors of conventional legal analysis. When subjected to [the rigors of conventional legal] analysis, I believe it is apparent that the conclusions [Chief Judge Wilkinson] reaches and the means by which he reaches those conclusions are analytically indefensible.

The true academic should find small comfort in [Chief Judge Wilkinson's] defense of his academic freedom. In reality, however, the true academic is in no need of defense. The court holds today, as has been uniformly recognized by the Supreme Court through the years, only that there is no *constitutional* right of free inquiry unique to professors or to any other public employee, that the First Amendment protects the rights of all public employees equally. Neither the value nor the contributions of academic inquiry to society are denigrated by such a holding. And to believe otherwise is to subscribe to the fashionable belief that all that is treasured must be in the Constitution and that if it is not in the Constitution then it is not treasured. But precisely because it is a constitution that we interpret, not all that we treasure is in the Constitution. Academic freedom is paradigmatic of this truism. Academic freedom, however, is also paradigmatic of the truism that not all that we treasure is in need of constitutionalization. No university worthy of the name would ever attempt to suppress true academic freedom – constrained or unconstrained by a constitution. And, if it did, not only would it find itself without its faculty; it would find itself without the public support necessary for its very existence. The Supreme Court has recognized as much – be it through wisdom, prescience, or simple duty to the Constitution – for over two hundred years now. It has recognized that, in the end, the academic can be no less accountable to the people than any other public servant. His speech is subject to the limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's. That we should all be accountable to the people, and accountable equally, should cause none of us to bridle.

HAMILTON, Senior Circuit Judge, concurring:

The Appellees claim that they have a First Amendment right to access and disseminate sexually explicit materials on computers that are owned or leased by the Commonwealth. The Appellees' access to, and dissemination of, sexually explicit materials is necessary for them to perform their duties as educators; but, nevertheless, the Appellees' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees. Because the Appellees' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees, the court today correctly concludes under the implicit holding of our *en banc* decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.) (*en banc*), that the speech in this case is employee speech, and, therefore, not entitled to First Amendment protection. Furthermore, the court correctly rejects the Appellees' contention

that even if the Act is constitutionally valid as to the majority of state employees, it is invalid to the extent it infringes on the academic freedom rights of university faculty.

I joined Judge Motz's dissent in *Boring*, which persuasively explains why a public employee should enjoy far greater First Amendment protection than that contemplated by *Boring*. *See id.* at 378-80. Left to my own devices, I would hold that the Appellees' speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the *Connick*/*Pickering* balancing test. However, being bound by the *en banc* court's decision in *Boring*, a decision the *en banc* court chose not to revisit in the present case, I concur in the court's majority opinion.

* * * *

WILKINSON, Chief Judge, concurring in the judgment:

I agree with the majority that the Virginia Act is constitutional. Unlike the majority, I believe that this statute restricts matters of public concern, especially in the context of academic inquiry. The state, however, has a legitimate interest in preventing its employees from accessing on state-owned computers sexually explicit material unrelated to their work. Here the Commonwealth has promoted this legitimate interest through minimally intrusive means, *i.e.*, by permitting university officials to grant waivers for all bona fide research projects. By thus preserving the structure of university self-governance, the statute withstands constitutional scrutiny.

I write separately because the majority accords the speech and research of state employees, including those in universities, no First Amendment protection whatsoever. While the statute may ultimately be constitutional, the First Amendment does not slumber while the state regulates speech on matters of vital public importance.

I.

Although the restrictions on Internet access in this statute may appear to pose a novel question, I agree with the majority that it is amenable to traditional analysis through the framework for public employee speech established in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). But because the statute at issue regulates a broad range of speech, its widespread impact "gives rise to far more serious concerns than could any single supervisory decision." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468, (1995) ("*NTEU*"). Moreover, the Act's restriction constitutes a prior restraint

because it chills Internet research before it happens. *Cf. Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Unlike *Pickering* and its progeny, the statute does not "involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities." *NTEU*, 513 U.S. at 467. Rather, this statute involves a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *Id.* When the legislative scythe cuts such a broad swath through the field of public employee speech, *Pickering* and *NTEU* require us to carefully consider the First Amendment interests at stake.

* * * *

The context of the affected speech is unique. In the university setting "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Internet research, novel though it be, lies at the core of that tradition. These plaintiffs are state employees, it is true. But these particular employees are hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern. A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. *See* William W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 53 Law & Contemp. Probs. 79, 87 (1990). Provocative comment is endemic to the work of a university faculty whose "function is primarily one of critical review." *Id.*

Furthermore, state university professors work in the context of considerable academic independence. The statute limits professors' ability to use the Internet to research and to write. But in their research and writing university professors are not state mouthpieces – they speak mainly for themselves. *See generally* David M. Rabban, "Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment," 53 Law & Contemp. Probs. 227, 242-44 (1990). It is not enough to declare, as the majority does, "The speech at issue here . . . is clearly made in the employee's role as employee." No one assumes when reading a professor's work that it bears the imprimatur of the government or that it carries the approval of his or her academic institution. University research and writing thus differ fundamentally from secondary school curriculum selection, in which we have held that the desires of the individual teacher must give way to local school board policies. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370-71 (4th Cir.1998) (en banc). Curricular choices uniquely can be perceived by "students, parents, and members of the public . . . to bear the imprimatur of the school." *Id.* at 368 (internal quotation marks omitted). The interest of the state in a professor's research projects is simply not as all-encompassing . . . .

The Commonwealth has nonetheless insisted that professors have no First Amendment interest in the content of their Internet research. It rests this breathtaking assertion on two props: that the professors are state employees, and that the computers are state-owned. *See* Appellant's Br. at 12 ("The speech at issue here is speech by state employees in the performance of their governmental duties. *This is not citizen speech; it is government speech.*"); *id.* ("[T]he Act governs such speech *only* insofar as state employees seek to use *state computers.* This is a legitimate exercise of control by government over its own property . . .").

Put simply, *Connick* does not support the Commonwealth's leap. To begin and end the public concern inquiry with the signature on plaintiffs' paychecks or the serial number on their computers would be to permit all manner of content and viewpoint-based restrictions on speech and research conducted in our universities. The Commonwealth acknowledges as much. *See* Appellant's Reply Br. at 14. ("'[G]overnment-as-speaker' as well as 'government-as-buyer' may constitutionally engage in content and viewpoint discrimination."). It cannot be true, however, that on university campuses the First Amendment places no limits on the Commonwealth's proprietary prerogative – a prerogative that it claims here in sweeping terms. *See id.* at 29. ("[T]he Internet remains as free as the open sea and anyone who wishes may sail there; but the Commonwealth's boats are the Commonwealth's business, and no one can take them out without the Commonwealth's permission.") Under this view, if the Commonwealth were to declare that certain politically sensitive subjects could not be researched on state computers by state employees holding politically objectionable views, the statutory restriction must be upheld.

By embracing the Commonwealth's view that all work-related speech by public employees is beyond public concern, the majority sanctions state legislative interference in public universities without limit. The majority's position would plainly allow the prohibition of speech on matters of public concern.[5] The worry over undue intrusion is not mere tilting at windmills – the Commonwealth's original Internet access restrictions were stunning in their scope. For example, the Act originally barred access to all materials having "sexually explicit content" without regard to whether the depiction was "lascivious" or whether it constituted the material's "dominant theme." *Compare* Va. Code Ann. § 2.1-804 (Michie Supp.1998), *with* Va. Code Ann. § 2.1-804 (Michie Supp.1999). As the panel opinion noted, this restriction swept

[5] The majority's hypothetical involving an assistant district attorney serves further to illustrate the drawbacks of its approach. In focusing once again solely on the form of speech, the majority ignores the different context between its hypothetical and the present case. Assistant district attorneys operate under a chain of supervision and command and their words would be taken to represent the government's position on a given matter. This differs so dramatically from the context of the present speech that it is hard to believe that the majority would even seek to draw a comparison. All this is quite apart from the fact that the majority's assistant district attorney hypothetical represents an individual employment matter that (academic or otherwise) is less likely to involve matters of public concern than a broad statutory restriction on speech.

within its ambit "research and debate on sexual themes in art, literature, history, and the law; speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders; and the routine exchange of information among social workers on sexual assault and child abuse." *Urofsky v. Gilmore,* 167 F.3d 191, 195 n. 6 (4th Cir.1999). These are areas of more than mere personal interest. Speech in the social and physical sciences, the learned professions, and the humanities is central to our democratic discourse and social progress.

* * * *

II.

Because the Act restricts speech on matters of public concern, we must determine whether the burden on speech is justified by the governmental interest at stake. *See Pickering,* 391 U.S. at 568. Because of the widespread impact of the statute, "the Government's burden is greater . . . than with respect to an isolated disciplinary action" such as those considered in *Connick* and *Pickering. NTEU,* 513 U.S. at 468. The Commonwealth must show that the interests of plaintiffs and of society in the expression "are outweighed by [the] expression's necessary impact on the actual operation of the Government." *Id.* (internal quotation marks omitted) . . . .

While I fully agree with my dissenting colleagues that the speech at issue here is of public concern, I part company with their balancing under the second part of the *Connick* analysis. There is no question that the General Assembly addressed a real, not a fanciful, problem when it enacted this statute. The record is replete with examples of Internet web sites displaying graphic forms of sexual behavior. *See Urofsky v. Allen,* 995 F. Supp. 634, 639 (E.D.Va.1998) (describing web site on university computer containing "graphic images of a nude woman in chains, a nude man with an erection, and a man and woman engaged in anal intercourse"). The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment. While such abuses may be confined to a small minority of employees, Virginia has an undisputed and substantial interest in preventing misconduct of this sort. Sexual harassment via computer is as objectionable in the university setting as it is in any workplace. The Commonwealth's interest as an employer in workplace efficiency is similarly beyond question. *See Pickering,* 391 U.S. at 568, 88 S.Ct. 1731; *Connick,* 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter").

The state thus has every right to require its employees to spend their workday energies on the functions for which it is paying them. As the Supreme Court has stated, "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). While many university employees doubtless have genuine scholarly interests in the study of sexual phenomena, for others the examination of sexually explicit matter may bear no relationship to any academic enterprise. As the Commonwealth argues, "Publication of materials in the workplace that colleagues find offensive and demeaning plainly harms workplace morale and detracts from the efficiency of the workforce." Appellant's Br. at 35 . . . .

On plaintiffs' side of the balance, the Act, as noted, restricts access to material that potentially touches on matters of public concern. The recent revisions to the statute, however, have narrowed its scope considerably . . . . Although the statute still limits access to some non-obscene information, it now restricts a more limited range of material-namely that which has as its dominant theme the lascivious depiction of nudity or sexual conduct.

Most importantly, through the waiver process the Commonwealth also accommodates the various interests at stake – barring employee access to lascivious material generally, but providing a procedure that can be invoked whenever educational institutions determine that academic freedom so requires. The significant state interest here is thus balanced against a minimal intrusion on academic inquiry. Under the Act, the ultimate judgment on whether a requested waiver is for a bona fide research project resides in the system of university governance. The statute grants "agency heads" the authority to approve these waivers. *Id.*§ 2.1-805. As a practical matter, it appears from the record that Virginia's colleges and universities have delegated primary approval authority to officials such as deans and department heads.

The Commonwealth thus maintains academic freedom by reposing critical authority within the university itself. The Supreme Court has noted that academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) (citations omitted). *See also* J. Peter Byrne, "Academic Freedom: A "Special Concern of the First Amendment,"" 99 Yale L.J. 251, 333 (1989) (defending institutional academic freedom based on "those research and humanistic values of a university that are unique to it"). Virginia's statute fits within this model of university self-governance . . . . Where the state, as here, has worked within the traditional governance structure for educational institutions, the hand of the federal judiciary should ordinarily be stayed.

Were we asked to review *ex post facto* the judgments of these academic deans and department heads with respect to individual waiver requests, we would thus act with extreme deference. And for good reason. The discretionary choices made by provosts, deans, and faculties in the contexts of hiring, tenure, curriculum selection, grants, and salaries all potentially burden individual academic freedom to some extent, but courts have generally been unwilling to second-guess these necessarily sensitive and subjective academic judgments. *See Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."); *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments."). We should not presume *ex ante* that those same institutions will discharge their authority under this statute in an irrational or arbitrary fashion. I am thus not prepared to believe, as plaintiffs suggest, that a free academic institution will invade the freedoms of its own constituent members. In fact, the record reflects just the opposite – several professors have received research waivers from their colleges or universities upon request. We have not been made aware of any examples of professors whose requests for exemptions were denied.

. . . The Commonwealth has made the judgment that universities themselves are best equipped to balance the enormous promise of the Internet against the novel risks that may accompany it. Because the limited restrictions in this Act are administered within the traditional structure of university governance, I do not believe the Virginia statute contravenes the Constitution.

III.

* * * *

The majority and concurrence . . . characterize my approach as one of academic privilege. They contend I believe that "professors possess a special constitutional right of academic freedom," *ante* at 408 n. 7, and that "the academy has a special contribution to make to society," *ante* at 417 (Luttig, J., concurring).

But the Supreme Court itself has emphasized that "academic freedom . . . is of transcendent value *to all of us* and *not merely to the teachers concerned.*" *Keyishian*, 385 U.S. at 603 (emphasis added). Indeed, "[t]he essentiality of freedom in the community of American universities is *almost self-evident.*" *Sweezy*, 354 U.S. at 250 (emphasis added). By its talk of special rights and privileges, I fear the majority somehow sees academic speech and democratic values as inconsistent or at odds. With all respect, this need not be our view. I had always

supposed that democracy and speech, including academic speech, assisted one another and that democracy functioned best when the channels of discourse were unfettered. It would be folly to forget this fundamental First Amendment premise in complex times when change of every sort confronts us . . . .

* * * *

MURNAGHAN, Circuit Judge, dissenting:

The majority's interpretation of the "public concern" doctrine makes the role of the speaker dispositive of the analysis. Specifically, the majority states that "critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'" *See ante* (quoting *Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362 (5th Cir.1986)). The majority then rejects the plaintiffs' First Amendment claim because "[t]he speech at issue here . . . is clearly made in the employee's role as employee." *Id.* at 408. Because an analysis of *Connick v. Myers,* 461 U.S. 138 (1983), and its progeny reveals that the majority has adopted an unduly restrictive interpretation of the "public concern" doctrine, I respectfully dissent.

I.

A.

In *Connick,* the Supreme Court held that, as a threshold matter, if a public employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern," then a court does not balance the employer's interests with those of the employee. *Connick,* 461 U.S. at 146. The Court broadly defined speech of public concern as speech "relating to any matter of political, social, or other concern to the community." *Id.* The Court also stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Nowhere in *Connick,* however, did the Court state that the role of the speaker, standing alone, would be dispositive of the public concern analysis.

Indeed, the facts of *Connick* belie this suggestion. Sheila Myers, an Assistant District Attorney, was discharged for distributing a questionnaire to the other attorneys in her office. In

general, Myers' questionnaire asked her peers what they thought of the trustworthiness of certain attorneys in the office, the morale of the office, and the office's transfer policy. *See id.* at 141.

The Court held that these questions "do not fall under the rubric of matters of 'public concern,'" because they were "mere extensions of Myers' dispute over her transfer to another section of the criminal court." *Id.* at 148. Myers' questionnaire, however, also asked whether her fellow attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149. This question was in the same form and context as Myers' other questions – an internal questionnaire distributed by an employee complaining about on-the-job conditions. The question thus was *speech by an employee in her role as an employee.* The Court nevertheless held that this question did "touch upon a matter of public concern." *Id.* The majority's formalistic focus on the "role of the speaker" in employee speech cases therefore runs directly contrary to Supreme Court precedent.

* * * *

C.

The majority justifies its singular focus on the role of the speaker by citing to language from *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU* "). In *NTEU,* the plaintiffs were executive branch employees challenging a law prohibiting federal employees from accepting any compensation for making speeches or writing articles, even when the speeches or articles did not have any connection to the employees' official duties. The Supreme Court held that the plaintiffs' speech was on a matter of public concern. *See id.* at 466. In doing so, the Court stated that "[t]hey seek compensation for their expressive activities in their capacity as citizens, not as Government employees. . . . With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work." *Id.* at 465.

The majority's analysis of this language attempts to push *NTEU* where it did not go. The Court in *NTEU* stated that the plaintiffs' speech was on a matter of public concern in part because it was unrelated to the plaintiffs' employment; however, nowhere in *NTEU* did the Court state the converse: namely, that *if* the plaintiffs' speech was in their role as employees, then it automatically would not qualify as speech on a matter of public concern. Therefore, at best, *NTEU* suggests that the role of the speaker is a *factor* in a public concern analysis. But even a broad reading of *NTEU* does not suggest that the role of the speaker is the *only* factor to consider in a public concern analysis, despite the majority's claims to the contrary.

* * * *

D.

Because speech by an employee in her role as an employee can qualify as speech on a matter of public concern, the issue thus becomes whether, in the instant case, the plaintiffs' speech is on a "matter of political, social, or other concern to the community." *Connick,* 461 U.S. at 146. The plaintiffs' speech easily meets this test . . . . The Act restricts over 101,000 state employees, including university professors, librarians, museum workers, and physicians and social workers at state hospitals from researching, discussing, and writing about sexually explicit material. As the district court noted, "the Act's broad definition of 'sexually explicit' content would include research and debate on sexual themes in art, literature, history and the law, speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders, and the routine exchange of information among social workers on sexual assault and child abuse." *Urofsky v. Allen,* 995 F. Supp. 634, 636 (E.D.Va.1998).

* * * *

II.

Because the plaintiffs' speech is on a matter of public concern, we must balance the plaintiffs' interests in speaking on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). Our analysis of this balancing test is guided by the Supreme Court's decision in *NTEU,* a case involving a statutory prohibition on certain types of employee speech.

As in *NTEU,* the Act at issue in the instant case does not involve a post hoc analysis of one public employee's speech and the impact of that speech on the operation of government. Rather, we are forced to apply *Pickering* to the Commonwealth's "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *NTEU,* 513 U.S. at 467. The widespread impact of a prospective deterrent on employee speech "gives rise to far more serious concerns than could any single supervisory decision," because "unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens." *Id.* at 468.

The Commonwealth's burden in justifying its statutory restrictions on speech is therefore greater than with respect to an isolated disciplinary action. The Commonwealth must establish

that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (quoting *Pickering*, 391 U.S. at 571).

A. The Interests of the Plaintiffs and the Public

The Act restricts 101,000 state employees from researching, discussing, and writing about sexually explicit topics within their areas of expertise, thereby depriving the plaintiffs of their ability to speak on matters of public concern. It is difficult to measure the effect that the Act will have in stifling commentary and discourse on important topics in art, literature, psychology, and other disciplines . . . . However, it is possible, for example, that seminal academic commentary on the works of Toni Morrison might be scrapped, and that research into sadomasochistic abuse in prisons might be set aside. The chilling of discourse on these topics and other issues adversely affects the material available to "potential audiences" of the plaintiffs' speech, restricting "the public's right to read and hear what the employees would otherwise have written and said." *NTEU,* 513 U.S. at 470. The Act thereby deprives the public of the "unique insights" that public employees can provide in their areas of specialization. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 94 (D.C. Cir.1995) (*en banc*).

B. The Commonwealth's Interests

The Commonwealth advances two interests in support of the Act's broad restrictions on employee speech: (1) maintaining operational efficiency in the workplace; and (2) preventing a sexually hostile work environment. While the Act may marginally serve the Commonwealth's asserted interests, the under and overinclusiveness of the Act is fatal to its constitutionality.

1. Underinclusiveness

The Commonwealth argues that the Act furthers its interest in workplace efficiency. The Commonwealth states that "[a] state employee who is reading sexually explicit material unrelated to his work is not doing the job he was hired to do." Appellant's Br. at 35. The Commonwealth's general interest in workplace efficiency, however, cannot be the basis for the Act's specific prohibition on accessing sexually explicit material on State computers.

First, employee efficiency is undermined by any activities that distract an employee from her job-related duties, not just unauthorized Internet use. Reading newspapers, listening to the radio, chatting with coworkers, or talking on the telephone with friends are examples of activities

that keep an employee from performing her best on the job. The Commonwealth, however, does not attempt to regulate these activities through the Act, nor does it cite to any evidence that accessing sexually explicit material undermines workplace efficiency any more than these activities.

Second, the Act does not even cover all of the uses of the Internet that undermine workplace efficiency. Employees may use State computers to send non-work-related e-mail, as well as access news services, chat rooms, sports websites, and other material unrelated to their jobs. The Commonwealth has not explained, and cannot possibly explain, why employees who access sexually explicit material are any less "efficient" at their work than employees who check espn.com every twenty minutes during the NCAA tournament.

The Commonwealth next argues that the Act furthers its interest in preventing sexual harassment in the workplace. Again, the Act is not tailored to combat this ill in any material way. The Act targets only access to sexually explicit material on the Internet-ignoring books, calendars, pictures, and other sexually explicit material that demeans women and helps create a sexually hostile work environment. A professor therefore would violate the Act by accessing the Internet to complete research on Victorian poetry, yet he would not violate the Act by leaving copies of Hustler Magazine lying around his office.

In addition, the Act only prohibits the accessing of sexually explicit material on *state-owned* computers; it does not impose a general ban on accessing any sexually explicit material on computers in the workplace. Thus, a state employee may use his own computer to access patently pornographic pictures around his students or colleagues without violating the Act. The Commonwealth does not provide any justification for why sexually explicit images are any less likely to create a hostile work environment if those images come from an employee's personal computer rather than from a state-owned computer.

2. Overinclusiveness

The Act is also impermissibly overinclusive. It prohibits research and commentary by state employees who access this material to advance public discourse, awareness, treatment, and commentary on a variety of disciplines and social problems. The Act thus reaches the legitimate work-related uses of sexually explicit material, uses wholly unrelated to the narrower category of gratuitous sampling of pornographic material that the Act was intended to address. The Commonwealth appears to concede this point; however, the Commonwealth argues that the Act's prior approval process ensures that employees who have a legitimate need to access sexual explicit material will be able to do so. The Act's prior approval provision allows state employees to access sexually explicit material "to the extent required in conjunction with a bona

fide, agency-approved research project or other agency-approved undertaking." The Act's prior approval process, however, has no check on the discretionary authority of State agencies. The Supreme Court, in a related context, has found that such grants of unbridled discretion to government agents invites arbitrary enforcement. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 (1988), the Court held that:

> when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Id. at 763; *see also Sanjour*, 56 F.3d at 97 ("Far from being the saving grace of this regulatory scheme-as the government suggests-the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible") . . . . The danger of arbitrary censorship is particularly relevant in the instant case, given the differing views on the merits of research and discussion into sexually related topics.

The prior approval process does not save the Act even if we could assume that approvals would not be withheld arbitrarily, because the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. Thus, even those employees who receive permission to speak will be inclined to engage in self-censorship, ultimately to the detriment of the public in the form of a banal and lifeless discourse on issues of public concern.

The under and overinclusiveness of the Act shows the "obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions." *Sanjour*, 56 F.3d at 95. The lack of fit between the Act's broad restrictions and the interests the Act allegedly was intended to serve "cast[s] serious doubt," *see id.*, on the Commonwealth's claim that employees' access to sexually explicit material has a "necessary impact on the actual operation of the Government." *NTEU*, 513 U.S. at 468 (internal quotation omitted). Consequently, the Act does not survive the heightened scrutiny applied to statutory restrictions on employee speech.

III.

For the foregoing reasons, I would affirm the judgment of the district court.

Notes and Questions

1. *Urofsky v. Gilmore* is discussed in the Text, pp. 396-401. The history of academic freedom, emphasized in the *Urofsky* majority opinion, is discussed in the Text Sections 6.1.3, 6.1.4, and 7.1.4.

2. The various opinions issued by the *en banc* court in *Urofsky* provide an instructive debate, and an interesting array of viewpoints, on academic freedom and professors' First Amendment free speech rights. Compare and contrast the various opinions. Which opinion, or parts of opinions, present(s) the soundest reasoning? The most perceptive analysis? The most constructive approach to the problem?

3. Running through the opinions, explicitly and implicitly, is the recurring question of whether professors (or academics) at public institutions have – or should have – First Amendment free speech rights that are more expansive, or differently configured, than the free speech rights of other public employees. How do the various opinions answer this question (explicitly or implicitly)? What do you think is the correct or preferable answer?

4. Regarding the plaintiffs' claim to a First Amendment right of academic freedom, the majority reasons that, if there is any such right in the First Amendment, it belongs only to the institution itself and not to its faculty members. Do you agree with the majority? For an analysis of the U.S. Supreme Court cases that differs from that of the *Urofsky* majority, see the Text section 6.1.7; and see also Richard Hiers, "Institutional Academic Freedom vs. Faculty Academic Freedom: A Dubious Dichotomy," 29 *J. Coll. & Univ. Law* 35 (2002). "

5. Suppose, after *Urofsky*, another public university professor in Virginia applies for and is denied prior approval for a particular computerized research project. If the professor challenges the denial in court, should the court be willing to consider and rule on: (a) the professor's claim that the denial of approval is wrong on the merits or an abuse of discretion? (b) the professor's claim that the university's prior approval process is unconstitutional under the free speech clause? Or are such claims precluded by *Urofsky?*

6. Subsequent to *Urofsky*, the U.S. Supreme Court added another important decision to its *Pickering*/*Connick* line of cases on public employee speech (see the Text Section 6.1.1)

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a case involving a free speech claim of a deputy district attorney, the Court held by a 5 to 4 vote that the First Amendment does not protect public employees whose statements are made as part of their official employment responsibilities. In emphasizing the distinction between speaking as an employee and speaking as a private citizen, the Court appears to support the *Urofsky* majority's argument in part II of its opinion. However, Justice Kennedy, speaking for the majority in *Garcetti*, noted at the end of his opinion that:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. [547 U.S. at 425].

Justice Kennedy was reacting to Justice Souter's concern, expressed in his dissenting opinion in *Garcetti*, that:

> The ostensible domain [of cases that the majority puts] beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (a

> governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread"). [547 U.S. at 425.]

The critically important question raised by these two statements from *Garcetti* seems to parallel the question addressed in Note 3 above.

7. For discussion of the potential impact of *Garcetti v. Ceballos* on faculty academic freedom in research and publication, and an illustrative case, see the Text Section 6.3, pp. 307-308.

G.

CHAPTER VII: THE STUDENT/INSTITUTION RELATIONSIHP

SEC. 7.1.3. The Contractual Rights of Students

Johnson v. Schmitz
119 F. Supp. 2d 90 (D. Conn. 2000)

OPINION BY: Janet Bond Arterton

RULING ON DEFENDANTS' MOTION TO DISMISS

I. FACTUAL BACKGROUND

Assuming all the facts in the complaint to be true, and drawing all inferences in favor of the plaintiff, the following represents the background of this case. Plaintiff Kris Johnson is a graduate student in the doctoral program at Yale University, in the School of Forestry and Environmental Studies. Upon his entrance into the program, he was assigned a committee of faculty advisors to assist him in the development of his dissertation. Defendant David Skelly is a member of this committee and defendant Oswald Schmitz is co-chair.

While working on a research project for Schmitz in the summer of 1995, Johnson developed the idea for his dissertation, based on the Trophic-Dynamic Theory of Redundancy (the Theory), and recorded his notes and other information about the Theory in a private journal. During that time, Johnson discovered two other student workers reading his journal and later overheard them explaining its contents to Schmitz. As a result of this incident, Johnson expressed hesitation when Schmitz requested that he explain his ideas. Johnson was told by Schmitz that in order to complete his dissertation and pass his qualifying exam, he would have to trust the faculty. Johnson subsequently explained the Theory to Schmitz. Schmitz thought highly of the Theory, and recommended that Johnson prepare a grant to obtain funding for further research.

Johnson expressed concern to Kristina Vogt, a Yale faculty member who was the other co-chair of his dissertation committee, that Schmitz would misappropriate his ideas; Vogt assured him that this would not happen. However, unbeknownst to Johnson, during that year Schmitz planned to take credit for the Theory and began steering his research in that direction. As this was occurring, Johnson continued to work on his research, incorporating a novel

technology called the Reaction Norm Approach into the Theory, and submitted a paper for publication in a well-known journal describing certain aspects of the theory. The Reaction Norm Approach was later appropriated by Skelly.

In mid-August 1996, Johnson took the written part of his doctoral qualifying exam, and was advised by Vogt that he had done very well. In Fall 1996, Johnson appeared before the members of his "doctoral dissertation committee" for the oral part of his qualifying exam. During the exam, Johnson was aggressively criticized by Schmitz and Skelly in order to discourage him from pursuing his ideas and to allow them to misappropriate the Theory. Johnson was told that his "thinking was flawed," "he could not see the big picture," and his ideas were "ridiculous and unoriginal." Following the exam, Schmitz told Johnson that he was relieving him of his ideas and subsequently, Schmitz and Skelly published Johnson's Theory and Reaction Norm Approach without attribution to Johnson.

In January 1997 Johnson submitted a formal letter to the Director of Doctoral Studies complaining of academic fraud. He did not receive a formal response, and in September Yale stopped delivering his monthly salary supplement and his funding. Johnson then wrote to the Dean of Yale School of Forestry and Environmental Studies who informed him that an Inquiry Committee would be formed. Five months later, the Committee informed Johnson that they had not found any reasonable grounds for believing his allegations of academic fraud. The investigation consisted of a keyword search to determine originality and did not include either intellectual analysis of Johnson' ideas, or personal interviews with plaintiff. Johnson appealed to the Provost who declined to reevaluate his claim.

Defendants moves to dismiss nine of plaintiff's remaining sixteen counts: (5) breach of express contract against Yale; (6) breach of implied contract against Yale; (7) breach of fiduciary duty against Schmitz, Skelly and Yale; (8) negligence against Schmitz and Skelly; (9) negligence against Yale; (11) defamation against Schmitz and Skelly; (12) defamation against Yale; (17) Unfair Trade Practices against Schmitz and Skelly; and (18) Unfair Trade Practices against Yale.

II. LEGAL STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted only "when it appears beyond doubt that there [is] no set of facts in support of plaintiff's claim which would entitle plaintiff to relief." *Harsco Corp. v. Segui*, 91 F.3d 337, 341 (2d Cir. 1996) (citing *Conley v. Gibson*, 355 U.S. 41, 46 (1957)). "A complaint should not be dismissed simply because a plaintiff is unlikely to succeed on the merits." *Harsco Corp*., 91 F.3d at 341 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). When deciding a motion to dismiss, "the complaint is to be construed in the light most favorable to the plaintiff," and all the factual allegations in the

complaint must be accepted as true. . . . However, consideration is limited to the facts stated in the complaint and documents attached to the complaint as exhibits or incorporated by reference.

III. DISCUSSION

A. Breach of Express and Implied Contracts by Yale

Johnson's complaint alleges that Yale made specific express and implied contractual promises to him, and failed to deliver on these commitments. He claims that the express contract is based on distributed documents, including admissions literature and matriculation representations given to all doctoral students. The implied contract is founded on an alleged agreement by Yale to grant him all of the rights, privileges, and protections to which Yale doctoral students are entitled in exchange for Johnson's agreement to become a graduate student.

In his opposition to the motion to dismiss, plaintiff outlines the specific contractual breaches claimed, although without delineation as to which promises are express and which are implied. Johnson's allegations include breaches of Yale's contractual duties to safeguard students from academic misconduct, to investigate and deal with charges of academic misconduct, and to address charges of academic misconduct in accordance with its own procedures. In addition, plaintiff claims that Yale violated the implied covenants of good faith and fair dealing inherent in each of these contracts. Defendants, in return, argue that Johnson's contractual claims are not cognizable under Connecticut law. For the reasons discussed below, this Court disagrees.

"The basic legal relation between a student and a private university or college is contractual in nature." *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992); accord *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 504 (1972); *Wickstrom v. North Idaho College*, 725 P.2d 155, 157 (Idaho 1986); *Cencor, Inc. v. Tolman*, 868 P.2d 396, 398 (Colo. 1994). "There seems to be 'no dissent' from [the] proposition" that the "catalogues, bulletins, circulars, and regulations of the institution" determine the contractual relationship between the student and the educational institution. *Ross*, 957 F.2d at 416 (quoting *Wickstrom*, 725 P.2d at 157); accord *Zumbrun*, 101 Cal. Rptr. at 504; *CenCor, Inc.*, 868 P.2d at 398. Although the Connecticut courts do not appear to have considered whether these documents are part of the educational contract, the Connecticut Supreme Court has given no indication it would not agree with the courts that have done so. Because a student bases his or her decision to attend a college or university, in significant part, on the documents received concerning core matters, such as faculty, curriculum, requirements, costs, facilities and special programs, application of contract principles based on these documents and other express or implied promises, consistent

with the limitations expressed in *Gupta v. New Britain General Hospital*, 687 A.2d 111 (Conn. 1996), appears sound. . . .

[The court then reviews a variety of cases in which courts refuse to entertain claims of educational malpractice in which the quality of the educational experience is challenged.]

However, the court [in Gupta] also emphasized that "there are . . . at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services." *Id*. First, if the claim alleged that the school had "failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field." *Id*. (citing *Wickstrom*, 725 P.2d 155) (action for breach of contract exists where plaintiff enrolled in course promising to train students to qualify as journeymen but failed to provide instruction on those skills). "The second would arise if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program." *Id*. (citing *CenCor, Inc.*, 868 P.2d at 399) (allowing breach of contract claim where defendant vocational school promised up-to-date equipment, computers, and word processing but failed to deliver).

* * * *

Johnson's claims against Schmitz, Skelly, and Yale, if cognizable, fall within the second *Gupta* exception for breach of a specific contractual promise distinct from a general, unactionable, promise to provide adequate education. The defendants argue that plaintiff's claims are simply educational malpractice claims in disguise, and characterize the plaintiff's claim as a breach of contract for failure "to provide an effective course or manner of education," challenging Yale's day-to-day practices and implementation of policies, "course of instruction," and "soundness of the method of teaching," as rejected in *Gupta*. Defendants thus contend that under *Gupta* . . . Johnson's breach of contract claim cannot be sustained.

The Court disagrees. The facts of this case are distinct from those in *Gupta* and the other cases cited by the defendant finding no cause of action of a breach of contract claim sounding in educational malpractice. As discussed above, in *Gupta*, the plaintiff claimed that the hospital "failed to provide proper training facilities." 239 Conn. at 580. He also claimed that the hospital breached a contract with him by failing to attain the standards established for teaching hospitals. With respect to the first claim, the court determined that this was simply an allegation "'that the education was not good enough.'" *Id*. at 593. With respect to the second claim, however, the court found that Gupta had failed to adduce any evidence in the trial court that the hospital had

either lost its accreditation or that its accreditation was even in jeopardy, and that the defendant therefore was entitled to summary judgment on that claim. See *id*. Thus, *Gupta* supports this Court's determination that Johnson's breach of contract claims against Schmitz, Skelly, and Yale must await further factual development before disposition. . . .

. . [W]here a breach of a specific, identifiable promise is alleged, courts have found such a claim actionable. For example, in *Ross,* the court found that the plaintiff stated an actionable claim where, in exchange for his enrollment and participation on the basketball team, Ross alleged that the University had made a specific promise to provide adequate tutoring services, and had breached that promise by failing to provide any such services. *Ross,* 957 F.2d at 417. Similarly, in *Zumbrun,* where the university had promised, in its catalogues and bulletins, to offer the course 'Sociology 200,' including lectures and a final examination, its failure to provide either lectures or a final exam stated a claim for breach of contract.

In the present case, Johnson does not claim that Schmitz, Skelly, or Yale failed to "provide an effective manner or course of instruction." Instead, he claims that Yale failed to deliver on its express and implied contractual duties to safeguard students from academic misconduct, to investigate and deal with charges of academic misconduct, and to address charges of academic misconduct in accordance with its own procedures. These alleged promises are based on Yale's own representations and procedures related to conduct peripheral or ancillary to the central educational process. Thus, they do not implicate the jurisprudential considerations associated with the rejected tort of educational malpractice, as the Court or fact finder will not be required to evaluate subjective aspects of the quality of Yale's graduate academic program or otherwise make judgments on purely academic issues, but instead will determine whether or not Yale had a contractual duty to safeguard its students from faculty misconduct, and, if so, whether that duty was breached in Johnson's case. . . .

Because the plaintiff has alleged specific promises by Yale which, if supported by the evidence, are capable of objective assessment by the court and therefore do not involve the court in academic decision making, defendant's motion to dismiss the breach of contract claim is DENIED.

* * * *

B. Breach of Fiduciary Duty

1. Claim against Yale

The plaintiff claims that, since Yale was "in a position of power and authority" over him and "in a position of trust and confidentiality with regard to his education ideas and work product," Yale had a fiduciary duty toward him. It is not enough to state generally that Yale was in a position of power and authority, otherwise all student-school relationships could be fiduciary in nature. However, the plaintiff points to the "uniqueness" of the relationship between a "graduate-level student and an educational institution." He avers that as a student climbs the education ladder, the student-school relationship transforms. Specifically, it is alleged, graduate students are expected to develop their own research ideas and to supply funding for this research in the form of grants, under the sponsorship of professors. Plaintiff asserts that, to that end, Yale promised to provide a "nurturing environment."

A fiduciary relationship is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." . . . Accordingly, "the fiduciary must act honestly, and with the finest and undivided loyalty[.]" *Konover Dev't Corp. v. Zeller*, 228 Conn. 206, 220, 635 A.2d 798 (1994).

The Connecticut Supreme Court has purposefully refrained from defining "a fiduciary relationship in precise detail and in such a manner as to exclude new situations." *Id*. 204 Conn. at 320 . . .

Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student. In light of the Connecticut Supreme Court's disinclination to confine the [reach] of the fiduciary duty doctrine by precise definition and its willingness to allow for case-by-case analysis in new situations, this Court concludes that more factual development is warranted in this case. Yale allegedly represented that it would safeguard its students from faculty misconduct and provide a nurturing environment for its students. Plaintiff may further develop such factual issues as Yale's representation of its mission towards graduate students, and whether or not it represented that it would take care of graduate students to the exclusion of all others. Because this inquiry is necessarily factually dependent, the determination of whether Yale owed a fiduciary duty to Johnson must await at least the summary judgment stage.

2. Claim against Schmitz and Skelly

The plaintiff claims that because Schmitz and Skelly were in a "position of power and authority" over Johnson, their relationship with him was of a fiduciary nature. Schmitz and Skelly held such a position because they were assigned to serve on his dissertation advisory committee who purpose was to "assist Johnson in the development and completion of his dissertation."

Plaintiff may show that it was justifiable for Johnson to place a high degree of trust and confidence in the professors. His relationship with Schmitz and Skelly was individualist as they were chosen to serve on a committee whose only purpose was to assist Johnson. Further, Schmitz encouraged Johnson to trust him in sharing his dissertation ideas. This act of encouraging Johnson to place trust in Schmitz is relevant to the consideration whether a fiduciary relationship was created here. . . .

Additionally, Schmitz and Skelly had a duty to represent Johnson's interests. The dissertation committee was created for no other purpose than to assist Johnson. Accordingly, this relationship is more analogous to the attorney-client relationship because the members of the committee were not entitled to act for their own benefit.

Having demonstrated that a fiduciary relationship might exist, the plaintiff alleges that the fiduciary duty was breached because Skelly and Schmitz, *inter alia*, misappropriated his ideas. The burden is shifted to Skelly and Schmitz to prove fair dealing by clear and convincing evidence. *Dunham*, 204 Conn. 303, 323, 528 A.2d 1123 (1987). For these reasons, defendant's motion to dismiss the breach of fiduciary duty count is DENIED.

C. Negligence

1. Claim against Yale

Plaintiff claims that Yale was negligent as to its duty to "establish and enforce reasonable rules, policies, and guidelines to ensure that the ideas, data, research projects, information, and career opportunities were not usurped, misappropriated, or plagiarized by members of the Yale faculty," and as to its duty to "establish and enforce reasonable measures to ensure that he was not repeatedly harassed . . . embarrassed, defrauded, slandered, and intimidated . . . by the

faculty." Johnson alleges that this duty was breached because the codes were inadequate and unenforced, and that he has been injured as a result.[3] . . .

The defendants in the present case argue that the plaintiff's claim is barred by *Gupta* because accepting the plaintiff's claim would require the court to "make judgments about the validity of broad educational policies and sit in review of the day-to-day implementation of these policies." . . . Here, the plaintiff's claims are distinguishable. He does not claim a duty to educate, but to establish and enforce reasonable rules. As previously stated in the discussion of plaintiff's breach of contract claim, this is a claim which the judiciary is capable of assessing. . . .

. . . [I]t is necessary to apply the test formulated by the Connecticut Supreme Court for determining whether Yale owed Johnson a legal duty of reasonable care. The first consideration is whether the harm suffered by Johnson was foreseeable by Yale. It is important to note that "the exact nature of the harm suffered need not have been foreseeable, only the 'general nature' of the harm." Lodge, 246 Conn. at 573. . . . [I]f Yale's rules for protecting its students were inadequate or if Yale failed to enforce them adequately, it is foreseeable that one of its students could suffer emotional distress and economic harm.

The second prong of the test calls for a public policy analysis. . . . Liability may be properly imposed on defendants if, and only if, doing so would serve a "legitimate objective of the law. . . . In the present case, the nexus is not too tenuous. Plaintiff alleges that Yale failed to protect Johnson against faculty misconduct, and he in turn was injured by faculty wrongdoing. In addition, a legitimate legal objective would be served by finding a duty. An important function of the tort system is the "'prophylactic' factor of preventing future harm." Universities are in the best position to prevent this kind of faculty misconduct in the future. Accordingly, since the existence of a duty of care might be shown, and plaintiff has alleged that the duty was breached, and that this breach caused him injury, the negligence count against Yale should not be dismissed.

2. Claim against Schmitz and Skelly

Plaintiff alleges that Schmitz and Skelly breached a duty of care owed to Johnson by obtaining Johnson's ideas, promising to use them for Johnson's benefit, and encouraging him to use the Yale laboratory and apply for research grants. These actions, it is asserted, were done without due concern for the consequences and harm that they might, and did, cause Johnson.

[3] Johnson does not specify exactly what kind of injury it is but, it can be inferred that the injury was economic harm, including loss of career opportunities, and emotional distress, caused by the "harassment" and "embarrassment" he allegedly suffered.

Defendant argues that the negligence claim comes within the educational malpractice exclusion. Previously discussed, Johnson is not claiming that Schmitz and Skelly breached a duty owed him by failing to educate him effectively. Thus, this claim is not barred by *Gupta*. . . .

D. Defamation

1. Claim against Schmitz and Skelly

The plaintiff alleges that during his oral qualifying examination, Schmitz and Skelly made false statements, known to be false, that injured him. Specifically, it is asserted, Schmitz and Skelly stated that "he could not see the 'big picture,' that his thinking was flawed, and his idea ridiculous and unoriginal." In addition, after the exam Schmitz allegedly told Johnson that "he did not have what it took to write a thesis and be awarded a Ph.D." . . .

In arguing that the statements plaintiff highlights as defamatory are mere expressions of opinion, the defendant points to cases in which employee work performances were criticized. The statements made in these cases are not able to be proved true or false. . . . This analogy is persuasive. While the court can imagine a situation in which a statement regarding the originality of ideas could be factual, in this case, the defendants' statements were merely expressions of opinion. The assertions were made during an academic evaluation of plaintiff's work to other members of the faculty. In the context of an evaluation, an ordinary person "would be likely to understand it is an expression of the speaker's opinion," including the statement that plaintiff's ideas were "ridiculous and unoriginal." The law protects even exaggerated or hyperbolic language. . .

In response, the plaintiff argues that he is relying on an exception established by the Second Circuit in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977). The court established that a statement of opinion based on "false fact" could be actionable. There, defendant had made opinion statements impliedly based on a non-existent personal relationship with the plaintiff. At oral argument, the plaintiff in the present case asserted that this exception applies because the defendants did not actually believe the truth of the criticisms they made of Johnson. This explanation, however, does not provide a factual basis on which defendants' statements are based, rather, it asserts that defendants were being untruthful about their opinions. Since the rendering of a false opinion is not actionable under defamation law, Counts 11 and 12 are DISMISSED.

* * * *

[The court also dismissed plaintiff's claims under a state deceptive trade practices statute, stating that the university's operations lacked the requisite commercial purpose to fall within the boundaries of the statute.]

IV. CONCLUSION

Defendants' Motion to Dismiss is DENIED, in part, and GRANTED, in part, as follows:

As to plaintiff's breach of express contract (Count 5), breach of implied contract (Count 6), breach of fiduciary duty (Count 7), and negligence claims (Counts 8 and 9) defendants' motion is DENIED.
As to plaintiff's allegations of defamation (Counts 11 and 12) and CUTPA violations (Counts 17 and 18), defendants' Motion is GRANTED.

IT IS SO ORDERED.

Notes and Questions

1. Note that the posture of this case is the denial of the university and individual defendants' motion to dismiss the plaintiff's claims. No ruling has yet been made on the merits of the case. A later proceeding indicates that settlement attempts were unsuccessful, at least initially, but additional proceedings were not reported in the case.

2. Do you agree with the judge's assertion that the sole role of a dissertation committee is to assist and represent the student? Does the committee have other functions as well?

3. Note that the judge does not take a position on whether Yale owes a fiduciary duty to Johnson, but allows him to attempt to demonstrate this duty in court. What aspects of the relationship between a graduate student and her faculty advisors might create a fiduciary relationship? How does this relationship differ from that of the attorney/client or trustee/beneficiary relationship?

4. What is the source of the "contract" between the plaintiff and Yale? What will the plaintiff be required to prove should the case be tried?

5. The court's dismissal of the defamation claim appears to rest on the opinion privilege. Another possible defense would be the qualified privilege afforded to employers and educators to comment upon and criticize, where appropriate, the performance of an employee or student. Which defense do you think is the stronger one in this situation?

6. A subsequent opinion in the case, 237 F. Supp. 2d 183 (D. Conn. 2002), indicates that an investigation of Johnson's claims of misappropriation of his research ideas by the National Science Foundation found his claims to be unsupported (*id*. at 187). If you were representing Yale University, what would be your advice as to settlement or litigation of this case?

SEC. 7.1.3. The Contractual Rights of Students

Al-Dabagh v. Case Western Reserve University
777 F.3d 355 (6th Cir. 2015)

OPINION BY: SUTTON, Circuit Judge.

Authority to decide whether a medical student deserves a degree usually rests with the student's school. In this unusual case, that did not happen. A federal district court found that Amir Al–Dabagh had proven himself worthy of a diploma and ordered Case Western Reserve University School of Medicine to give him one—disregarding the university's determination that he lacked the professionalism required to discharge his duties responsibly. Because that lack-of-professionalism finding amounts to an academic judgment to which courts owe considerable deference, we must reverse.

Anyone who has ever been to a doctor's office knows the value of a good bedside manner. That is why Case Western does more than just teach its students facts about the human body. Its curriculum identifies nine "core competencies." First on the list is professionalism. Medical knowledge does not make an appearance until the fifth slot.

The curriculum tells a student to exercise professionalism in four ways:

> • Consistently demonstrate[ ] ethical, honest, responsible and reliable behavior.
>
> • Identif[y] challenges to professionalism and develop[ ] a strategy to maintain professional behaviors when adherence to professional standards is threatened in the clinical and/or research settings.
>
> • Engage[ ] in respectful dialogue with peers, faculty, and patients, to enhance learning and resolve differences.
>
> • Recognize[ ] personal limitations and biases and find[ ] ways to overcome them.

R. 15–1 at 93, PageID # 534.

The university's student handbook emphasizes professionalism in several other places. Here: Case Western values "student professionalism ... as highly as mastery of the basic sciences and clinical skills." *Id.* at 61, PageID # 502. And here: A Case Western degree conveys not only "a level of competency as measured by performance on tests" but also "a commitment to professional responsibility." *Id.* at 62, PageID # 503. And here: "Medical school education entails the mastery of didactic, theoretical, and technical material, as well as the demonstration of appropriate professional and interpersonal behavior." R. 2–8 at 2, PageID # 161.

The task of figuring out whether a student has mastered these professionalism requirements falls to the university's Committee on Students. Assembled from the university's

faculty and administrators, the Committee "conducts detailed reviews" of a student's exam scores, clinical performance, and "professional attitudes and behavior." *Id.* at 1–2, PageID # 160–61. A student cannot receive a degree without the Committee's approval, good grades notwithstanding.

Amir Al–Dabagh enrolled at Case Western's medical school in 2009. He did well academically, as exhibited by recommendation letters praising his "academic excellence" in 2011 and 2013, R. 10–5 at 1, PageID # 345; *see* R. 10–6 at 1, PageID # 347. He even published several articles and won a special award for "Honors with Distinction in Research." R. 2–7 at 1, PageID # 159.

Professionalism was another matter. His troubles began during his first semester. All first-year medical students must participate in discussion sessions and arrive on time to each of them. Al–Dabagh came late to almost thirty percent of the meetings, holding up the class as a result. According to his instructor, he asked not to be marked late each time. According to his own testimony, he asked only once, and only then because the admitted student he was hosting was also running late. But he does not deny the tardiness or its frequency. And in his instructor's judgment, quite reasonably, "[a]sking [a faculty member] to lie about attendance" is "a more serious breach of professionalism[ ] than tardiness itself." R. 12–3 at 3, PageID # 375.

The problems did not stop there. In 2012, two female students accused Al–Dabagh of behaving inappropriately at a formal dance called the Hippo Ball—short (we presume) for Hippocrates. One said he propositioned her for sex, "grab[bed her] hand and trie[d] to pull [her] towards the dance floor," and told her that, "[I]f you don't dance with me, I'm gonna embarrass you until you do." R. 12–1 at 2, PageID # 368. The other said she was walking across the room when she "felt someone grab [her] butt." *Id.* at 4, PageID # 370. When she turned around, she saw Al–Dabagh—at which point he and her boyfriend nearly came to blows. Later that night, according to a police incident report, Al–Dabagh jumped out of a moving taxi after attempting to stiff its driver out of a twenty-dollar fare. Al–Dabagh recalls the night differently. He never harassed anyone, never tried to welch on the driver, and fell out of the cab when "someone assaulted" him. R. 2–2 at 2, PageID # 128. Whatever happened, the night's events sparked his first run-in with the Committee, which forced him to undergo "an intervention on professionalism" and threatened him with "dismissal" if "further issues" arose. R. 15–10 at 2, PageID # 598.

Further issues arose. In 2013, Al–Dabagh received a stinging evaluation about his performance in an internal medicine internship. Nurses and hospital staffers "consistently complained about his demeanor"; a patient's family once "kicked him out of the room"; and he sometimes gave patient-status presentations without first preparing. R. 12–5 at 2, PageID # 379. Al–Dabagh by contrast asserts that the negative comments stemmed from his "critical ...

attitude" toward one of his supervisors—an account confirmed by another evaluator. R. 2–2 at 3, PageID # 129; R. 2–11 at 1–2, PageID # 165–66. But he does not dispute that the Committee "serious[ly] consider[ed]" dismissing him in response. R. 15–3 at 5, PageID # 545. It opted for less severe but still drastic measures, requiring him to repeat the internship and enrolling him in "gender specific training." R. 2–12 at 1, PageID # 167. It also added an addendum to his letter of recommendation for residency programs, the existence of which a faculty supporter described as "very permanent[ly] ... damaging" and "too heavy a punishment." R. 2–11 at 1, PageID # 165. The Committee had not written such an addendum in at least twenty-five years. When Al–Dabagh appealed, the Committee reaffirmed its decision, citing "a pattern of unprofessionalism with regard to communication and personal conduct." R. 12–8 at 2, PageID # 385.

Matters came to a head in April 2014, when the university received word that North Carolina had convicted Al–Dabagh for driving while intoxicated. Al–Dabagh insists that he was not in fact drunk. He swerved to miss a deer, he says, and hit a utility pole instead. The university by this point had already invited Al–Dabagh to graduate. No matter: The Committee convened an emergency session, unanimously refused to certify him for graduation, and dismissed him from the university. After he appealed, the Committee agreed to lighten its punishment, offering to let him withdraw from the university in writing—freeing him to apply to other programs without having to explain a damaging official dismissal.

Al–Dabagh did not accept the Committee's offer. Instead, he sued the university in federal district court, alleging that it breached its state-law duties of good faith and fair dealing when it declined to award him a degree. The court agreed, ordering the university "to issue a diploma to [Al–Dabagh] as having satisfied the requirements to become a doctor of medicine and to list [him] as having graduated in whatever ways are customary for the school." R. 19 at 1. The university appeals. Reviewing the district court's factfinding for clear error and its legal conclusions anew, we reverse.

To start, we must smooth out a procedural wrinkle. After losing in the district court, Case Western did not move for a stay. Instead, it complied with the injunction and gave Al–Dabagh a degree. Thanks to its decision, Al–Dabagh is now a practicing resident. Doesn't that moot the case? No, because the university will revoke that degree if it wins. *See* Motion to Expedite Appeal, *Al–Dabagh v. Case W. Reserve Univ.*, No. 14–3551. And an appeal remains alive if the effects or benefits of compliance can be undone. Charles Alan Wright et al., 13B *Federal Practice and Procedure* § 3533.2.2 (3d ed.2014); *cf. Carachuri–Rosendo v. Holder*, 560 U.S. 563, 573 n. 8, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010). We therefore have jurisdiction to move on.

Ohio treats the relationship between a university and its students as "contractual in nature." *Behrend v. State*, 55 Ohio App.2d 135, 379 N.E.2d 617, 620 (1977). Case Western's

student handbook supplies the contract's terms, as the parties agree, and makes clear that the only thing standing between Al–Dabagh and a diploma is the Committee on Students' finding that he lacks professionalism. Unhappily for Al–Dabagh, that is an academic judgment. And we can no more substitute our personal views for the Committee's when it comes to an academic judgment than the Committee can substitute its views for ours when it comes to a judicial decision. Ohio law allows a court to overturn such judgments only if they are "arbitrary and capricious," regardless of "whether the court would have decided ... matter[s] differently." *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 78 Ohio App.3d 302, 604 N.E.2d 783, 788 (1992). Federal Due Process law comes to the same end. A court must "show great respect for the faculty's professional judgment" and may not "override" that judgment "unless it is such a substantial departure from accepted academic norms as to demonstrate that the ... committee responsible did not actually exercise professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985).

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. *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 576 (6th Cir.1988). The Ohio Supreme Court indeed has deferred to a similar form of academic judgment by this same institution in the past. In a case with greater equities than this one, the Court approved the medical school's refusal to admit a gifted blind applicant because its goal was not to train "specialized" doctors—she wished to be a psychiatrist—but generalist ones capable of "function[ing] in a broad variety of clinical situations." *Ohio Civil Rights Comm'n v. Case W. Reserve Univ.*, 76 Ohio St.3d 168, 666 N.E.2d 1376, 1387 (1996).

Nor do we have any reason to doubt the propriety of *this* curricular choice. Professionalism has been a part of the doctor's role since at least ancient Greece. The original Hippocratic Oath required adherents to "refrain ... from acts of an amorous nature" in "[w]hatsoever house [they] may enter," "whatever may be the rank of those whom it may be [their] duty to cure." 3 *The London Medical Repository* 258 (James Copland ed.,1825). It is entirely reasonable to assess the presence of professionalism early. For once a medical student graduates, we must wait for a violation before we may punish the absence of it. *See Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993) (affirming a medical board's decision to suspend a doctor after he had sex with an emotionally vulnerable patient). Cases defining "academic decisions" in the Due Process context confirm the point. The United States Supreme Court has even deemed "academic" a school's decision to dismiss a student who "lacked a critical concern for personal hygiene." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 81, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

We repeatedly have emphasized that "academic evaluations" may permissibly extend beyond "raw grades [and] other objective criteria." *Ku v. Tennessee*, 322 F.3d 431, 436 (6th Cir.2003); *see Yoder v. Univ. of Louisville*, 526 Fed.Appx. 537, 549–50 (6th Cir.2013). Other circuits have come to the same conclusion. Dismissing a medical student for lack of professionalism is "academic," says one. *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 463 (4th Cir.2012). Refusing to approve a Ph.D. thesis because its acknowledgement section was unprofessional is "academic," says another. *Brown v. Li*, 308 F.3d 939, 943, 952 (9th Cir.2002). Dismissing a student for "non-cognitive" problems like "sleeping in" is "academic," says still another. *Richmond v. Fowlkes*, 228 F.3d 854, 856, 858 (8th Cir.2000). And so on. *See Harris v. Blake*, 798 F.2d 419, 423 (10th Cir.1986) (dismissing a student for failing to attend practical class sessions is "academic"); *Perez v. Tex. A & M Univ. at Corpus Christi*, No. 14–40081, 589 Fed.Appx. 244, 249-50, 2014 WL 5510955, at *4 (5th Cir. Nov. 3, 2014) (dismissing a student for tardiness is "academic").

Whether we take our cue from Case Western's curriculum, the student handbook contract between the student and university, the Supreme Court, the Ohio cases, our own cases, or cases from other circuits, the conclusion is the same: The Committee's professionalism determination is an academic judgment. That conclusion all but resolves this case. We may overturn the Committee only if it "substantial[ly] depart[ed] from accepted academic norms" when it refused to approve Al–Dabagh for graduation. *Ewing*, 474 U.S. at 225, 106 S.Ct. 507. And given Al–Dabagh's track record—one member of the Committee does not recall encountering another student with Al–Dabagh's "repeated professionalism issues" in his quarter century of experience, R. 15–5 at 3, PageID # 560—we cannot see how it did.

To the contrary, Al–Dabagh insists: The Committee's decision was a "punitive disciplinary measure" that had nothing to do with academics. Appellee's Br. at 27. In support, he points to the handbook's statement that the Committee "acts on behalf of the Faculty of Medicine in non-academic disciplinary matters involving medical students." R. 15–1 at 60, PageID # 501. Doesn't this show that its action was non-academic in nature? No, for two reasons. First, his argument overlooks the reality that the university's disciplinary procedures are parallel to, not exclusive of, the Committee's role in approving students for graduation. That same handbook section makes clear that "[u]nprofessional activities may also be subject to a formal university disciplinary action." *Id.* at 59, PageID # 500. And the Committee's refusal to approve Al–Dabagh for graduation took place outside the disciplinary process. Second, his argument fails to wrestle with the prominent place of professionalism in the university's academic curriculum—which itself is an academic decision courts may not lightly disturb.

Even if professionalism *is* an academic criterion, Al–Dabagh persists that the university defined it too broadly. As he sees it, the only professional lapses that matter are the ones linked

to academic performance. That is not how we see it or for that matter how the medical school sees it. That many professionalism-related cases involve classroom incidents does not establish that *only* classroom incidents are relevant to the professionalism inquiry, and Al–Dabagh has identified no case holding that the concept must be defined so narrowly. An analogy illustrates the point. Our own standards indicate that professionalism does not end at the courtroom door. *E.g.*, Supreme Court Rules for the Government of the Bar of Ohio, Rule I, § 11(D)(3)(b), (k) (instructing Ohio's bar admissions committee to consider an applicant's drug and alcohol problems and his "[n]eglect of financial responsibilities" when assessing his character and fitness). Why should hospitals operate any differently? As for the danger that an expansive view of professionalism might forgive, or provide a cloak for, arbitrary or discriminatory behavior, we see no such problem here. Nothing in the record suggests that the university had impermissible motives or acted in bad faith in this instance. And nothing in our deferential standard prevents us from invalidating genuinely objectionable actions when they occur.

Al–Dabagh next claims that the university's residency-recommendation letters demonstrate that his missteps were not a big deal. Had he really been as unprofessional as the university now makes him out to be, he asks, why did it praise his professionalism when he applied to residency programs? At one level, we share Al–Dabagh's puzzlement. Why did the university omit any mention of his professionalism-related struggles from its recommendation? Its explanation—that it tries "to support its students as much as possible," R.18 at 18–19, PageID # 656–57—is unconvincing. Even so, the university sent the recommendation *before* Al–Dabagh failed his internship. It was that failure that first led the Committee to contemplate Al–Dabagh's dismissal. And it was that failure that prompted the university to provide an addendum to its recommendation that referenced Al–Dabagh's problems.

Al–Dabagh, last of all, claims that the Committee faulted him for things that didn't happen (for instance, the sexual harassment incidents at the Hippo Ball) and disregarded his explanations for the things that did (for instance, his poor internship performance and his driving-while-intoxicated conviction). He invites us to decide for ourselves whether he behaved in a sufficiently professional way to merit a degree. That, as we have made clear, goes beyond our job description. It was neither arbitrary nor capricious for the Committee to credit other accounts above Al–Dabagh's. And if a dismissal from medical school for poor hygiene and untimeliness falls within the realm of reason, *Horowitz*, 435 U.S. at 91 n. 6, 98 S.Ct. 948, it should go without saying that Al–Dabagh's dismissal falls within the realm of reason too.

For these reasons, we reverse.

Notes and Questions

1. What document or documents define the contract between a student and an institution?

2. In characterizing the relationship between Al-Dabagh and Case Western as contractual in nature, the court also found it important to characterize the actions taken against Al-Dabagh as academic in nature? Why was this distinction of potential importance? Do you agree with the court that the actions taken against Al-Dabagh were academic rather than disciplinary in nature?

3. Based on the information provided in the opinion concerning the professionalism standards at issue, do you agree that these standards were appropriately applied to Al-Dabagh for his conduct in North Carolina? Why or why not?

4. The court approved of the professionalism standards applied in the case. Could such professionalism standards be applied to all students, such as those majoring in English or history?

SEC. 7.1.4. Student Academic Freedom

Tatro v. University of Minnesota
816 N.W.2d 509 (Minn. 2010)

Meyer, Justice.

When appellant Amanda Tatro was a junior in the Mortuary Science Program at respondent University of Minnesota, she posted statements on Facebook, a social networking site, which she has described in court filings as "satirical commentary and violent fantasy about her school experience." After becoming aware of these posts, a faculty member referred the matter to the Office for Student Conduct and Academic Integrity. Following a hearing, the Campus Committee on Student Behavior (CCSB) found that Tatro had violated the Student Conduct Code and academic program rules governing the privilege of access to human cadavers. The CCSB imposed sanctions, which included a failing grade for an anatomy laboratory course. The University Provost affirmed the sanctions. On appeal, among other issues, Tatro argued that the University violated her constitutional rights to free speech by disciplining her for Facebook posts. The court of appeals upheld the disciplinary sanctions. We affirm the court of appeals' decision on the free speech issue, but use a different analysis. We hold that the University did not violate the free speech rights of Tatro by imposing sanctions for her Facebook posts that violated academic program rules where the academic program rules were narrowly tailored and directly related to established professional conduct standards.

The Mortuary Science Program is a Bachelor of Science program for upperclass undergraduate students. The Program Director testified that the primary purpose of the program – its mission" – is to prepare students to be licensed funeral directors and morticians. The Mortuary Science Program requires students to pass science, business, psychology, and technical courses, as well as laboratory courses in anatomy, embalming, and restorative art. Students also must complete a clinical rotation at a funeral home.

The laboratory courses use human cadavers from the University's Anatomy Bequest Program. The Anatomy Bequest Program relies on individuals who volunteer to donate their bodies after death to the University. The Mortuary Science Program is one of several University departments, including medicine, dentistry, physical therapy, occupational therapy, and medical device engineering, which use human cadavers for teaching and research purposes.

In the fall of 2009, Tatro was enrolled in the three required laboratory courses. At the beginning of the semester, she received orientation and instruction in the policies of the Anatomy Bequest Program, and the rules governing the laboratory courses. Tatro then signed the Anatomy

Bequest Program Human Anatomy Access Orientation Disclosure Form, acknowledging that she understood and agreed to comply with the program rules, as well as "additional laboratory policies" stated in the course syllabus. Without signing the form, Tatro would not have been allowed to participate in the laboratory courses.

The course syllabus for the anatomy lab included rules "set up to promote respect for the cadaver." The anatomy lab rules allowed "respectful and discreet" "[c]onversational language of cadaver dissection outside the laboratory," but prohibited "blogging" about the anatomy lab or cadaver dissection. The instructor for the anatomy lab course testified that "blogging" was intended to be a broad term and that she explained to the students during orientation that blogging included Facebook and Twitter. Students were advised that "[f]ailure to adhere to these rules may result" in the student's "eviction" from the anatomy lab and the course.

On December 11, 2009, Tatro's Facebook activity was brought to the attention of the Mortuary Science Program Director. The activity at issue was a series of writings on Tatro's Facebook page, commonly known as "posts" or "status updates." At the time of these posts, Tatro's Facebook privacy settings allowed her "friends" and "friends of friends" to see what she had posted. Tatro had "hundreds" of Facebook friends.

The University's discipline of Tatro has focused on the following four posts:

- •**Amanda Beth Tatro** Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve... [November 12, 2009]

- •**Amanda Beth Tatro** Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. [December 6, 2009]

- •**Amanda Beth Tatro** Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code. [December 7, 2009]

- •**Amanda Beth Tatro** Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. [Undated.]

"Bernie" was the name that Tatro had given to the human cadaver on which she and her anatomy laboratory group members were training. Tatro testified that "Death List #5" is a reference to one of her favorite movies, *Kill Bill*, and the phrase "Lock of hair in my pocket" is a reference to a song by the Black Crowes, one of her favorite bands.

On the morning of December 14, 2009, the Director of the Mortuary Science Program and other staff members met to discuss Tatro's Facebook posts. The Director testified that "[t]here was a lot of fear" surrounding Tatro's post about stabbing someone with a trocar[2] and hiding a scalpel in her sleeve. According to the Director, the staff members "were very much concerned for their safety," particularly given other well-known episodes of school violence outside of Minnesota. Based on these safety concerns, the Director called the University police. The Director and a University police officer met with Tatro at the University. The Director told Tatro to stay away from the Mortuary Science Department and staff members while the matter was being investigated. University police ultimately determined that no crime had been committed.

Tatro, believing that she had been suspended, attempted to bring attention to her punishment by reporting the incident to, and sharing her Facebook posts with, the news media. After Tatro appeared on local television stations, the Anatomy Bequest Program received letters and calls from donor families and the general public who expressed concerns about Tatro's lack of professionalism, poor judgment, and immaturity. Others questioned the University about the steps it would take to prevent something like this from happening in the future.

On December 16, two days after the Mortuary Science staff meeting, the Director of the Office of Student Conduct and Academic Integrity (OSCAI) informed Tatro that she could return to school to complete her coursework and take her final examinations. The instructor of the anatomy lab course testified that if the timing of these events had been different – not on the eve of finals – she would not have allowed Tatro to come back to the lab or take the final examination and Tatro would not have passed the course. But the instructor consulted the OSCAI, which advised her to let Tatro take the final because "there's going to be some process here."

At the end of the term, the instructor entered Tatro's grade for the anatomy lab course – "MORT 3171" – as a "C+," but notified Tatro by e-mail that the instructor was submitting a formal complaint to the OSCAI. The instructor indicated that the Facebook posts violated the anatomy lab rules and the policies of the Anatomy Bequest Program. The instructor explained that the primary reason for the rules is that "people who have volunteered to graciously donate their bodies for the purposes of anatomy education do so with the intent to teach anatomy, not for

[2] A trocar is a long hollow needle made of stainless steel that is typically inserted into the body during embalming to aspirate gas and fluids.

the purposes of public display for amusement and fascination." The instructor recommended as a sanction for the violation of these rules "a grade of an F." On December 29, Tatro was informed that the OSCAI was investigating her for violations of the University's Student Conduct Code.

Tatro exercised her right to challenge the OSCAI complaint in a formal hearing before the CCSB. The Director of the Mortuary Science Program, two instructors in the program, and the President of the Mortuary Science Student Association testified at the hearing about the program's emphasis on respect, dignity, and professionalism as a foundation for later working as a funeral director or mortician, as well as the need for respect for the donors to the Anatomy Bequest Program. The witnesses also testified about the general reaction to Tatro's Facebook posts, including the concern and fear that they and others at the University had expressed. The faculty members all believed that Tatro should be expelled from the Mortuary Science Program.

Tatro also testified at the CCSB hearing, explaining that she uses humor and jokes to release anxiety and to stave off depression due to her unique life circumstances. Tatro suffers from a debilitating central nervous system disease, and she has served as the primary caretaker for her mother, who suffers from the effects of a traumatic brain injury. Tatro intended her Facebook posts to be read only by friends and family who would understand her sarcasm, morbid sense of humor, and references to popular movies and songs. Tatro claimed not to understand that her Facebook posts fell within the scope of the blogging prohibition, but did acknowledge that she understood she was restricted from writing about the details of what she did in the lab and that restriction included Facebook.

Discussing the post about stabbing "a certain someone," Tatro explained that she was referring to an ex-boyfriend who lives in California and had broken up with her the night before she posted that Facebook entry. She knew that he would see the post and stated that she simply wanted him to know that she "was pissed." She also knew that "all the Mort Sci kids" would see the post, but she never intended to incite or induce fear in anyone. Tatro conceded, however, that she could understand how others might misunderstand her sense of humor, especially when taken out of context.

The CCSB found Tatro responsible for violating the Student Conduct Code provision prohibiting threatening conduct. According to the CCSB, Tatro's "postings and subsequent actions were threatening to the person in the posts, the department, and the students and faculty." The CCSB also found Tatro responsible for violating several University rules, which fall within the provision of the Student Conduct Code prohibiting "conduct that violates University, collegiate, or departmental regulations that have been posted or publicized, including provisions contained in University contracts with students." These rule violations included (1) Anatomy Laboratory Rule #7, which provides in part that "[b]logging about the anatomy lab or the cadaver dissection is not allowable"; and (2) the rules listed on the Anatomy Bequest Program Human

Anatomy Access Orientation Disclosure Form. The CCSB decision stated that Tatro's "actions were inappropriate for someone in this profession," indicating that "the reason that these rules are strict is to set standards for behavior from the beginning of the program that will carry into the profession." Therefore, to facilitate the "personal and professional development" of Tatro, the CCSB believed that "it would be helpful for [Tatro] to seek professional guidance." The CCSB imposed the following sanctions:

1. Changing Tatro's grade in MORT 3171 to an "F."

2. Completion of a "directed study course" in clinical ethics.

3. A letter to one of the faculty members in the Mortuary Science Program addressing the issue of respect within the program and the profession.

4. A psychiatric evaluation at the student health service clinic and completion of any recommendations made by their evaluation.

5. Placement on probation for the remainder of Tatro's undergraduate career.

Tatro appealed the CCSB's decision to the Provost's Appeal Committee (PAC), an advisory panel that makes a nonbinding recommendation to the Provost. After a hearing, the PAC recommended that the Provost uphold the CCSB's decision. Provost E. Thomas Sullivan issued a "final decision," which affirmed the findings of the CCSB and the sanctions imposed.

Tatro then appealed to the court of appeals by writ of certiorari, raising several challenges to the University's imposition of disciplinary sanctions. The court of appeals affirmed the sanctions, concluding that (1) the University had jurisdiction to conduct the disciplinary proceedings, (2) sufficient evidence supported the University's determination that Tatro had violated University rules, (3) the University had the authority to change one of Tatro's grades as a disciplinary sanction, and (4) the University did not violate Tatro's free speech rights. *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 817-23 (Minn. App. 2011). We granted Tatro's request for further review of the free speech issue.

* * * *

II.

We next address Tatro's constitutional challenge to the sanctions imposed by the University. Tatro argues that the University violated her free speech rights under the United States and Minnesota Constitutions by disciplining her for satirical "literary expressions on her Facebook page." U.S. Const. amend. I; Minn. Const. art. I, § 3. Because the Minnesota constitutional right to free speech is coextensive with the First Amendment, we look primarily to federal law for guidance. *See State v. Wicklund*, 589 N.W.2d 793, 798-801 (Minn. 1999) (declining to extend the free speech protections of the Minnesota Constitution "beyond those protections offered by the First Amendment").

We review constitutional free speech issues de novo. *Id.* at 797. In a recent school speech case, the United States Supreme Court explained that courts are "the final arbiter of the question whether a public university has exceeded constitutional constraints," and courts "owe no deference to universities" in considering that question. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2988 (2010). Nonetheless," [c]ognizant that judges lack the on-the-ground expertise and experience of school administrators," the Court also held that school administrators' decisions related to the "pedagogical approaches" of a professional program – even outside the narrow confines of the classroom – "are due decent respect." *Id.* at 2988-89. In *Martinez*, which concerned the constitutionality of a law school policy that required officially recognized student groups to comply with the school's nondiscrimination policy, the Court stated that "determinations of what constitutes sound educational policy . . . fall within the discretion of school administrators and educators." *Id.*at 2989 n.16.

Before deciding whether the disciplinary sanctions violated Tatro's free speech rights, we must determine the applicable legal standards. The parties argue that different standards apply, depending upon whether we are considering the discipline for Tatro's violation of the academic program rules, or the discipline for her violation of the "threatening conduct" rule.

A. Academic program rules.

We first analyze the appropriate legal standard for Tatro's violation of the academic program rules. Tatro argues that the University violated her free speech rights by imposing discipline for her Facebook posts, which she claims were "outside her professional education activities." The University counters that it did not violate Tatro's free speech rights by enforcing reasonable academic program rules related to legitimate pedagogical objectives.

As a condition of access to human cadavers in her laboratory courses, Tatro was required to follow certain academic program rules, which included the Mortuary Science Student Code of Professional Conduct, the rules of the Anatomy Bequest Program, and the anatomy lab rules. By signing the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form, Tatro acknowledged that "[t]he opportunity to review and dissect the human body is a privilege" that "carries with it an important responsibility" for treating the human cadaver "with utmost respect and dignity." In addition, Tatro agreed to follow specific anatomy lab rules, which provide that "[c]onversational language of cadaver dissection outside the laboratory should be respectful and discreet" and that "[b]logging about the anatomy lab or the cadaver dissection is not allowable." "The clear intent" of these rules, according to the Provost's decision, "is that all matters related to the lab, both in and outside the lab, must be taken seriously, done respectfully, and communicated about in a respectful and professional manner."

The University asserts that these academic program rules serve a dual purpose: to educate students concerning the professional and ethical responsibilities of the funeral service profession, and to maintain the viability of the Anatomy Bequest Program. In addition, amicus American Board of Funeral Service Education (ABFSE), the accrediting agency for funeral service education, represents that "the rules established and enforced by the University of Minnesota are of the type required by the ABFSE's accreditation standards."

The CCSB found that Tatro's Facebook posts violated academic program rules of the Mortuary Science Program.

- **Amanda Beth Tatro** Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve.
- **Amanda Beth Tatro** Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.
- **Amanda Beth Tatro** Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.

The Provost affirmed the findings of the CCSB, as well as the sanctions imposed, concluding that Tatro's Facebook posts were disrespectful and unprofessional. The court of appeals affirmed the Provost's decision, concluding that the evidence supports the University's finding that Tatro violated academic program rules of the Mortuary Science Program, including "the overall policy

requirement" that was explained during orientation" of treating donors with respect and dignity." *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 819 (Minn. App. 2011).[3]

1. Legal standards

The factual situation presented by this appeal has not been addressed in any published court decision – a university's imposition of disciplinary sanctions for a student's Facebook posts that violated academic program rules. Consequently, the constitutional standard that applies in this context is unsettled. The court of appeals relied on a line of cases beginning with *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), where the Supreme Court held that a school district may limit or discipline student expression if school officials reasonably conclude that the expression will "materially and substantially disrupt the work and discipline of the school." *See Tatro*, 800 N.W.2d at 820. Neither party asks us to apply this standard in the context of a university student's violation of academic program rules; the parties instead have advocated standards at different ends of the free speech spectrum.

Tatro's basic argument is that public university students are entitled to the same free speech rights as members of the general public with regard to Facebook posts. *See Healy v. James*, 408 U.S. 169 (1972) (stating that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"). In contrast, the University argues that it may constitutionally enforce academic program rules that are "reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession," even when those rules extend to off-campus conduct. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (stating that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

[3] The court of appeals did determine that certain of the University's findings of rule violations lacked evidentiary support. For example, the court concluded that the University's findings that Tatro violated an anatomy lab rule applicable to the physical handling of a cadaver and provisions of the Mortuary Science Student Conduct Code applicable in the context of a funeral service or while transporting a decedent lacked evidentiary support. Tatro, 800 N.W.2d at 818-19. Nonetheless, the court of appeals concluded that the evidence supports the University's other determinations of rule violations and that "the sanctions imposed were not arbitrary, oppressive, or unreasonable." Id. at 823.

We conclude that neither of the standards proposed by the parties nor the standard applied by the court of appeals is appropriate in the context of a university student's Facebook posts when the university has imposed disciplinary sanctions for violations of academic program rules. First, we observe that the *Hazelwood* legitimate pedagogical concerns standard proposed by the University applies to "school-sponsored" speech and addresses the question "whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 270-71, 273. As the Supreme Court has explained, the legitimate pedagogical concerns standard applies to "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271 (stating that "school-sponsored" speech comprises "expressive activities" that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences").

In this case, because the public would not reasonably perceive Tatro's Facebook posts to bear the imprimatur of the University, the Facebook posts cannot be characterized as "school-sponsored speech." Applying the legitimate pedagogical concerns standard to a professional student's Facebook posts would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school's actions be "reasonably related" to "legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 272-73. Further, the universe of "legitimate pedagogical concerns" has been broadly construed, at least in the high school setting, to cover values like "discipline, courtesy, and respect for authority." *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (observing that "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic"); *see also Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir.1992) (stating that avoidance of controversy is a valid pedagogical concern in a nonpublic school forum). Accordingly, we decline to extend the legitimate pedagogical concerns standard to a university's imposition of disciplinary sanctions for a student's Facebook posts.

Next, we recognize that courts often have applied the *Tinker* substantial disruption standard, as the court of appeals did here, to the regulation of student speech over the Internet. *See, e.g.,J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (observing that "the majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities"); *see also Morgan v. Swanson*, 659 F.3d 359, 384 (5th Cir. 2011) (suggesting a dichotomy between "the private speech contemplated in *Tinker* [and] the school-sponsored speech discussed in *Hazelwood*"). For example, the Second Circuit has concluded that a high school student may be disciplined for "expressive conduct" in a publicly accessible blog posting "when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was

similarly foreseeable that the off-campus expression might also reach campus." *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir.2007)). Similarly, the Pennsylvania Supreme Court concluded that a school could punish an eighth grade student for creating a threatening website directed at his algebra teacher where the website "created disorder and significantly and adversely impacted the delivery of instruction" at the school. *J.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 807 A.2d 847, 869 (Pa. 2002). In contrast, courts have refused to allow schools to regulate out-of-school speech where the speech did not or was not likely to cause a substantial disruption of school activities.[4]

Even though courts have applied *Tinker* to speech originating off campus that reaches the attention of school authorities, at least in the K-12 setting, we decline to apply the *Tinker* substantial disruption standard to Tatro's Facebook posts.[5] The *Tinker* substantial disruption standard does not fit the purposes of the sanctions here. The driving force behind the University's discipline was not that Tatro's violation of academic program rules created a substantial disruption on campus or within the Mortuary Science Program, but that her Facebook posts

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[4] See, e.g., J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930-31 (3d Cir. 2011) (concluding that a school district could not have reasonably forecast a substantial disruption after a student created on her home computer a MySpace profile that made fun of her middle school principal and took specific steps to make the profile private), cert. denied, 132 S. Ct. 1097 (2012); Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 217 (3d Cir. 2011) (concluding that a high school could not punish a student merely because his creation of a "parody" MySpace profile of his principal outside of school reached inside the school), cert. denied, 132 S. Ct. 1097 (2012).

[5] We note that courts have struggled with the question of whether postings on social networking sites constitute on-campus or off-campus speech, given "the somewhat 'everywhere at once' nature of the internet." Blue Mountain Sch. Dist., 650 F.3d at 940(Smith, J., concurring). Although Tatro stresses that her Facebook posts were prepared off campus, our analysis does not make a distinction between on-campus and off-campus Facebook posts.

We also recognize that controversy exists over whether the free speech standards that developed in K-12 school cases apply in the university setting. See generally Kelly Sarabyn, The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights, 14 Tex. J. C.L. & C.R. 27, 28-49 (2008). For example, the Third Circuit has indicated that "[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools." McCauley v. Univ. of V.I., 618 F.3d 232, 247, 54 V.I. 849 (3d Cir. 2010) (citing "the differing pedagogical goals of each institution, the in loco parentis role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times"). The Sixth Circuit, while acknowledging the differences between K-12 students and university students, has indicated that courts can account for different levels of maturity in the application of the standard. Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012). Further, the Ninth Circuit has pointed out that in the context of academic decisions, "arguably the need for academic discipline and editorial rigor increases as a student's learning progresses." Brown v. Li, 308 F.3d 939, 950, 951 (9th Cir. 2002). Because we do not rely on any established free speech standards, we need not consider the issue here.

violated established program rules that require respect, discretion, and confidentiality in connection with work on human cadavers.

Thus, we are left with the question of the appropriate legal standard to apply to the University's regulation of Tatro's Facebook posts. In deciding the constitutional rights of students, the Supreme Court has explained that the "mode of analysis set forth in *Tinker* is not absolute" and that courts must consider "'the special characteristics of the school environment.' "*Morse v. Frederick*, 551 U.S. 393, 405 (2007) (quoting *Tinker*, 393 U.S. at 506). For example, in *Morse*, the Court concluded that the governmental interest in stopping student drug abuse allowed a high school to restrict student expression reasonably regarded "as promoting illegal drug use." *Id.* at 408 (concluding that high school officials did not violate the First Amendment by confiscating a pro-drug banner at a school-sanctioned, school-supervised event and suspending the student who had brought the banner to the event); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a high school "acted entirely within its permissible authority in imposing sanctions" in response to a student's "offensively lewd and indecent speech" at a school assembly, even without any showing of substantial disruption).

Consequently, we must consider the special characteristics of the academic environment of the Mortuary Science Program and its professional requirements when deciding the standard that applies. The University and supporting amici curiae stress that the Mortuary Science Program is a professional program that trains students to be funeral directors and morticians. They contend that ethics are a fundamental part of the program and argue that the University is entitled to set and enforce reasonable course standards designed to teach professional norms. In support of the University's position, courts have concluded that in certain professional programs, valid curricular requirements can encompass compliance with professional and ethical obligations. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (discussing a counseling program requirement of compliance with counseling code of ethics). For example, in a case involving a counseling student's noncompliance with an ethics code, the Eleventh Circuit concluded that when a state university conditions a student's participation in a counseling clinical practicum on compliance with a professional code of ethics, the student, "having voluntarily enrolled in the program, does not have a constitutional right to refuse to comply with those conditions." *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011) (rejecting free speech and free exercise claims). On the other hand, a university cannot use a code of ethics "as a pretext" for punishing a student's protected speech. *Ward*, 667 F.3d at 735. In the *Ward* case, the Sixth Circuit concluded that a counseling student was entitled to a jury trial on her free speech and free exercise claims, stating that a reasonable jury could find that the university ejected the student from the counseling program "because of her faith-based speech," not because her conduct violated the code of ethics. *Id.* at 738.

Despite her starting point, which equates the free speech rights of university students with those of the general public, Tatro acknowledges that the University may constitutionally regulate "off-campus conduct that violate[s] specific professional obligations." Specifically, Tatro understood that there were limitations on what she could post on Facebook about her work with human cadavers. As an extreme example, one of the instructors in the Mortuary Science Program testified at the CCSB hearing about an incident that occurred at a medical school in New York where a student posted a picture of a human cadaver on Facebook. According to the instructor, state health officials were considering sanctions against the medical school. Although Tatro does not dispute that the University could impose a narrow rule that would prohibit a mortuary science student from identifying a human donor on Facebook, she argues that the University cannot impose a broad rule that would prohibit mortuary science students from criticizing faculty members or posting offensive statements that are unrelated to the study of human cadavers.

We acknowledge the concerns expressed by Tatro and supporting amici that adoption of a broad rule would allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason. Nonetheless, the parties agree 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 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.[6]

[6] The court of appeals noted that Tatro "signed an agreement to follow the anatomy-laboratory, and the anatomy-bequest, program rules," which the court of appeals construed "as a contract" with the University. Tatro, 800 N.W.2d at 817. Our analysis of Tatro's free speech argument does not depend on Tatro's agreement to restrict her speech as a condition of participating in the laboratory courses. We concur with Tatro that a university cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on her free speech rights.

2. Application of standards

We now examine whether the academic program rules of the Mortuary Science Program are narrowly tailored and directly related to established professional conduct standards. Tatro argues that the academic program rules, as applied to her, violate her free speech rights because the University is simply claiming that she violated "accepted *unwritten* social norms" – not any "specific standards or authorities governing professional behavior."

We first consider the scope of established professional conduct standards for the mortuary science profession. Tatro claims that the only established professional conduct standard potentially applicable to her Facebook posts pertains to the disclosure of "personally identifiable facts, data, or information about a decedent." Minn. Stat. § 149A.70, subd. 7(5) (2010) (addressing professional conduct of mortuary science licensees and interns). Because her Facebook posts did not reveal any personally identifiable facts, data, or information about the human cadaver she was studying, Tatro contends that the University's "purported need to enforce professional standards is not applicable" and that the University violated her free speech rights by sanctioning her for using her "Facebook page as a literary device to express her emotions." Although Tatro suggests that the confidentiality standard set forth in the Minnesota statute is the only established professional conduct standard that bears any relationship to this case, the Minnesota statute that Tatro cites also provides that unprofessional conduct includes the "failure to treat" "the body of the deceased" or "the family or relatives of the deceased" "with dignity and respect." Minn. Stat. § 149A.70, subd. 7(3) (2010).[7] Accordingly, we conclude that dignity and respect for the human cadaver constitutes an established professional conduct standard for mortuary science professionals.

Next, we analyze the relationship between the statutory professional conduct standards and the academic program rules promulgated by the University. The University charged Tatro with violating academic program rules regulating student access to human cadavers: both general rules that require respectful treatment of human cadavers and specific laboratory rules that prohibit disrespectful, conversational language about cadaver dissection outside the laboratory and blogging about cadaver dissection or the anatomy lab. Essentially, the University asks us to defer to "university educators to reasonably determine academic standards and rules for professional education." Although "a university's interest in academic freedom" does not

[7] Tatro does not challenge the state's authority to set professional conduct standards for mortuary science professionals and interns. Tatro also does not challenge the constitutionality of any of the statutory professional conduct standards. See Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) ("When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question."). Therefore, the validity and constitutionality of the state standards are not at issue here.

"immunize the university altogether from First Amendment challenges," courts have concluded that a university "has discretion to engage in its own expressive activity of prescribing its curriculum" and that it is appropriate to "defer[] to the university's expertise in defining academic standards and teaching students to meet them." *Brown v. Li*, 308 F.3d 939, 950, 952 (9th Cir. 2002); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (cautioning courts "to resist 'substitut[ing] their own notions of sound educational policy'" for that of school authorities, even in areas outside of a narrow instructional context like extracurricular programs (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982))).

The academic program rules requiring respectful treatment of human cadavers are consistent with the statutory professional conduct standard requiring mortuary science professionals to treat the deceased "with dignity and respect." Minn. Stat. § 149A.70, subd. 7(3). Significantly, the academic program rules do not require respectful and discreet behavior on Facebook generally, but explicitly pertain to statements about cadaver dissection and the anatomy lab. Giving deference to the curriculum decisions of the University, we conclude that the academic program rules imposed on Tatro as a condition of her access to human cadavers are directly related to established professional conduct standards.

We also conclude that the academic program rules of the Mortuary Science Program, as applied, are narrowly tailored. In examining the academic program rules, we consider whether the University's restrictions on the mode, manner, and place of student speech are "substantially broader than necessary" to achieve the objective of ensuring that students treat human cadavers with respect and dignity. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that the government's "regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so"). The academic program rules allow "respectful and discreet" conversational language of cadaver dissection outside the laboratory, but prohibit blogging about cadaver dissection or the anatomy lab. In this case, the University is not sanctioning Tatro for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media. Accordingly, we conclude that the University's sanctions were grounded in narrowly tailored rules regulating widely disseminated Facebook posts.

Finally, we reject Tatro's argument that she did not violate any academic program rules because "[s]he merely engaged in satirical literary expression" that was "unrelated to any course work." The court of appeals concluded that the evidence supports the University's decision that Tatro violated the anatomy lab rule providing that "conversational language" about cadaver dissection should be respectful and discreet and "the overall policy requirement of treating donors with respect and dignity." *Tatro*, 800 N.W.2d at 819. The propriety of this conclusion is

not before us on appeal. Nonetheless, we observe that Tatro's Facebook posts were about the human cadaver she was dissecting in her anatomy lab course. Giving the human cadaver a name derived from a comedy film about a corpse and posting commentary about "playing" with the human cadaver, taking her "aggression" out on the human cadaver, and keeping a "[l]ock of hair" in her pocket are incompatible with the notions of respect and dignity for the individual who chose to donate his body to support the research and education missions of the Anatomy Bequest Program. Notwithstanding the claim that Tatro's "friends" would understand her sense of humor and recognize the reference to a song from one of her favorite bands, the widespread dissemination of Tatro's posts on Facebook and through the news media undermined her professional conduct obligations of respect and discretion with regard to human cadavers. And the publicity surrounding Tatro's posts resulted in letters and calls to the Anatomy Bequest Program from donor families and the public regarding Tatro's poor judgment and lack of professionalism. Therefore, we conclude that Tatro's Facebook posts violated the academic program rules of the Mortuary Science Program.

In affirming the sanctions here, we stress that the University's rules and policies governing access to human cadavers are unique because respectful treatment of human cadavers is imperative to maintaining the trust of the individuals who donate their bodies to the Anatomy Bequest Program. The University is not arguing that Tatro's controversial speech harmed the school's standing with financial supporters. As Tatro acknowledged at the CCSB hearing, there would not be a Mortuary Science Program if people were not willing to donate their bodies after death to the Anatomy Bequest Program. Further, the consequences of any violation of trust caused by a student in the Mortuary Science Program would extend far beyond the Mortuary Science Program to other University programs that rely on donated human cadavers for their research and education missions.

Finally, we note that courts have considered the seriousness of the consequences in analyzing First Amendment claims. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 52-53 (2d Cir. 2008). In this case, Tatro was not expelled or even suspended from the Mortuary Science Program. The University allowed Tatro to continue in the Mortuary Science Program with a failing grade in one laboratory course. As amici supporting the University have argued, the First Amendment does not give Tatro a right "to engage in unprofessional and unethical conduct without any academic repercussions."

Therefore, we affirm the University's discipline of Tatro for Facebook posts that violated academic program rules governing the privilege of access to human cadavers. Our decision is based on the specific circumstances of this case – a professional program that operates under established professional conduct standards, a program that gives students access to donated human cadavers and requires a high degree of sensitivity, written academic program rules

requiring the respectful treatment of human cadavers, and measured discipline that was not arbitrary or a pretext for punishing the student's protected views.

B. Threatening conduct

The parties separately address the University's imposition of discipline for Tatro's violation of the Student Conduct Code, which prohibits conduct that "endangers or threatens to endanger the health, safety, or welfare of another person." Tatro argues that the University cannot discipline her for any speech that does not constitute a "true threat" and claims that her Facebook posts do not constitute a "true threat." The University argues that it may constitutionally impose discipline for threatening speech that substantially disrupted the Mortuary Science Program.

Having concluded that the University did not violate Tatro's free speech rights by imposing sanctions for her violation of academic program rules, we do not consider the threatening speech as a stand-alone violation, particularly since the complaint and sanctions here appear to have been based on the totality of the posts. It is not evident that the University imposed separate and distinct sanctions for the threatening speech. The requirement that Tatro complete a psychiatric evaluation may have been related in part to the threatening speech, but the CCSB decision explained that Tatro's "actions were inappropriate for someone in this profession" and that "the Panel felt that it would be helpful for [Tatro] to seek professional guidance" in order "to facilitate both [her] personal and profession[al] development." Therefore, we affirm the sanctions imposed without separately addressing Tatro's threatening speech.

Affirmed.

Notes and Questions

The Tatro case is discussed on pp. 493-494 and 627-628 of the Text.

1. Much of the court's free speech analysis concerns "applicable legal standards" for a case such as this. Courts and commentators generally agree that the First Amendment's free speech clause is the source of numerous legal standards for resolving free speech issues, and that it is often difficult to determine which standard (or standards) apply to a

particular case. In *Tatro* the court discusses four possible standards for that case: the *Tinker* standard (see generally the Text Section. 9.4.1, pp. 656-657); the *Hazelwood* standard (see generally various places in the Text Sections. 7.1.4 and 10.3); the "professional . . . conduct/narrow tailoring" standard; and the "true threat" standard (see the Text Section. 7.5.1, and sec. 9.5.2,). The "professional conduct" legal standard is new, crafted by the court for this case; the other three standards are established in the law and were crafted by the U.S. Supreme Court. How does the *Tatro c*ourt rule on the applicability of these standards to the case? Do you agree that the standard the court selects is the best one for the courts to use in cases like this? Will this standard be workable for academic program administrators and provide them with suitable guidance on how to apply their rules without violating students' free speech rights?

2. Suppose two other cases come to the court in which a student had made various postings on Facebook. In one case the student is an undergraduate majoring in mathematics. In the other case, the student is a graduate student in an English literature program. In each case, the student's postings used crude attempts at humor to make fun of the materials, assignments, and class sessions for the courses they were taking; and were disrespectful of the instructors and the students in these courses. The institution determined that these postings violated its academic rules and penalized the student for the postings, while the student claimed that the penalty violated his/her free speech rights. Would (or should) the legal standard and the reasoning used by the court in Tatro also apply to these other two cases? Would (or should) the court reach the same result? Why or why not?

3. Suppose yet another case comes to the court in which a university had penalized a student for making various postings on Facebook. The student, who attended the university's law school, was charged with violating provisions of the university's student conduct code prohibiting conduct that "threatens" another person in the university and conduct that "disrupts" university functions. The university determined that the student's postings on Facebook violated these provisions, and the student claimed that the university's action violated his/her free speech rights. Would the legal standard that the *Tatro* court applied in that case also apply to this case? Would any of the other three standards listed in note 2 above apply? Why or why not?

4. Postings on Facebook and other social media often are done off-campus, and often are done using the student's own computer equipment and programs rather than the institution's. Did such facts have any effect on the court's reasoning or result in the

Tatro case? Should such facts have had any effect in *Tatro*? Would or should such facts be pertinent to the reasoning or result in any other free speech cases in which a student is penalized for social media postings?

SECS. 7.1.4 and *8.6.3 Student Academic Freedom and Academic Dismissals – Constitutional Issues*

Ward v. Polite

667 F.3d 727 (6th Cir. 2010)

Opinion by: Jeffrey S. Sutton

In its graduate-level counseling-degree program, Eastern Michigan University prohibits students from discriminating against others based on sexual orientation and teaches students to affirm a client's values during counseling sessions. In three years with the program, Julea Ward frequently expressed a conviction that her faith (Christianity) prevented her from affirming a client's same-sex relationships as well as certain heterosexual conduct, such as extra-marital relationships. That stance did not sit well with the values-affirming lessons of her counseling professors, but for nearly three years none of this prohibited Ward from continuing to take classes toward a degree and from doing well in the process. Entering the last stages of the program with a 3.91 GPA, she signed up for a student practicum, a required course in experiential learning that requires students to put their training into practice by counseling real clients. When the university asked Ward to counsel a gay client, Ward asked her faculty supervisor either to refer the client to another student or to permit her to begin counseling and make a referral if the counseling session turned to relationship issues. The faculty supervisor referred the client. The university commenced a disciplinary hearing into Ward's referral request and eventually expelled her from the program. Ward sued the university defendants under the First and Fourteenth Amendments.

Curriculum choices are a form of school speech, giving schools considerable flexibility in designing courses and policies and in enforcing them so long as they amount to reasonable means of furthering legitimate educational ends. The key problem with the university's position is not the adoption of this anti-discrimination policy, the existence of the practicum class or even the values-affirming message the school wants students to understand and practice. It is that the school does not have a no-referral policy for practicum students and adheres to an ethics code that permits values-based referrals in general. When the facts are construed in Ward's favor, as they must be at this stage of the case, a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith, not due to a policy against referrals. We reverse the trial court's grant of summary judgment in favor of the university.

I.

After teaching English and radio and television broadcasting at Southfield High School in suburban Detroit for ten years, Julea Ward decided to become a school counselor. Ward enrolled at Eastern Michigan University in May 2006 and began taking classes towards a master's degree in counseling, all while continuing to teach full-time. In order to become a licensed counselor in Michigan, an individual must obtain a master's degree in counseling. *See* Mich. Comp. Laws § 333.18107(1)(b). Early on in the university's counseling program, Ward sparred with professors over faith-based issues, particularly her belief that Christianity prohibited her from "affirm[ing]" or "validat[ing]" the "homosexual behavior" of counseling clients. When Ward expressed these views, professors disagreed, sometimes kindly, sometimes less so, but consistently making the point that, as a counselor, she must support her clients' sexual orientation, whatever that may be.

Despite these occasional conflicts, Ward did well academically. She had a 3.91 grade point average going into the winter 2009 quarter, with just four classes (13 credit hours) left to complete the degree. That quarter, she enrolled in a counseling practicum, a graduation prerequisite that requires students to apply what they have learned through one-on-one counseling sessions with real clients. Students spend a minimum of 40 hours counseling several clients over the course of the practicum. Students meet with clients in an office at the school, and they later meet with a faculty supervisor for at least one hour each week to discuss the clients, the practicum and their professional development.

Ward counseled her first two clients in practicum without incident. When she reviewed the file of the third client, she noticed he sought counseling about a same-sex relationship. Ward called her faculty supervisor, Professor Yvonne Callaway, and asked (1) whether she should meet with the client and refer him only if it became necessary – only if the counseling session required Ward to affirm the client's same-sex relationship – or (2) whether the school should reassign the client from the outset. Callaway reassigned the client.

When Ward met with Callaway the next day for their weekly meeting, Callaway was not happy. In twenty years of teaching, she told Ward, no practicum student had made such a request. Callaway told Ward that her actions created an "ethical dilemma," prompting her to schedule an informal review with Ward. These meetings are not "disciplinary" but are designed "to assist the student in finding ways to improve his/her performance or to explore the option of the student voluntarily leaving the program." Callaway, Ward and Ward's academic supervisor, Professor Suzanne Dugger, participated in the informal review. Callaway raised concerns about Ward's refusal to counsel the assigned client, and Ward reiterated her religious objection to affirming same-sex relationships. All three participants agreed that "the development of a remediation plan would not be possible." Dugger and Callaway gave Ward two options:

withdraw from the program or seek a formal review. Ward asked for a formal review, in which a committee composed of several faculty members and one student considers allegations of improper behavior or poor academic performance. The committee may impose a range of sanctions, from requiring a student to repeat a course to dismissing the student from the program.

Before the hearing, Dugger told Ward that she had violated two provisions of the American Counseling Association's (ACA) code of ethics by: (1) "imposing values that are inconsistent with counseling goals," Rule A.4.b, and (2) "engag[ing] in discrimination based on . . . sexual orientation," Rule C. 5. The counseling program's student handbook incorporates the ACA code of ethics and tells students, including practicum students, to follow it.

The formal review committee consisted of two faculty members from the counseling program (Professors Irene Ametrano and Perry Francis), one faculty member from the education leadership program (Professor Gary Marx) and one student representative (Paula Stanifer). The hearing began with an explanation of the faculty members' concerns, including Callaway's and Dugger's accounts of Ward's practicum experience and their shared opinion that her conduct violated the code of ethics. Dugger recommended that Ward be dismissed from the counseling program.

Ward responded that she did not discriminate against anyone. She had no problem counseling gay and lesbian clients, so long as the university did not require her to affirm their sexual orientation. Because her professors taught her that counselors dealing with such clients "cannot talk about anything other than affirming [their same-sex] relationships," – a message Ward's religious beliefs prohibited her from delivering – Ward asked that she be allowed to refer gay and lesbian clients seeking relationship advice to another counselor.

Two days later, the university sent Ward a letter conveying the committee's unanimous opinion that she violated the code of ethics. Because Ward was "unwilling to change [her] behavior," the committee expelled her from the counseling program, effective that day. Ward appealed the committee's decision to the Dean of the College of Education, Dr. Vernon Polite. He denied the appeal.

Ward filed this § 1983 action against the members of the formal review committee and Professor Callaway, Professor Dugger and Dean Polite as well as the President and the members of the Board of Regents of the University. Her expulsion from the program, she claimed, violated her free-speech and free-exercise rights under the First and Fourteenth Amendments. At the outset, the district court dismissed Ward's official-capacity claims against the President and Board of Regents because they did not play a role in the expulsion.

At the close of discovery, the district court granted the defendants' motion for summary judgment and denied Ward's cross-motion. The court held that the university defendants

permissibly enforced a neutral and generally applicable curricular requirement against Ward and did not target her because of her speech or religious beliefs.

II.

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits governments from "abridging the freedom of speech" and "prohibiting the free exercise" of "religion." Ward claims the university defendants violated both guarantees.

A.

The "freedom of speech" claim implicates two strands of law that occasionally run into each other. At one level, governmental bodies, including public high schools and universities, have considerable authority to control their own speech. . . . Foremost among a school's speech is its selection and implementation of a curriculum – the lessons students need to understand and the best way to impart those lessons – and public schools have broad discretion in making these choices. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2988-90 (2010). This line of authority helps to explain why the First Amendment allows: (1) a public high school to delete stories from the school newspaper – one about teenage pregnancy, the other about the impact of divorce on students – given that the paper "bear[s] the imprimatur of the school" and the school's actions were "reasonably related to legitimate pedagogical concerns," *Hazelwood Schl. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988); (2) a public high school to require students who display a banner bearing the message "BONG HiTS 4 JESUS" during a school-sponsored event to remove the banner or face suspension because schools may "restrict student expression that they reasonably regard as promoting illegal drug use," *Morse v. Frederick*, 551 U.S. 393, 408 (2007); and (3) a law school at a public university to enforce an "all comers" policy requiring registered student organizations to accept all interested students regardless of whether their conduct or beliefs are consistent with the organizations' ideals, *Christian Legal Soc'y*, 130 S. Ct. at 2995 (2010).

The Court, at the same time, has insisted that the public schools are not expression-free enclaves. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). The free-speech clause generally prohibits suppressing speech "because of its message," and the Court has enforced that prohibition in the public school – indeed the university – setting. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). The free-speech guarantee also generally prohibits the most aggressive form of viewpoint discrimination – compelling an individual "to utter what is not in [her] mind" and indeed what she might find deeply offensive –

and the Court has enforced that prohibition, too, in the public school setting. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). This line of authority explains why the First Amendment prohibits public schools from: (1) expelling students who refuse to recite the Pledge of Allegiance, *id*. at 642; (2) suspending students for wearing black armbands to school to protest the Vietnam War, at least where there is no indication that the students' actions will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *Tinker*, 393 U.S. at 509; and (3) withholding funding for the publications of a student organization because the publication expresses a religious viewpoint, *Rosenberger*, 515 U.S. at 835.

In reconciling these principles, the Supreme Court tells us that "First Amendment rights" must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. That is somewhat helpful. More helpful is this: Public educators may limit "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. The neutral enforcement of a legitimate school curriculum generally will satisfy this requirement; the selective enforcement of such a curriculum or the singling out of one student for discipline based on hostility to her speech will not. *See Christian Legal Soc'y*, 130 S. Ct. at 2987-88; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289-93 (10th Cir. 2004).

The *Hazelwood* test, it is true, arose in the context of speech by high school students, not speech by college or graduate students. But for the same reason this test works for students who have not yet entered high school . . . it works for students who have graduated from high school. The key word is student. *Hazelwood* respects the latitude educational institutions – at any level – must have to further legitimate curricular objectives. All educators must be able "to assure that participants learn whatever lessons the activity is designed to teach." *Hazelwood*, 484 U.S. at 271. Just as a junior high school English teacher may fail a student who opts to express her thoughts about a once-endangered species, say a platypus, in an essay about *A Tale of Two Cities*, . . . so a law professor may fail a student who opts to express her views about Salvador Dali and the fourth dimension in a torts exam. That the First Amendment protects speech in the public square does not mean it gives students the right to express themselves however, whenever and about whatever they wish on school assignments or exams. "A school need not tolerate student speech that is inconsistent with its basic educational mission." *Hazelwood*, 484 U.S. at 266. Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.. . .

By requiring restrictions on student speech to be "reasonably related to legitimate pedagogical concerns," *Hazelwood* allows teachers and administrators to account for the "level of maturity" of the student. 484 U.S. at 271. Although it may be reasonable for a principal to

delete a story about teenage pregnancy from a high school newspaper, *id*. at 274-75, the same could not (likely) be said about a college newspaper. "To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students" makes all the difference. *Hosty*, 412 F.3d at 734.

Nor, it is worth adding, does the university setting invariably mean that educators have less discretion over their curriculum and class-related speech. It may be true that university students can handle more mature themes, but it is also true that they are not forced to be there, something that cannot be said about most students at public high schools. A prospective university student has the capacity to learn what a curriculum requires before applying to the school and before matriculating there. When a university lays out a program's curriculum or a class's requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them.

Hazelwood also features a question crucial to the resolution of all school-speech cases, whether at the high school or university level: Whose speech is it? The closer expression comes to school-sponsored speech, the less likely the First Amendment protects it. *Hazelwood*, 484 U.S. at 271, 273. And the less the speech has to do with the curriculum and school-sponsored activities, the less likely any suppression will further a "legitimate pedagogical concern[]," which is why the First Amendment permits suppression under those circumstances only if the speech causes "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. . . .

A university's control over curricular speech comes with one other limitation. Although educators may "limit[]" or "grade[] speech in the classroom in the name of learning," and although they may control their own speech and curriculum, the First Amendment does not permit educators to invoke curriculum "as a pretext for punishing [a] student for her . . . religion.". . . Even in the context of a secular university, religious speech is still speech, and discriminating against the religious views of a student is not a legitimate end of a public school...

B.

Gauged by these requirements, Ward's free-speech claim deserves to go to a jury. Although the university submits it dismissed Ward from the program because her request for a referral violated the ACA code of ethics, a reasonable jury could find otherwise – that the code of ethics contains no such bar and that the university deployed it as a pretext for punishing Ward's religious views and speech.

The ACA code of ethics, in the first place, does not prohibit values-based referrals like the one Ward requested. Consider the two provisions Ward allegedly violated. The first one says:

> Counselors [1] are aware of their own values, attitudes, beliefs, and behaviors and [2] avoid imposing values that are inconsistent with counseling goals.
> [3] Counselors respect the diversity of clients, trainees, and research participants.

What exactly did Ward do wrong in making the referral request? If one thing is clear after three years of classes, it is that Ward is acutely aware of her own values. The point of the referral request was to *avoid* imposing her values on gay and lesbian clients. And the referral request not only respected the diversity of practicum clients, but it also conveyed her willingness to counsel gay and lesbian clients about other issues – all but relationship issues – an attitude confirmed by her equivalent concern about counseling heterosexual clients about extra-marital sex and adultery in a values-affirming way.

The second provision says:

> Counselors [1] do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law.
> [2] Counselors do not discriminate against clients, students, employees, supervisees, or research participants in a manner that has a negative impact on these persons.

Here too, what did Ward do wrong? Ward was willing to work with all clients and to respect the school's affirmation directives in doing so. That is why she asked to refer gay and lesbian clients (and some heterosexual clients) if the conversation required her to affirm their sexual practices. What more could the rule require? Surely, for example, the ban on discrimination against clients based on their religion (1) does not require a Muslim counselor to tell a Jewish client that his religious beliefs are correct if the conversation takes a turn in that direction and (2) does not require an atheist counselor to tell a person of faith that there is a God if the client is wrestling with faith-based issues. Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination.

Nor did the referral request have a "negative impact" on the client. Quite the opposite, as the client never knew about the referral and perhaps received better counseling than Ward could have provided.

Not only did Ward's referral request respect these provisions, but another provision of the code of ethics expressly permits values-based referrals. "If counselors determine an inability to be of professional assistance to clients," the code says that they may refer them. As a specific application of this principle, one implicating secular and faith-based values, the code allows

counselors to "choose to work or not work with terminally ill clients who wish to explore their end-of-life options." Consistent with these provisions, Ward's expert, Dr. E. Warren Throckmorton, the former chairman of the American Mental Health Counselors Association's ethics committee (and a former president of the organization), said that Ward's request to refer this client complied with the code. . . .

That the code of ethics permits referrals is consistent with a separate policy of the ACA, also embraced by the university and also supportive of referrals. The ACA discourages conversion therapy – helping a client convert from one sexual orientation to another – on the theory that it is unproven and may do more harm than good for a client. In view of this policy, it makes sense to allow a student, concerned about her capacity to stay neutral if a client shows an interest in conversion therapy, to refer clients seeking such therapy. Several professors said that a student counselor would be permitted to make such a referral.

No matter what the code of ethics means and no matter how it has been interpreted, the university defendants respond that the school had a different policy for practicum students – a "blanket rule" that they could not refer any clients. But a reasonable jury could find that this was an after-the-fact invention. The university cannot point to any policy articulated in its course materials, the student handbook or anything else forbidding practicum students from making referrals. The student manual, to the contrary, includes a chapter dedicated to "Referrals," which says that students "may at times need to refer a client for additional counseling services outside the Counseling Clinic" and encourages students "to first consult with their Faculty Supervisor for assistance in making the referral."

At no point did any professor tell Ward about a no-referral policy – not during the informal review, not during the formal review, not even in the letter dismissing her from the program. Worse, there are at least two settings where the university permits students – in practicum – to have a say over whom they counsel. The school permits students to request certain types of clients to counsel – what you might call a yes-referral policy – and the school will honor the request. Why a school would honor student requests to counsel clients with certain types of problems but refuse requests not to counsel clients with certain types of problems is not self-evident. The record confirms at least one instance, moreover, when the school *permitted* a practicum referral, allowing a grieving student to refrain from counseling a grieving client. The university demurs, claiming this was not a "referral" but a "single incident of non-assignment." No matter the label, the incident calls into question the basis for the university's actions. At the very least, it shows that the counseling department was willing to avoid unsuitable student-client matches in some instances. Why treat Ward differently? That her conflict arose from religious convictions is not a good answer; that her conflict arose from religious convictions for which the department at times showed little tolerance is a worse answer.

On top of the absence of a written policy barring referrals in the practicum class, there is plenty of evidence that the only policy governing practicum students was the ACA code of ethics, which as shown contemplates referrals. Ward says that her professors told her that "when you get to practicum, you're supposed to use everything that has been taught to you in previous courses," including the code of ethics. The professors do not say otherwise. During the formal review, Callaway explained that "students have the same obligation to clients as those required of professional counselors" and that "[c]ounselors in training have a responsibility to understand and follow the ACA code of ethics." Dugger concurred: "[A]ll students in [the] counseling program are informed . . . that they are expected to adhere to the ACA code of ethics. Ms. Ward . . . would also have been informed of this via the practicum manual." Based on the professors' and Ward's statements, a reasonable jury could conclude that practicum students were required to follow the written code of ethics, not an unwritten (yet-to-be-enforced) no-referrals policy. The epitome of a pretextual explanation for a student's expulsion is a reason never expressed or invoked before.

A reasonable jury also could find evidence of religious-speech discrimination from the formal review. The inquiry was not a model of dispassion. Many of the participants' comments and questions focused on Ward's beliefs and her religious objection to affirming same-sex relationships. Professor Dugger said that Ward "communicated an attempt to maintain [her] belief system and [her] behaviors," and dismissed the religious basis of Ward's objections: She offered her "professional opinion" that Ward was "selectively using her religious beliefs in order to rationalize her discrimination against one group of people" because Ward said that she could "set aside her religious values" and counsel clients about things such as "abortion, child abuse, and murder" but "could not set aside her religious values in order to effectively counsel non-heterosexual clients." This line of inquiry suggests a distinction between secular values and spiritual ones, with a preference for the former over the latter. Besides, the reason why Ward (in Professor Dugger's words) could "set aside her religious values" in counseling clients about "abortion, child abuse, and murder" is because the university likely would not insist that she affirm the values underlying this conduct.

Pressing these points, Dugger asked Ward whether she would "see [her] brand of Christianity as superior to" that of a Christian client who viewed her faith differently. In the same vein, Professor Marx queried "how someone with such strong religious beliefs [as Ward's] would enter a profession that would cause [her] to go against those beliefs . . . by its stated code of ethics." And Professor Francis took Ward "on a little bit of a theological bout," asking whether she believed that "anyone [is] more righteous than another before God?" and whether, if Ward's stated beliefs were true, "doesn't that mean that you're all on the same boat and shouldn't [gays and lesbians] be accorded the same respect and honor that God would give them?”

These statements represent the contemporaneous thoughts of the decision-makers who dismissed Ward, and they permit the inference that Ward's religious beliefs motivated their actions, particularly in the absence of a formal policy barring referrals. A recent decision from the Tenth Circuit helps to show why. Christina Axson-Flynn was a student in the University of Utah's actor training program. *Axson-Flynn*, 356 F.3d at 1280. As a Mormon, she refused to say aloud portions of scripts that used curse words or took the Lord's name in vain. Faculty members pushed back. They told her that she should "talk to some other Mormon girls who are good Mormons, who don't have a problem with" adhering to scripts as written, and that she would either have to "modify [her] values" or leave the program. The Tenth Circuit held that the faculty members' statements created "a genuine issue of material fact as to whether [their] justification for script adherence was truly pedagogical or whether it was a pretext for religious discrimination."

The same is true here. Many of the faculty members' statements to Ward raise a similar concern about religious discrimination. A reasonable jury could find that the university dismissed Ward from its counseling program because of her faith-based speech, not because of any legitimate pedagogical objective. A university cannot compel a student to alter or violate her belief systems based on a phantom policy as the price for obtaining a degree. *Cf. Barnette*, 319 U.S. at 642.

III.

Ward independently claims that the University "prohibit[ed] the free exercise" of her "religio[us]" faith. U.S. Const. amend. I. Under this guarantee, public authorities may enforce neutral and generally applicable rules and may do so even if they burden faith-based conduct in the process. That is why Oregon could deny unemployment benefits to two members of a Native American tribe found guilty of using a proscribed drug, peyote, even when they used the substance for sacramental purposes. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). The rule comes with an exception. If the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment only if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). That is why the City of Hialeah (Florida) could not enforce ordinances that purported to be neutral and generally applicable on their face – regulating the keeping and killing of animals – but in practice targeted the adherents of one faith (the Santeria religion) and the actions of one faith (animal sacrifices). *Id*. at 524-25, 533-35.

The exception rather than the rule governs Ward's case. On its face, the ACA code of ethics sets forth neutral and generally applicable policies, and the university has ample authority to adopt these policies, including the anti-discrimination provisions, for the school's graduate counseling program. What poses a problem is not the adoption of an anti-discrimination policy; it is the implementation of the policy, permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed, much less a faith-neutral, manner to Ward.

The university defendants, as shown, cannot point to *any* written policy that barred Ward from requesting this referral. Not the code of ethics, not the school's antidiscrimination policy, not even the course description of the practicum – none of the natural havens for such a written policy contains one.

Considerable evidence, as also shown, suggests that the ethics code *permits* values-based referrals. According to the university's textbooks, Ward's expert (Dr. Throckmorton) and even to *some* of the writings of the university's expert (Dr. Kaplan), such referrals are not out of custom but have become de rigueur. That is particularly true in the context of values conflicts about sexual practices, where one study indicated that forty percent of counselors had referred clients on this basis. Corey & Corey, *Becoming a Helper* (5th ed. 2007) at 235-36. Several professors also testified that a counselor would be permitted, if not encouraged, to refer a gay or lesbian client seeking conversion therapy.

The code of ethics also expressly permits counselors to refer "terminally ill clients who wish to explore their end-of-life options." This is because, as the code acknowledges, "end-of-life decisions" involve weighty "personal" and "moral" issues. Yet end-of-life decisions are heavily influenced by one's "religion/spirituality" and one's "culture," each of which is covered by the anti-discrimination policy. Such decisions surely come within Professor Callaway's broad definition of the term "culture," which she interprets to mean "the way we see things, the way we do things, what seems normal to us." To refer a client who, due to his religion or culture, seeks to end his life in a particular way would seem to run afoul of the anti-discrimination policy to the same degree that Ward's actions in this case ran afoul of the policy. Yet the university permits one referral but not the other.

Counselors likewise may turn away – refer – clients who cannot pay for their services. Understandable though that policy may be, it appears to violate another feature of the ethics code, which forbids discrimination based on "socioeconomic status." The policy thus seems to permit referrals for secular – indeed mundane – reasons, but not for faith-based reasons.

Even if the code of ethics permitted Ward's referral request, the University says that the department had a policy of disallowing *any* referrals during practicum. Where? The record, as shown, contains no evidence of such a policy. The university cannot point to any articulation of it *before* Ward's enrollment in the practicum. And if such a policy existed, why didn't Ward's

instructor tell her about it when Ward made the request and why did the instructor *permit* the referral? Ample evidence supports the theory that no such policy existed – until Ward asked for a referral on faith-based grounds.

This ad hoc application of the anti-discrimination policy stands in marked contrast to *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177 (6th Cir. 1993), where we rejected a veterinary student's free-exercise challenge to a requirement that she complete a course in which students had to operate on live animals. *Id*. at 180-81. Unlike the university's *sotto voce* referral policy, the veterinary program in *Kissinger* advised all matriculating students that they would be required to operate on live animals and the policy was neutral and generally applicable. The complaining student could not identify any circumstances in which a student was allowed, or would be allowed, to graduate without completing the course. *Id*. at 179-81.

At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny. *See Smith*, 494 U.S. at 884; *Lukumi Babalu*, 508 U.S. at 537. A double standard is not a neutral standard.. . . .

The university does not argue that its actions can withstand strict scrutiny, and we agree. Whatever interest the university served by expelling Ward, it falls short of compelling. Allowing a referral would be in the best interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counselor better suited to discuss his relationship issues). The multiple types of referrals tolerated by the counseling profession severely undermine the university's interest in expelling Ward for the referral she requested. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006). Neither does the unsubstantiated possibility that the counseling program could lose its accreditation provide a compelling interest. Other than generalized statements that the program must teach the ACA code of ethics in order to maintain accreditation (the same code that contemplates values-based referrals), there is no concrete evidence that Ward's referral request placed the program's accreditation in danger. A compelling interest demands more.. . .

IV.

None of this means that Ward should win as a matter of law with respect to her free-speech and free-exercise claims. In view of the university's claim that a no-referral policy existed for the practicum class, supported by the testimony of several professors and administrators, and in view of the reality that the purported policy arises in the context of a university's curriculum and *its* counseling services, the district court properly rejected Ward's cross-motion for summary judgment. Construing the evidence in the university's favor, a jury might credit the university's

claim that such a policy existed and conclude that practicum students were subject to a general ban on referrals, making it difficult for Ward to demonstrate that she was expelled on pretextual grounds as opposed to the ground that she refused to adhere to a general and reasonable curricular requirement. Just as the inferences favor Ward in the one setting, they favor the university defendants in the other. At this stage of the case and on this record, neither side deserves to win as a matter of law.

V.

A recent decision of the Eleventh Circuit, when read together with our decision, helps to illustrate the permissible and impermissible ways to handle the vexing issues that occasionally arise in enforcing anti-discrimination policies through a school curriculum. Also at issue in *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), was a graduate-level counseling program and the school's enforcement of an anti-discrimination policy in the context of a claim of discrimination based on sexual orientation. The Eleventh Circuit ruled for Augusta State University, rejecting a student's appeal of a preliminary-injunction decision in which the trial court refused to require the school to re-admit her after she refused to complete a remediation plan. 664 F.3d 865.

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. 664 F.3d 865. 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." 664 F.3d 865. 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.

The two decisions in the end share the same essential framework and reasoning. They both apply *Hazelwood* to curricular speech at the university level, and they both show that the even-handed enforcement of a neutral policy is likely to steer clear of the First Amendment's free-speech and free-exercise protections. Both decisions also are consistent with *Christian Legal Society*, which considered whether a Christian organization at a law school could insist that its members adhere to certain faith-based codes of conduct.130 S. Ct. at 2978. The Court held that the law school's anti-discrimination policy, requiring registered student organizations to accept all comers, did not violate the First Amendment on its face, yet it remanded the case to determine whether the school selectively enforced the policy against some organizations but not others. *Id.* at 2994-95. While *Keeton* involved Augusta State's across-the-board application of an ethical rule that prohibits counselors from imposing their values on clients, today's case reveals evidence that Eastern Michigan University selectively enforced a no-referral policy against Ward. . . . .

VII.

For these reasons, we reverse and remand to the district court for further proceedings.

Notes and Questions

1. *Ward v. Polite* is discussed on pp. 430, 432, 434, and 649 of the Text Section. *Keeton v. Anderson-Wiley*, the similar contemporaneous case analyzed by the *Ward* court, is discussed on pp. 430-434, 437, and 649 of the Text. Note that the appellate court in *Ward* relies on the U.S. Supreme Court decisions in *Hazelwood*, *Rosenberger*, and *Southworth*, and the appellate court decision in *Axson-Flynn* — all discussed in section 7.4.1 of the Text. Note especially how the *Ward* court explains the applicability of *Hazelwood*, a secondary school case, to higher education – a major issue discussed in 7.1.4 and other sections of the Text.

2. Focus on the student-plaintiff's free speech claim addressed in part II of the court's opinion. How might the student have also claimed a violation of academic freedom? How would you articulate the academic freedom right that is at stake, and how would you argue that the counseling program administrators and faculty had violated this right?

What is to be gained for the student by presenting her claim as an academic freedom claim as well as a free speech claim (or as an academic freedom claim that merges with a free speech claim)?

3. The court puts the student's free speech claim into the category of "student speech in school-sponsored expressive activities," a category to which the *Hazelwood* case may apply. What is the "student speech?" What were the "school-sponsored expressive activities?" In what respect was this student speech part of a "school-sponsored expressive" activity? According to the court, in what circumstances would such student speech (of a student in higher education) be protected by the First Amendment's free speech clause? In what circumstances would the higher educational institution's authority over its own programs and activities take precedence over the student speech? Do you agree with the way in which the court (relying heavily on *Hazelwood*) reconciled the student's speech rights with the institution's programmatic or academic interests?

4. In cases concerning *faculty* speech, some courts have made a distinction between *faculty* academic freedom and "*institutional*" academic freedom (see the Text Section 6.1.7) and have given precedence to institutional academic freedom in cases of conflict. It appears that, in higher education, "school sponsored expressive activities" could be seen as analogous to the institution's own academic speech and thus protected by institutional academic freedom. If courts continue to apply *Hazelwood* to higher education, the result therefore could be a distinction between *student* academic freedom and *institutional* academic freedom that is comparable to the distinction between faculty academic freedom and institutional academic freedom. Would such a development likely mean less academic freedom protection for student speech?

5. If you were an *administrator* of the counseling program in *Ward*, how would you propose to reform the program to eliminate the problems identified by the court? In particular, what would you do about the program's alleged "non-referral" policy? About the issues concerning the ACA code of ethics? If you were an *attorney* for the university, how would you advise the program administrators about the limitations that the First Amendment free speech clause places on their authority to reform the program? In particular, how would you advise the administrators about their First Amendment obligations regarding a "non-referral" policy? Regarding the ACA code of ethics? Regarding the need to revise existing written policies or draft new policies?

SEC. 7.1.3. The Contractual Rights of Students.

Problem 12

You are the dean of the college of business at State University. Yesterday the chair of the accounting department advised you that an angry student would probably be asking to talk with you. The chair explained that the student had been told that she would not be able to graduate at the end of the spring semester because she had not taken a course required for all accounting majors – a course that is offered only during the fall semester. The chair explained that the student had been using "an old copy of the student handbook" and that the curriculum had changed since that version of the handbook had been published.

Today the student, Marcia Mapp, came to see you. Marcia explained that she had been admitted to the business school, an upper division undergraduate school, four years ago, and had completed the accounting program through the junior year. That summer she was seriously injured in an automobile accident, and had to take a leave of absence from State University. At the end of the past summer she returned to campus to seek advice on re-enrolling. None of the accounting professors were around, so she asked one of the department secretaries for help. The secretary, having worked in the accounting department for only two weeks, searched for a copy of the student handbook. Finding one dated three years earlier, the secretary let Marcia photocopy the pages that described the requirements for the accounting major. The secretary also helped Marcia register for courses so that when the fall semester started, she would not have to risk finding that the courses that she needed were full.

Student handbooks are given to all students who, in their sophomore year, seek to major in accounting and are accepted by the department. The accounting department changed the curriculum while Marcia was recovering from her injuries, and new handbooks were provided to all students currently registered in any accounting course. Marcia was readmitted through the registrar's office, and was told to see the department chair before registering for class – but the department chair was on vacation when Marcia came to campus. Although the required course was offered during the fall semester, Marcia did not learn that she needed to take that course until near the end of the semester. Now she is seeking a waiver of the course requirement. The department chair has refused, stating that the Certified Public Accountant examination relies on material covered in that course, and that students who wish to sit for the CPA exam will not be allowed to do so unless they have taken the course.

Marcia says that she cannot afford to wait another six months to graduate, and has retained a lawyer. What would you, as dean of the college, do? Can Marcia prevail in a lawsuit? Should you try to persuade the department chair to change his mind?

SEC. 7.1.4 Student Academic Freedom

Problem 13

Professor Crank teaches political science. He is known as an outspoken conservative and teaches courses on the U.S. Constitution and civil rights law. He believes that the U.S. Constitution has been "trashed" by federal courts and teaches his students that the federal nondiscrimination laws are a violation of American citizens' rights to "discriminate freely as a form of freedom of association" and "voice their own opinions, however un-politically correct."

He requires his students to write papers criticizing the *Brown v. Board of Education* decision and the concept of nondiscrimination in employment as a violation of one's first amendment right to free association. Several students in the class have objected to the assignment. What are their rights, vis-à-vis the professor's right to make assignments? Does one academic freedom right "trump" the other?

SEC. 7.2.4.2. Sex Discrimination in Admissions

United States v. Virginia
518 U.S. 515 (1996)

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., took no part in the consideration or decision of the case.

OPINION BY: GINSBURG

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

I.

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has

made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II.

A.

[The Court describes the "adversative" model of instruction at VMI and notes the lack of privacy, the hierarchical system and harsh treatment of "rats" (first year students), and the intense loyalty of VMI alumni. The Court concludes this section by noting that "Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]," quoting the trial court opinion.]

B.

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Trial of the action consumed six days and involved an array of expert witnesses on each side.

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. "Some women, at least," the court said, "would want to attend the school if they had the opportunity." *Id.*, at 1414. The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment" – "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.*, at 1437-1438. And it also was established that "some women are capable of all of the individual activities required of VMI cadets." *Id.*, at 1412. In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." *Id.*, at 1441.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982), was the closest guide. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*, 458 U.S. at 724

(internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single gender environment, be it male or female," yields substantial benefits. 766 F. Supp., at 1415. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." *Ibid.* If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the *only* means of achieving the objective "is to exclude women from the all-male institution – VMI." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.*, at 1432. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered" if women were admitted, *id.*, at 1413: "Allowance for personal privacy would have to be made," *id.*, at 1412; "physical education requirements would have to be altered, at least for the women," *id.*, at 1413; the adversative environment could not survive unmodified. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.*, at 1413.

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." 976 F.2d 890, 892 (1992). . . . In short, the court concluded, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Ibid.*

The parties agreed that "*some* women can meet the physical standards now imposed on men," *id.*, at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.*, at 899. The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach – would be materially affected by coeducation." *Id.*, at 896-897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.*, at 900. In May 1993, this Court denied certiorari.

C.

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission – to produce "citizen-soldiers" – the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F. Supp. 471, 476-477 (WD Va. 1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. Mary Baldwin's faculty holds "significantly fewer Ph.D.'s than the faculty at VMI," *id.*, at 502, and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition.

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. Training its attention on methods of instruction appropriate for "most women," the Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.*; see 44 F.3d 1229, 1233 (CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, *id.*, at 1234, but the VWIL House would not have a military format, 852 F. Supp., at 477, and VWIL would not require its students to eat meals together or to wear uniforms during the school day, *id.*, at 495. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.*, at 476. In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F.3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program, *id.*, at 499. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million. Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open

its network to VWIL graduates, *id.*, at 499, but those graduates will not have the advantage afforded by a VMI degree.

D.

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. The District Court again acknowledged evidentiary support for these determinations:

> "The VMI methodology could be used to educate women and, in fact, some women . . . may prefer the VMI methodology to the VWIL methodology." *Id.*, at 481. But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.*, at 484.

A divided Court of Appeals affirmed the District Court's judgment. 44 F.3d 1229 (CA4 1995). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." *Id.*, at 1236. The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitimacy" of the governmental objective and refusing approval for any purpose revealed to be "pernicious." *Ibid.*

"Providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed, *id.*, at 1238; that objective, the court added, is "not pernicious," *id.*, at 1239. Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *Ibid.*

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the

Commonwealth could not "accomplish [its] objective of providing single-gender education." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypassing any equal protection scrutiny." *Id.*, at 1237. The court therefore added another inquiry, a decisive test it called "substantive comparability." *Ibid.* The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other means offered by the State." *Ibid.* Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable." *Id.*, at 1241.

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "'exceedingly persuasive [justification]'" for the Commonwealth's action. *Id.*, at 1247 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." 44 F.3d, at 1247. That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission." *Ibid.*

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Id.*, at 1250. But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short . . . from providing substantially equal tangible and intangible educational benefits to men and women." *Ibid.*

The Fourth Circuit denied rehearing en banc. 52 F.3d 90 (1995). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion. Judge Motz agreed with Judge Phillips that Virginia had not shown an "'exceedingly persuasive justification'" for the disparate opportunities the Commonwealth supported. *Id.*, at 92 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" 52 F.3d, at 93. "Women need not be guaranteed equal 'results,'" Judge Motz said, "but the Equal Protection Clause does require equal opportunity . . . [and] that opportunity is being denied here." *Ibid.*

III.

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI – extraordinary opportunities for military training and civilian leadership development – deny to women "capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, *id.*, at 1413 – as Virginia's sole single-sex public institution of higher education – offends the Constitution's equal protection principle, what is the remedial requirement?

IV.

We note, once again, the core instruction of this Court's pathmarking decisions in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U.S. 127, 136-137 (1994), and *Mississippi Univ. for Women*, 458 U.S. at 724 (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). . . . [The Court discusses examples of historical discrimination against women, including the denial of the right to vote, limitations on careers for women, prohibition on women acting as executors of estates, and others]. To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U.S. at 724. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving* v. *Virginia*, 388 U.S. 1 (1967). Physical differences

between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard* v. *United States*, 329 U.S. 187, 193 (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano* v. *Webster*, 430 U.S. 313, 320 (1977) *(per curiam)*, to "promote equal employment opportunity," see *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people.[8] But such classifications may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia – the Mary Baldwin VWIL program – does not cure the constitutional violation, *i.e.*, it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F.2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second,

[8] Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F. Supp., at 1413, 1432; 976 F.2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 720, n. 1 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

A.

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. . . .

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensating for discrimination against women." 458 U.S. at 727. Undertaking a "searching analysis," *id.*, at 728, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730. Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. . . . [The Court traces the history of state-funded postsecondary education in Virginia, noting that the most prestigious state-funded university, the University of Virginia, first admitted women in 1972.]

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See 766 F. Supp., at 1427-1428. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." Whatever internal purpose the Mission Study Committee served – and however well meaning the framers of the report – we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focused on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how the conclusion was reached." *Ibid.*

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" See 976 F.2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan – a plan to "afford a unique educational benefit only to males." *Ibid.* However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B.

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia."

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach." 976 F.2d, at 896-897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., at 1414, and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets," *id.*, at 1412. The parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now impose[s] on men." 976 F.2d, at 896. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'etre*, "nor VMI's implementing methodology is inherently unsuitable to women." *Id.*, at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based

developmental differences." 766 F. Supp., at 1434-1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.*, at 1434. For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." *Ibid.* "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do;" but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." *Ibid.*

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed* v. *Reed*, 404 U.S. 71 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." . . .

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F.3d, at 93. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women – or men – should be forced to attend VMI;" rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women*, 458 U.S. at 730, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which

> "forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . It arises rather from a comprehension of the magnitude of the responsibilities connected with the

> successful practice of law, and a desire to *grade up* the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added).

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although

> "the faculty . . . never maintained that women could not master legal learning . . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

[The Court then reviews the history of exclusion of women from medical school, police careers, and the federal military academies, citing social science research and history concerning the rationalizations for these exclusions.] . . .

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, see 458 U.S. at 724-725, was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals

> "'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril.'" 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps. Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women*, 458 U.S. at 731, that must be the solid base for any gender-defined classification.

VI.

In the second phase of the litigation, Virginia presented its remedial plan – maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F.3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afforded to both genders benefits comparable in substance, [if] not in form and detail," *id.*, at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, *id.*, at 1240-1241. The United States challenges this "remedial" ruling as pervasively misguided.

A.

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]. "See *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (internal quotation marks omitted). The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly addressed and related to" the violation, see *Milliken*, 433 U.S. at 282, *i.e.*, the equal protection denied to women

ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development." If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana*, 380 U.S. at 154. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented.

[The Court notes that the parallel program for women offers no rigorous military training such as that offered by VMI; Mary Baldwin College is not a military institute; housing is not in military-style residences; and VWIL students need not live together, eat together, or wear uniforms during the school day. Leadership training was to be done in "seminars, externships, and speaker series rather than through the military-style "adversative" training offered by VMI.] . . .

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*." 852 F. Supp., at 476 (emphasis added). See also 44 F.3d, at 1233-1234 (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for *women as a group*") (emphasis added). The Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F. Supp., at 480-481.

As earlier stated, . . . generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men*. It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." 852 F. Supp., at 478. By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group*, for "only about 15% of VMI cadets enter career military service." See 766 F. Supp., at 1432.

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F.2d, at 899; "some women . . . do well under [the] adversative model," 766 F. Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.*, at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.*, at 1412, and "can meet the physical standards [VMI] now impose[s] on men," 976 F.2d, at 896. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,[9] a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." *Louisiana*, 380 U.S. at 154.

B.

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network. [The Court discusses the differences in student academic achievement, faculty educational attainment, faculty salaries, curricular choices, and majors between VMI and Mary Baldwin College, as well as the differences in physical and athletic facilities and in the alumni networks that graduates of VMI enjoy.] . . . Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI's current endowment, $131 million – the largest public college per-student endowment in the Nation – will gain $ 220 million. . . .

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." *Id.*, at 1241. Instead, the Commonwealth has

[9] Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. [See] note following 10 U.S.C. § 4342 (academic and other standards for women admitted to the Military, Naval, and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Experience shows such adjustments are manageable. See U.S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, *Report of Admission of Women* (Project Athena I-IV) (1977-1980) (4-year longitudinal study of the admission of women to West Point); Defense Advisory Committee on Women in the Services, *Report on the Integration and Performance of Women at West Point* 17-18 (1992).

created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support, and influence.

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See *Sweatt* v. *Painter*, 339 U.S. 629 (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas."

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who had become a member of the Texas Bar." *Id.*, at 633. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over 65,000 volumes, scholarship funds, a law review, and moot court facilities.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige." *Id.*, at 634. Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. *Id.*, at 633. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C.

. . . We have earlier described the deferential review in which the Court of Appeals engaged, a brand of review inconsistent with the more exacting standard our precedent requires. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." 44 F.3d, at 1235, 1236. Recognizing

that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. In sum, Virginia's remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

VII.

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertained the [then] relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein*, 309 F. Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offered courses of instruction . . . not available elsewhere." 309 F. Supp., at 187. The court further noted: "There exists at Charlottesville a 'prestige' factor [not paralleled in] other Virginia educational institutions." *Ibid.*

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige" – associated with its success in developing "citizen-soldiers" – is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training, and for scientific specialization. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing in the community, traditions, and prestige." *Id.*, at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection. . . . There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

For the reasons stated, the initial judgment of the Court of Appeals, 976 F.2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F.3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Chief Justice Rehnquist wrote a separate concurring opinion because he disagreed with Justice Ginsburg's analysis of the violation and the ability of Virginia to remedy the violation. Rehnquist agreed with the majority that the "parallel program" at Mary Baldwin College was "distinctly inferior" to VMI, but he believed that the state could cure the constitutional violation by providing a public institution for women that offered the "same quality of education and [was] of the same overall calibre" as VMI. Justice Ginsburg had characterized the exclusion of women as the constitutional violation, while Justice Rehnquist characterized the violation as the maintenance of an all-male institution without providing a comparable institution for women.]

[Justice Scalia dissented, attacking the Court's interpretation of equal protection jurisprudence, saying that the Court had used a higher standard than the intermediate scrutiny that is typically used to analyze categories based on gender. Justice Scalia asserted that, since the Constitution does not specifically forbid distinctions based on gender, the political process, not the courts, should be used to change state behavior. Finding that the maintenance of single-sex education is an important educational objective, Justice Scalia would have upheld the continued exclusion of women from VMI.]

Notes and Questions

1. Equal protection jurisprudence historically has reserved "strict scrutiny" analysis to claims of race and national origin discrimination (see the Text Section 7.2.5, for a discussion of strict scrutiny). Although Justice Ginsberg termed the level of review in *United States v. Virginia* "skeptical scrutiny," Justice Scalia objected that the former "intermediate scrutiny," a more deferential standard, had been inappropriately strengthened. Under "intermediate scrutiny," the state's classification must be "substantially related to an important governmental objective." Strict scrutiny requires the state to demonstrate a "compelling state interest" that employs means that are

"narrowly tailored" to achieve that interest. Do you believe that Virginia would have prevailed had the more traditional definition of "intermediate scrutiny" been used?

2. Note that some of the organizations supporting the maintenance of VMI's single sex status were women's colleges, all of which were private. Given the fact that this case was brought under the Equal Protection Clause rather than under Title IX, and the fact that Title IX contains an exception for historically single-sex colleges, what motive underlay these women's colleges' decision to submit amicus briefs in support of VMI?

3. Assume that, after the conclusion of the case, VMI admits women and subjects them to exactly the same requirements as men: shaved heads, equal physical qualifications and training requirements, lack of privacy in barracks, etc. Would female cadets or applicants have any viable legal basis for challenging these policies?

4. With respect to Justice Rehnquist's opinion, would it be possible for Virginia to exactly replicate VMI in a new, all-female version? What aspects of VMI could be replicated? Are there some aspects that could not be replicated?

5. For students interested in a review of the development of equal protection jurisprudence on the basis of sex, several omitted parts of this opinion are instructive. See, in particular, 515 U.S. at 531-534.

SEC. 7.2.4.3. Disability Discrimination in Admissions

Southeastern Community College v. Davis
442 U.S. 397 (1979)

POWELL, J., delivered the opinion for a unanimous Court.

This case presents a matter of first impression for this Court: Whether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I.

Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973-1974 academic year, she was enrolled in the College Parallel program of Southeastern Community College, a state institution that receives federal funds. Respondent hoped to progress to Southeastern's Associate Degree Nursing program, completion of which would make her eligible for state certification as a registered nurse. In the course of her application to the nursing program, she was interviewed by a member of the nursing faculty. It became apparent that respondent had difficulty understanding questions asked, and on inquiry she acknowledged a history of hearing problems and dependence on a hearing aid. She was advised to consult an audiologist.

On the basis of an examination at Duke University Medical Center, respondent was diagnosed as having a "bilateral, sensori-neural hearing loss." A change in her hearing aid was recommended, as a result of which it was expected that she would be able to detect sounds "almost as well as a person would who has normal hearing." But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for effective communication: "While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker."

Southeastern next consulted Mary McRee, Executive Director of the North Carolina Board of Nursing. On the basis of the audiologist's report, McRee recommended that respondent not be admitted to the nursing program. In McRee's view, respondent's hearing disability made

it unsafe for her to practice as a nurse. In addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program: "To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs."

After respondent was notified that she was not qualified for nursing study because of her hearing disability, she requested reconsideration of the decision. The entire nursing staff of Southeastern was assembled, and McRee again was consulted. McRee repeated her conclusion that on the basis of the available evidence, respondent "has hearing limitations which could interfere with her safely caring for patients." Upon further deliberation, the staff voted to deny respondent admission.

Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging both a violation of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed., Supp. III),[2] and a denial of equal protection and due process. After a bench trial, the District Court entered judgment in favor of Southeastern. 424 F. Supp. 1341 (1976). It confirmed the findings of the audiologist that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and further found:

> [In] many situtions such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks, which would make lipreading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physicians's instructions concerning procurement of various

[2] The statute, as set forth in 29 U. S. C. § 794 (1976 ed., Supp. III), provides in full:

"No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees*."

The italicized portion of the section was added by § 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, 92 Stat. 2982. Respondent asserts no claim under this portion of the statute.

types of instruments and drugs where the physician would be uanble to get the nurse's attention by other than vocal means. *Id*., at 1343.

Accordingly, the court concluded:

[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where [respondent's] particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential of danger to future patients in such situations. *Id*., at 1345.

Based on these findings, the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by § 504. In its view, "[otherwise] qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F. Supp., at 1345. Because respondent's disability would prevent her from functioning "sufficiently" in Southeastern's nursing program, the court held that the decision to exclude her was not discriminatory within the meaning of § 504.

On appeal, the Court of Appeals for the Fourth Circuit reversed. 574 F.2d 1158 (1978). It did not dispute the District Court's findings of fact, but held that the court had misconstrued § 504. In light of administrative regulations that had been promulgated while the appeal was pending, see 42 Fed. Reg. 22676 (1977), the appellate court believed that § 504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." 574 F.2d, at 1160. It concluded that the District Court had erred in taking respondent's handicap into account in determining whether she was "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." *Id*., at 1161. The Court of Appeals also suggested that § 504 required "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive." 574 F.2d, at 1162.

Because of the importance of this issue to the many institutions covered by § 504, we granted certiorari. 439 U.S. 1065 (1979). We now reverse.

II.

As previously noted, this is the first case in which this Court has been called upon to interpret § 504. It is elementary that "[the] starting point in every case involving construction of

a statute is the language itself." . . . Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[6]

The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F.2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations promulgated by the Department of HEW to interpret § 504 reinforce, rather than contradict, this conclusion. According to these regulations, a "[qualified] handicapped person" is, "[with] respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity . . . ." 45 CFR § 84.3 (k)(3) (1978). An explanatory note states:

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[6] The Act defines "handicapped individual" as follows:

"The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." § 7 (6) of the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 88 Stat. 1619, 89 Stat. 2-5, 29 U. S. C. § 706 (6).

This definition comports with our understanding of § 504. A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified."

> "The term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." 45 CFR pt. 84, App. A, p. 405 (1978) (emphasis supplied).

A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.[7] We think it clear, therefore, that HEW interprets the "other" qualifications that a handicapped person may be required to meet as including necessary physical qualifications.

III.

The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. As the District Court found, this ability also is indispensable for many of the functions that a registered nurse performs.

Respondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make § 504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.

Respondent finds support for this argument in portions of the HEW regulations discussed above. In particular, a provision applicable to postsecondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped

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[7] The note states: "Paragraph (k) of § 84.3 defines the term 'qualified handicapped person.' Throughout the regulation, this term is used instead of the statutory term 'otherwise qualified handicapped person.' The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms 'qualified' and 'otherwise qualified' are intended to be interchangeable." 45 CFR pt. 84, App. A, p. 405 (1978).

persons, and to provide "auxiliary aids" such as sign-language interpreters. Respondent argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

We note first that on the present record, it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. Section 84.44 (d)(2), for example, explicitly excludes "devices or services of a personal nature" from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. See 424 F. Supp., at 1346. Furthermore, it also is reasonably clear that § 84.44 (a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501 (b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarly, § 503 (a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals. . . ." The President is required to promulgate regulations to enforce this section.

Under § 501 (c) of the Act, by contrast, state agencies such as Southeastern are only "[encouraged] . . . to adopt and implement such policies and procedures." Section 504 does not

refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action, and knew how to provide for it in those instances where it wished to do so. Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979). Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.

IV.

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational

institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.[12]

One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

V.

Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion.

So ordered.

Notes and Questions

1. *Davis* was the controlling case with respect to the admission of students with disabilities until the 1990 passage of the Americans With Disabilities Act (see the Text Section 7.2.4.3, pp. 454-459 and Section 8.4.2.). The ADA requires places of public accommodation (which includes private colleges and universities) to determine whether a qualified individual can perform the academic and "technical" requirements of the

[12] Respondent contends that it is unclear whether North Carolina law requires a registered nurse to be capable of performing all functions open to that profession in order to obtain a license to practice, although McRee, the Executive Director of the State Board of Nursing, had informed Southeastern that the law did so require. See App. 138a-139a. Respondent further argues that even if she is not capable of meeting North Carolina's present licensing requirements, she still might succeed in obtaining a license in another jurisdiction.

Respondent's argument misses the point. Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast. Even if the licensing requirements of North Carolina or some other State are less demanding, nothing in the Act requires an educational institution to lower its standards.

program with or without "reasonable" accommodation, but the ADA does not require a college or university to modify its academic or programmatic standards or requirements in order to accommodate a student.

2. *Davis* makes it clear that professional programs need not "lower" their academic standards or omit significant elements of their programs in order to accommodate the needs of a student with a disability. The *Davis* court was able to discuss this issue with respect to concerns about patient safety. How would a court go about analyzing a challenge by a student with a disability who could not perform the oral conversation portions of a foreign language program and asked for an exemption? Or a student who had "math anxiety" and wished to be exempt from the math requirements of a general education program? Or a blind student who cannot perform the activities necessary to fulfill the college's physical education requirement? See the discussion of *Guckenberger* in the Text Section 8.3.4.4, pp. 608-610).

3. Some professional and pre-professional programs require internships or practica as a condition of graduation. May an institution reject an applicant who is academically qualified, but whom the institution fears may have difficulty with the clinical portion of the program (such as an applicant whose psychiatric disorder makes it difficult for that individual to deal with demanding clients or patients)?

4. Programs such as that in *Davis* say that all graduates must be able to perform in any setting, since the license issued (for example, to a nurse or a lawyer) does not limit the venues in which that professional may practice. Although the *Davis* court agreed with this argument, is there some middle ground that institutions might take in order to more fully accommodate the needs of students with disabilities?

5. Is problematic behavior in a student's past a legitimate ground for refusing that individual admission to college or to a graduate program? For example, if an applicant indicates that he or she has a psychiatric disability that has motivated that individual to harm others, but a medical professional certifies that the applicant is no longer a danger to others, should the college or program evaluate the individual without considering the prior misconduct? Would the college or program have a sound legal basis for denying admission to such an individual? Would your answer depend upon whether the college was private or public? Selective or an open-admission institution? Or whether the

program was a liberal arts degree or a professional program in which the individual would work closely with clients and patients?

6. The *Davis* case provides an instructive illustration of the role of administrative agency regulations, and the legal relationship between such regulations and the statutes they implement. What role did regulations play in *Davis*? What role do they play in general? When will a court consider a regulation to be invalid?

SEC. 7.2.5. Affirmative Action Programs

Grutter v. Bollinger[*]
539 U.S. 306 (2003)

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of THOMAS, J. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I-VII. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ. joined. KENNEDY, J., filed a dissenting opinion.

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

A.

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110.[**] More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body

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* [Authors' note]: *Grutter* was decided at the same time as *Gratz v. Bollinger*, 539 U.S. 244 (2003). Both cases involved affirmative action programs at the University of Michigan. The law school's program was upheld in *Grutter* by a divided vote; the undergraduate school's program was invalidated in *Gratz* by a divided vote. The *Gratz* case is mentioned at various points in the opinions in *Grutter*.]

** [Authors' note]: "App." refers to the Appendix of materials taken from the record of the case and filed with the Court.

diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.*, at 118. The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.*, at 120. By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." *Id.*, at 120-121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing

classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

B.

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." App. 33-34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race . . . .

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as "'all persons who: (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.'" App. to Pet. for Cert. 191a-192a.

* * * *

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a

particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.,* at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.,* at 208a-209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did not quantify critical mass in terms of numbers or percentages. *Id.,* at 211a. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a "'determinative'" factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's "'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'" Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups that have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students. *Id.,* at 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995-2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made "'cell-by-cell'" comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups "'is an extremely strong factor in the decision for acceptance,'" and that applicants from these minority groups "'are given an extremely large allowance for admission'" as compared to applicants who are members of nonfavored groups. *Id.,* at 218a-220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11-13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

* * * *

We granted certiorari, 537 U.S. 1043 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities . . . .

II.

A.

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.*, at 408 (opinion of STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.*, at 320. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." *Ibid.*

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies . . . . We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S., at 289-290. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in "'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession'" as an unlawful interest in racial balancing. *Id.*, at 306-307. Second, Justice Powell rejected an interest in remedying

societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.,* at 310. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." *Id.,* at 306, 310.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.,* at 311. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.,* at 312, 314. Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.,* at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603 (1967)). In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313. Both "tradition and experience lend support to the view that the contribution of diversity is substantial." *Ibid.*

Justice Powell, however, was careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.,* at 314. For Justice Powell, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race. *Id.,* at 315. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.*

* * * *

[F]or the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

B.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protect[s] *persons,* not *groups,*" all "governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995) (emphasis in original; internal quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 227.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña, supra,* at 237 (internal quotation marks and citation omitted). Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U.S., at 229-230. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.,* at 230. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot,* 364 U.S. 339, 343-344 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and

qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In *Adarand Constructors, Inc. v. Peña,* we made clear that strict scrutiny must take "'relevant differences' into account." 515 U.S., at 228. Indeed, as we explained, that is its "fundamental purpose." *Ibid.* Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.

III.

A.

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondent Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke.* It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e.g., Richmond v. J.A. Croson Co., supra,* at 493 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination . . . . Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 96, n. 6 (1978); *Bakke,* 438 U.S., at 319, n. 53 (opinion of Powell, J.).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, *e.g., Wieman v. Updegraff,* 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957); *Shelton v. Tucker,* 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S., at 603. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke, supra,* at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y., supra,* at 603. Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U.S., at 318-319.

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondent Bollinger et al. 13. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke,* 438 U.S., at 307 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.; Freeman v. Pitts,* 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond v. J.A. Croson Co.,* 488 U.S., at 507. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to [Petition] for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." *Id.,* at 246a, 244a.

The Law School's claim of a compelling interest is further bolstered by its *amici,* who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse

workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e.g.,* W. Bowen & D. Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (G. Orfield & M. Kurlaender eds., 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (M. Chang, D. Witt, J. Jones, & K. Hakuta eds., 2003).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3-4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Ibid.* At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.,* at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). This Court has long recognized that "education … is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae,* affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as *Amicus Curiae* 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." *Ibid.*

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5-6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt v. Painter, supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B.

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically

and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S., at 493 (plurality opinion).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice KENNEDY's assertions, we do not "abando[n] strict scrutiny," see *post* (dissenting opinion). Rather, as we have already explained, *supra*, we adhere to *Adarand's* teaching that the very purpose of strict scrutiny is to take such "relevant differences into account." 515 U.S., at 228 (internal quotation marks omitted).

[To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke*, 438 U.S., at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.*, at 317. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.*, at 315-316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid.*

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond v. J.A. Croson Co.*, *supra*, at 496 (plurality opinion). Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'CONNOR, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all

other candidates for the available seats," *Bakke, supra,* at 317 (opinion of Powell, J.). In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," *Sheet Metal Workers v. EEOC, supra,* at 495, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants," *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638 (1987).

Justice Powell's distinction between the medical school's rigid 16-seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. See *Bakke, supra,* at 323 (opinion of Powell, J.) ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"). What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some "plus" for race, or gave greater "weight" to race than to some other factors in order to achieve student body diversity. 438 U.S., at 317-318.

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.,* at 323 "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as Justice KENNEDY posits, does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "sugges[t] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. See *post,* at 2372 (dissenting opinion). To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondents Bollinger et al. 43, n. 70 (citing App. in Nos. 01-1447 and 01-1516(CA6), p. 7336). Moreover, as Justice KENNEDY concedes [see below], between 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

THE CHIEF JUSTICE believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. [See dissenting opinion below]. But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately

enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. See [below] (dissenting opinion).

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke*, 438 U.S., at 318, n. 52 (opinion of Powell, J.) (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger*, *post*, 539 U.S. 244, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See [below] 539 U.S., at 271-272 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, *supra*, at 317 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions,"

and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.*, at 118-119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic – *e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.*, at 83-84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondent Bollinger et al. 10; App. 121-122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice KENNEDY speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. [See below] (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors. See 438 U.S., at 316 ("'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor'").

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6 (1986) (alternatives must serve the interest "about as well"); *Richmond v. J.A. Croson Co.*, 488 U.S., at 509-510 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at

507 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Ed., supra,* at 280, n. 6 (narrow tailoring "require[s] consideration" of "lawful alternative and less restrictive means").

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." App. to [Petition] for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14-18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke,* 438 U.S., at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 630 (O'CONNOR, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority

applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke, supra,* at 317 (opinion of Powell, J.). As Justice Powell recognized in *Bakke,* so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname . . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 U.S., at 318.

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti,* 466 U.S. 429, 432. Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States v. Lopez,* 514 U.S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond v. J.A. Croson Co.,* 488 U.S., at 510 (plurality opinion); see also Nathanson & Bartnik, "The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools," 58 Chicago Bar Rec. 282, 293 (May-June 1977) ("It would be a sad day indeed, were

America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all").

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondent Bollinger et al. 34; *Bakke, supra*, at 317-318 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See [Transcript] of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV.

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U.S.C. § 1981 also fail. See *Bakke, supra*, at 287 (opinion of Powell, J.) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389-391 (1982) (the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause) . . . .

Justice GINSBURG, with whom Justice BREYER joins, concurring.

* * * *

The Court . . . observes that "[i]t has been 25 years since Justice Powell [in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." For at least part of that time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See *Hopwood v. Texas*, 78 F.3d 932 (C.A.5 1996); cf. *Wessmann v. Gittens*, 160 F.3d 790 (C.A.1 1998); *Tuttle v. Arlington Cty. School Bd.*, 195 F.3d 698 (C.A.4 1999); *Johnson v. Board of Regents of Univ. of Ga.*, 263

F.3d 1234 (C.A.11 2001). Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown v. Board of Education*, 347 U.S. 483 (1954); cf. *Cooper v. Aaron*, 358 U.S. 1.

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. See, *e.g., Gratz v. Bollinger*, *post*, 539 U.S., at 298-301 (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272-274 (1995) (Ginsburg, J., dissenting); Krieger, "Civil Rights Perestroika: Intergroup Relations after Affirmative Action," 86 Calif. L.Rev. 1251, 1276-1291, 1303 (1998). As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* p. 4 (Jan.2003).[***] And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See *id.*, at 11; Brief for National Urban League et al. as *Amici Curiae* 11-12 (citing General Accounting Office, Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area 17 (2002)).

However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, *A National Priority: Americans Speak on Teacher Quality* 2, 11 (2002) (public opinion research conducted for Educational Testing Service); No Child Left Behind Act of 2001, Pub.L. 107-110, 115 Stat. 1806, 20 U.S.C. § 7231 (2000 ed., Supp. I), it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice SCALIA, with whom Justice THOMAS joins, concurring in part and dissenting in part.

I join the opinion of THE CHIEF JUSTICE [see below, dissenting opinion]. As he demonstrates, the University of Michigan Law School's mystical "critical mass" justification for

[***] [Authors' note]: The current URL (as of December 2013) for this report is: http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream.

its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

I also join Parts I through VII of Justice THOMAS's opinion. I find particularly unanswerable his central point: that the allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

I add the following: The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "'cross-racial understanding,'" *ante*, and "'better prepar[ation of] students for an increasingly diverse workforce and society,'" *ante*, all of which is necessary not only for work, but also for good "citizenship," *ibid.* This is not, of course, an "educational benefit" on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law – essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, it is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. *And therefore:* If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate – indeed, *particularly* appropriate – for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized – indeed, should be praised – if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," *ante*, and sufficiently avoids "separate admissions tracks," *ante*, to

fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a "'good faith effort'" and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely "'a permissible goal.'" *Ante,* (quoting *Sheet Metal Workers' v. EEOC,* 478 U.S. 421, 495 (1986) (O'CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter;* and while the opinion accords "a degree of deference to a university's academic decisions," *ante,* "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 (2003).) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter.* (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses – through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

Justice THOMAS, with whom Justice SCALIA joins as to Parts I-VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority: "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us . . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! … And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ⋯ [Y]our interference is doing him positive injury." "What the Black Man Wants: An Address Delivered in Boston, Massachusetts," on 26 January 1865, reprinted in 4 *The*

Frederick Douglass Papers 59, 68 (J. Blassingame & J. McKivigan eds.1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. See *ante* (stating that racial discrimination will no longer be narrowly tailored, or "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I.

* * * *

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondent Bollinger et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are

components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," *ante*, at 2339, that the majority expressly rejects?

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic – so much so that the majority uses them interchangeably. Compare *ibid.* ("[T]he Law School has a compelling interest in attaining a diverse student body"), with *ante*, at 2341 (referring to the "compelling interest in securing the *educational benefits* of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity." But see *ibid.* (citing the need for "openness and integrity of the educational institutions that provide [legal] training" without reference to any consequential educational benefits).

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondent Bollinger et al. 33-36. In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.

* * * *

III.

A.

* * * *

IV.

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of . . . the academic quality of all admitted students," *ante*, need not be considered before racial discrimination can be employed. In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work "'about as well.'" *Ante* (quoting *Wygant*, 476 U.S., at 280, n. 6). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, and do "about as well" *in vindicating the compelling state interest.* The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system – it cannot have it both ways.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, see Brief for United States as *Amicus Curiae* 13-14, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.

A.

The Court bases its unprecedented deference to the Law School – a deference antithetical to strict scrutiny – on an idea of "educational autonomy" grounded in the First Amendment. *Ante*. In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.

* * * *

B.

1.

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. See *ante*; but see also Rothman, Lipset, & Nevitte, "Racial Diversity Reconsidered," 151 Public Interest 25 (2003) (finding that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality). The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, *e.g.*, Flowers & Pascarella, "Cognitive Effects of College Racial Composition on African American Students After 3 Years of College," 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen, "The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities," 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white colleges).

* * * *

2.

Moreover one would think, in light of the Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996), that before being given license to use racial discrimination, the Law School would be required to radically reshape its admissions process, even to the point of sacrificing some elements of its character. In *Virginia*, a majority of the Court, without a word about academic freedom, accepted the all-male Virginia Military Institute's (VMI) representation that some changes in its "adversative" method of education would be required with the admission of women, *id.*, at 540 but did not defer to VMI's judgment that these changes would be too great. Instead, the Court concluded that they were "manageable." *Id.*, at 551, n. 19. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. *Id.*, at 533; *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). So in *Virginia*, where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference. Apparently where the status quo being defended is that of the elite

establishment – here the Law School – rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

C.

Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U.S., at 544-545. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education,"[8] Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics. University of California Law and Medical School Enrollments…. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," *ante,* rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination.

V.

* * * *

Finally, the Court's disturbing reference to the importance of the country's law schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," *ibid.*, through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant,* 476 U.S., at 276 (plurality opinion); *Croson,* 488 U.S., at 497 (plurality

[8] Cal. Const., Art. 1, § 31(a), states in full: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (C.A.9 1997).

opinion); *id.,* at 520-521 (SCALIA, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color – an endeavor I have previously rejected. See *Holder v. Hall,* 512 U.S. 874, 899 (1994) (THOMAS, J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis,* 416 U.S., at 342 (Douglas, J., dissenting).

VII.

As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous.

* * * *

For the immediate future, . . . the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Chief Justice REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. *Ante,* see also *Fullilove v. Klutznick,* 448 U.S. 448, 498 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the

governmental purpose"). I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. Brief for Respondent Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

As we have explained many times, "'"[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."'" *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 223 (1995) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.)). Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race "'fit'" a compelling state interest "with greater precision than any alternative means." *Id.,* at 280, n. 6; *Regents of Univ. of Cal*. v. *Bakke,* 438 U.S. 265, 299 (1978) (opinion of Powell, J.) ("When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "'[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Adarand, supra,* at 226; *Fullilove, supra,* at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"). We likewise rejected calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Bakke, supra,* at 314.

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.

Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.'" *Ante* (quoting Brief for Respondent Bollinger et al. i). They contend that a "critical mass" of underrepresented minorities is necessary to further that interest. *Ante*. Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate

opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. See App. to [Petition] for Cert. 211a; Brief for Respondent Bollinger et al. 26. These objectives indicate that "critical mass" relates to the size of the student body. *Id.,* at 5 (claiming that the Law School has enrolled "critical mass," or "enough minority students to provide meaningful integration of its classrooms and residence halls"). Respondents further claim that the Law School is achieving "critical mass." *Id.,* at 4 (noting that the Law School's goals have been "greatly furthered by the presence of … a 'critical mass' of" minority students in the student body).

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority group. See, *e.g., id.,* at 49, n. 79 ("The Law School's . . . current policy . . . provide[s] a special commitment to enrolling a 'critical mass' of 'Hispanics' "). But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass."

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

These different numbers, moreover, come only as a result of substantially different treatment among the three underrepresented minority groups, as is apparent in an example offered by the Law School and highlighted by the Court: The school asserts that it "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Ante* (citing Brief for

Respondent Bollinger et al. 10). Specifically, the Law School states that "[s]ixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 [Grade Point Average (GPA)] and a [score of] 159 or higher on the [Law School Admission Test (LSAT)]" while a number of Caucasian and Asian-American applicants with similar or lower scores were admitted. *Ibid.* Review of the record reveals only 67 such individuals. Of these 67 individuals, 56 were Hispanic, while only 6 were African-American, and only 5 were Native American. This discrepancy reflects a consistent practice. For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. App. 200-201. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. *Id.*, at 198. Likewise, that same year, 16 Hispanics who scored between a 151-153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. *Id.*, at 200-201. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted. *Id.*, at 198.

These statistics have a significant bearing on petitioner's case. Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve "critical mass" or further student body diversity. They certainly have not explained why Hispanics, who they have said are among "the groups most isolated by racial barriers in our country," should have their admission capped out in this manner. Brief for Respondent Bollinger et al. 50. True, petitioner is neither Hispanic nor Native American. But the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of "critical mass" is simply a sham. Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation.

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Ante* (quoting *Bakke,* 438 U.S., at 307 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante*. The Court concludes, however, that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke*, only pays "'[s]ome attention to numbers.'" *Ante* (quoting *Bakke, supra,* at 323).

But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are

members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups. [*Authors' note*: The tables have been omitted. If readers wish to study them, they may be found at 539 U.S. at 383-384.]

For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law School would be significantly smaller if the race of each applicant were not considered. See App. to Pet. for Cert. 223a; Brief for Respondent Bollinger et al. 6 (quoting App. to Pet. for Cert. 299a). But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. See Brief for Respondent Bollinger et al. 43, n. 70 (discussing admissions officers' use of "periodic reports" to track "the racial composition of the developing class").

Not only do respondents fail to explain this phenomenon, they attempt to obscure it. See *id.*, at 32, n. 50 ("The Law School's minority enrollment percentages . . . diverged from the percentages in the applicant pool by as much as 17.7% from 1995-2000"). But the divergence between the percentages of underrepresented minorities in the applicant pool and in the *enrolled* classes is not the only relevant comparison. In fact, it may not be the most relevant comparison. The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School's admissions program that the Court finds appealing, see *ante*, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool.

But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional." *Ante*.

* * * *

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.

Justice KENNEDY, dissenting.

The separate opinion by Justice Powell in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 289-291, 315-318 (1978), is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. *Id.,* at 312-314; *ante*. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence. *Ante.*

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Bakke, supra,* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). This Court has reaffirmed, subsequent to *Bakke,* the absolute necessity of strict scrutiny when the State uses race as an operative category. *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224 (1995) ("[A]ny

person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989); see *id.*, at 519 (KENNEDY, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts"). The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's (Law School) assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." *Ante*; see also *Bakke, supra,* at 307 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom

offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.

The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota. 137 F. Supp.2d 821, 851 (E.D.Mich.2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987-1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondent Bollinger et al. 49, n. 79.

Year	Percentage of Enrolled Minority Students
1987	12.3%
1988	13.6%
1989	14.4%
1990	13.4%
1991	19.1%
1992	19.8%
1993	14.5%

1994	20.1%
1995	13.5%
1996	13.8%
1997	13.6%
1998	13.8%

The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict scrutiny requires the Law School to overcome the inference. Whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment. *Bakke*, 438 U.S., at 289 (opinion of Powell, J.). In this respect, the Law School program compares unfavorably with the experience of Little Ivy League colleges. *Amicus* Amherst College, for example, informs us that the offers it extended to students of African-American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers total, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. See Brief for Amherst College et al. as *Amici Curiae* 10-11. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.

The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way. *Adarand Constructors*, 515 U.S., at 224. At the very least, the constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool, discussed by THE CHIEF JUSTICE, *ante*, require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither.

The obvious tension between the pursuit of critical mass and the requirement of individual review increased by the end of the admissions season. Most of the decisions where race may decide the outcome are made during this period. See *supra*. The admissions officers

consulted the daily reports, which indicated the composition of the incoming class along racial lines. As Dennis Shields, Director of Admissions from 1991 to 1996, stated, "the further [he] went into the [admissions] season the more frequently [he] would want to look at these [reports] and see the change from day-to-day." These reports would "track exactly where [the Law School] st[ood] at any given time in assembling the class," and so would tell the admissions personnel whether they were short of assembling a critical mass of minority students. Shields generated these reports because the Law School's admissions policy told him the racial makeup of the entering class was "something [he] need[ed] to be concerned about," and so he had "to find a way of tracking what's going on." Deposition of Dennis Shields in Civ. Action No. 97-75928, pp. 129-130, 141 (E.D.Mich., Dec. 7, 1998).

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review, save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.

The Law School made no effort to guard against this danger. It provided no guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students. The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept. The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning. The Little Ivy League colleges, for instance, do not keep ongoing tallies of racial or ethnic composition of their entering students. See Brief for Amherst College et al. as *Amici Curiae* 10.

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision making. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school

faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Dean Allan Stillwagon, who directed the Law School's Office of Admissions from 1979 to 1990, explained the difficulties he encountered in defining racial groups entitled to benefit under the Law School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Schuck, "Affirmative Action: Past, Present, and Future," 20 Yale L. & Pol'y Rev. 1, 34 (2002) (citing Levinson, "Diversity," 2 U. Pa. J. Const. L. 573, 577-578 (2000); Rubenfeld, "Affirmative Action," 107 Yale L.J. 427, 471 (1997)). This is not to suggest the faculty at Michigan or other law schools do not pursue aspirations they consider laudable and consistent with our constitutional traditions. It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision making. Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. *Ante*. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

As to the interpretation that the opinion contains its own self-destruct mechanism, the majority's abandonment of strict scrutiny undermines this objective. Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith. The majority admits as much: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable" (quoting Brief for Respondent Bollinger et al. 34).

If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the

worst of all outcomes. Other programs do exist that will be more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it. It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

SEC. 7.2.5. Affirmative Action Programs

Fisher v. University of Texas at Austin [*Fisher II*]
136 S. Ct. 2198 (2016)

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

Justice KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See *Hopwood v. Texas*, 78 F.3d 932, 934–935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with *Hopwood*, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H.B. 588, commonly known as the Top Ten Percent Law. Tex. Educ.Code Ann. § 51.803 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may

choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, and *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257. In *Gratz,* this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. See 539 U.S., at 255, 275–276, 123 S.Ct. 2411. In *Grutter,* however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. See 539 U.S., at 337, 343–344, 123 S.Ct. 2325. In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood* 's categorical prohibition.

In the wake of *Grutter,* the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body ... to all of the University's undergraduate students." App. 481a–482a (affidavit of N. Bruce Walker ¶ 11 (Walker Aff.)); see also *id.,* at 445a–447a. The University concluded that its admissions policy was not providing these benefits. Supp. App. 24a–25a.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." *Id.,* at 23a. After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of *Grutter,* it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a

combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1–to–6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. See App. 218a–220a, 430a.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. Deposition of Brian Breman 9–14, Record in No. 1: 08–CV–00263, (WD Tex.), Doc. 96–3. The Admissions Office also undertakes regular "reliability analyses" to "measure the frequency of readers scoring within one point of each other." App. 474a (affidavit of Gary M. Lavergne ¶ 8); see also *id.*, at 253a (deposition of Kedra Ishop (Ishop Dep.)). Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.

Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants' scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS.

Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. 645 F.Supp.2d 587, 608 (W.D.Tex.2009). Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for

underrepresented minorities. *Id.,* at 606 ("Plaintiffs cite no evidence to show racial groups other than African–Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions. As the Defendants point out, the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian–Americans"); see also Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 12 (the contention that the University discriminates against Asian–Americans is "entirely unsupported by evidence in the record or empirical data"). There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant's background, can alter an applicant's PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant's AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. See U.S. Const., Amdt. 14, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, *Fisher v. University of Tex. at Austin,* 570 U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. 758 F.3d 633 (C.A.5 2014). This Court granted certiorari for a second time, 576 U.S. ——, 135 S.Ct. 2888, 192 L.Ed.2d 923 (2015), and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I,* 570 U.S., at ——, 133

S.Ct., at 2418. Strict scrutiny requires the university to demonstrate with clarity that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.' "*Ibid.*

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." *Id.*, at ——, 133 S.Ct., at 2419. A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' " *Ibid.* Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals." *Ibid.* (internal quotation marks and citation omitted).

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. *Id.*, at ——, 133 S.Ct., at 2419–2420. A university, *Fisher I* explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." *Id.*, at ——, 133 S.Ct., at 2420 (internal quotation marks omitted). Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," *Grutter*, 539 U.S., at 339, 123 S.Ct. 2325 it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2420.

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." *Id.*, at ——, 133 S.Ct., at 2421 The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. *Id.*, at ——, 133 S.Ct., at 2421. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by *Fisher I*. See 758 F.3d, at 659–660. Judge Garza dissented.

III

The University's program is *sui generis*. Unlike other approaches to college admissions

considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*.

*** * * ***

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." *Fisher I,* 570 U.S., at ——, 133 S.Ct., at 2419 (internal quotation marks omitted); see also *Grutter,* 539 U.S., at 328, 123 S.Ct. 2325. As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Id.,* at 330, 123 S.Ct. 2325 (internal quotation marks and alteration omitted). Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Ibid.* (internal quotation marks omitted).

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large

is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.' " Supp. App. 1a; see also *id.*, at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶ 4) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Supp. App. 23a. All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. *Fisher I, supra,* at ——, 133 S.Ct., at 2419. The University's 39–page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Supp. App. 25a; see also App. 481a–482a (Walker Aff. ¶¶ 8–12) (describing the "thoughtful review" the University undertook when it faced the "important decision ... whether or not to use race in its admissions process"). Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." See, *e.g., id.*, at 253a (Ishop Dep.), 314a–318a, 359a (Walker Dep.), 415a–416a (Defendant's Statement of Facts), 478a–479a, 481a–482a (Walker Aff. ¶¶ 4, 10–13). Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Brief for Petitioner 46. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of

data," App. 446a, and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. See, *e.g., post,* at 2240 (opinion of ALITO, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African–American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. See Supp. App. 43a. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. See, *e.g.*, App. 317a–318a.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African–American students enrolled in them, and 27 percent had only one African–American student. Supp. App. 140a. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. *Id.*, at 74a, 140a. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African–American. Supp. App. 157a. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African–American. *Ibid.* Those increases—of 54 percent and 94

percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. Brief for Petitioner 47. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African–American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶ 4–20). Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*, 539 U.S., at 339, 123 S.Ct. 2325.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2433 (GINSBURG, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." *Ibid.* Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that

college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it. See *Grutter, supra,* at 340, 123 S.Ct. 2325 (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); 758 F.3d, at 653 (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978),] envisions"). At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz,* 539 U.S., at 304, n. 10, 123 S.Ct. 2411 (GINSBURG, J., dissenting).

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable"

means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I, supra,* at ——, 133 S.Ct., at 2420. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt v. Painter,* 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring); see also *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

* * * *

Notes and Questions

(For both *Grutter* and *Fisher II*)

1. *Grutter* v. *Bollinger* and *Gratz* v. *Bollinger* are compared and analyzed in the Text Section 7.2.5.

2. Note the *Grutter* majority's reliance on Justice Powell's opinion in the celebrated *Bakke* case, decided 25 years before *Grutter* and *Gratz*. *Bakke* is discussed in the Text Section 7.2.5, pp. 466-468, and *Grutter's* adoption of the principles in the Powell opinion is discussed in that Section on pp. 470-472.

3. The *Grutter* majority opinion (like the *Gratz* majority opinion) applies "strict scrutiny" review to the affirmative action plan at issue. Why does strict scrutiny review apply here? What are the components of strict scrutiny review? The dissenting Justices also agree that strict scrutiny review applies, but they disagree with the way in which the majority applies strict scrutiny. What is the crux of this disagreement?

4. Compare the *Grutter* majority's "narrow tailoring" analysis with that in the Rehnquist and Kennedy dissenting opinions. What "inferences" do Chief Justice Rehnquist and Justice Kennedy draw from the facts that the majority does not draw? How do these inferences distinguish Rehnquist's and Kennedy's reasoning and conclusions from the majority's?

5. Do you agree with the majority's determination that race-conscious admissions policies would no longer have been be necessary in 25 years (from the date of the Court's decision)? Note Justice Ginsburg's different perspective on this matter, expressed in her concurring opinion, in particular her discussion of problems in elementary/secondary education and their effect on higher education.

6. Many "amicus curiae" or ("friend of the court") briefs were filed in the *Grutter* and *Gratz* cases. A list at the end of the Westlaw version of the *Grutter* opinions lists 43 amicus briefs, many of them representing multiple parties. Numerous colleges, universities, and educational associations, most of which supported affirmative action, were represented by these briefs. What role do these amicus briefs play in the majority's analysis of the case?

7. Suppose the graduate department of physics at the University of Michigan, or some other public university, were to have the same type of affirmative action plan as that the Court approved in *Grutter*. If rejected physics applicants challenged this plan, would there be any basis for distinguishing the case from *Grutter* and for the Court to employ different reasoning or reach a different result?

8. Justice Thomas, in his dissent, draws a comparison between the *Grutter* majority and the majority opinion in *United States* v. *Virginia* (the VMI case). (This case is set out above in this Section of this volume of materials.) Are the two opinions inconsistent, as Justice Thomas suggests? Or is there justification for the Court deferring in *Grutter* to the institution's views of its educational mission and how to accomplish it, but not deferring to the institution's views on these matters in the VMI case?

9. Suppose the law school in *Grutter* had been part of a *private* university. Under *Grutter* (and *Gratz*), should a court subject a private university's affirmative action plan to the same legal standards as apply to a public university? Would it matter whether the private university was a recipient of federal funds?

10. Since *Grutter* and *Gratz,* the U.S. Supreme Court has decided three other cases on affirmative action in admissions: *Parents Involved in Community Schools v. Seattle School District No. 1,* and two cases involving the University of Texas (commonly known as *Fisher I* and *Fisher II*). The cases are discussed in the Text Section 7.2.5. The *Parents Involved* case dealt with K-12 education and the Court majority determined that *Grutter* and *Gratz* do not apply directly or fully to K-12 education. Nevertheless, the Justices' opinions in *Parents Involved* have much to say about race- preferential and other race-conscious admissions plans. The *Fisher* case, a higher education case, focused on the judicial standard of review that applies to race preferential measures in admissions policies, and affirmed that the "strict scrutiny" standard used in *Grutter* and *Gratz* (and also *Parents Involved*) remains the applicable standard. The Court in *Fisher* did not determine whether the University of Texas admissions policy was valid under the strict scrutiny standard; instead, it questioned how the lower court applied the standard, particularly with regard to whether, and to what extent, the court should defer to the university's determinations on why to use race preferences and how to implement them.

Sec. 7.2.5 Affirmative Action Programs

Students for Fair Admissions, Inc. v. President & Fellows of Harvard College[56]

143 S. Ct. 2141 (2023)

OPINION BY: ROBERTS

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. A rating of "1" is the best; a rating of "6" the worst. In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." In assigning the overall rating, the first readers "can and do take an applicant's race into account."

[56] Author's note: This opinion combines two lawsuits; one against Harvard and a second, by the same plaintiff, against the University of North Carolina at Chapel Hill. Justice Jackson participated only in the lawsuit against the University of North Carolina at Chapel Hill; she recused herself from the lawsuit involving Harvard.

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. The subcommittees can and do take an applicant's race into account when making their recommendations.

The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off " in minority admissions from the prior class. Each applicant considered by the full committee is discussed one by one, and every member of the committee must vote on admission. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. The full committee decides as a group which students to lop. In doing so, the committee can and does take race into account. Once the lop process is complete, Harvard's admitted class is set. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200."

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. Readers are required to consider "[r]ace and ethnicity . . . as one factor" in their review. Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities," and essays.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." The admissions decisions made by the first readers are, in most cases, "provisionally final."

Following the first read process, "applications then go to a process called 'school group review' . . . where a committee composed of experienced staff members reviews every [initial] decision." The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may also consider the applicant's race.

C

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." In November 2014, SFFA filed separate lawsuits

against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The District Courts in both cases held bench trials to evaluate SFFA's claims. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. The First Circuit affirmed that determination. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case.[57]

* * * * *

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person . . . the equal protection of the laws." To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws. The Constitution, they were determined, "should not permit any distinctions of law based on race or color," because any "law which operates upon one man [should] operate *equally* upon all."

* * * * *

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."

[57] The Court address UNC's allegation that SFFA lacked standing to sue; the Court rejected that claim.

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school.

* * * * *

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."

As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]." Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants."

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." It observed that all "racial classifications, however compelling their goals," were "dangerous." And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit."

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the

Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle."

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it. Neither does UNC's. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.

A

Because "[r]acial discrimination [is] invidious in all contexts," we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher* v. *University of Tex. at Austin,* 579 U. S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than . . . an amorphous end to justify it."

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private

sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively

"train[s] future leaders" is standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question."

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.' And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21-707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," and that "deference does not imply abandonment or abdication of judicial review."

Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. The programs at issue here do not satisfy that standard.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted." Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a

'negative'" to be a student with lower grades and lower test scores. This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." That requirement is found throughout our Equal Protection Clause jurisprudence more generally.

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." UNC is much the same. It argues that race in itself "says [something] about who you are."

* * * * *

One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race,

think alike,"—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." Such stereotyping can only "cause[ ] continued hurt and injury," contrary as it is to the "core purpose" of the Equal Protection Clause.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point."

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," or "precise number or percentage," or "specified percentage," So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group."

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%-11.7% of the admitted pool. The same theme held true for other minority groups. Harvard's focus on numbers is obvious.

UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," a metric that turns solely on whether a group's "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina." The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation.

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure[ ] that race will always be relevant . . . and that the ultimate goal of eliminating" race as a criterion "will never be achieved."

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure."

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. Indeed, the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student

body diversity." But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted.

Here, however, Harvard concedes that its race-based admissions program has no end point. And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." And UNC suggests that it might soon use race to a *greater* extent than it currently does. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. It cannot "justify a [racial] classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered."

* * * *

The dissents here do not acknowledge any of this. . . . . They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (JUSTICE JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality will end" (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based admissions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texaswhose "goal" it was to enroll a "critical mass" of certain minority students. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means.

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." To drive the point home, *Fisher II* limited itself just as *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going

forward. And the Court openly acknowledged that its decision offered limited "prospective guidance.

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent defends by making these omissions: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*. 347 U. S., at 495 (emphasis added). It depends, says the dissent.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees (opinion of JACKSON, J.). Indeed he did:

"[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

CONCURRENCES BY JUSTICES THOMAS, GORSUCH, AND KAVANAUGH
DISSENT BY SOTOMAYOR, JOINED BY KAGAN AND JACKSON

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education

to our democratic society. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, §9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, and gave enslavers the right to retrieve enslaved people who escaped to free States. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with

intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.[58]

* * * * *

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for an institution of higher education." Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter* v. *Bollinger*, a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," and held that race may be used in a narrowly tailored manner to achieve this interest, see also *Gratz* v. *Bollinger*, ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is "'too open-ended, ill-defined, and indefinite to constitute a compelling interest'").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher I*, seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." Several years later, in *Fisher II*, the Court upheld the admissions program at the University of Texas under this framework.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that "'experience lend[s] support to the view that the contribution of diversity is substantial.' Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and

[58] The dissent discusses the history of segregation and discrimination on the basis of race, as well as the *Brown v. Board of Education* (1954) decision..

ensure that students obtain "the skills needed in today's increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints." More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races.

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

* * * * *

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal.

What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.[59]

* * * * *

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U. S., at 327 304, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

* * * * *

There is no basis for overruling *Bakke, Grutter,* and *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

* * * * *

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

[59] The dissent describes several forms of racial inequality: poverty, school funding disparities; achievement gaps, and college enrollment differences by race.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "advantages" underrepresented minority students "at the expense of " other students.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are Black, and 12.6% are Latino. Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." Similarly, because of achievement gaps that result from entrenched racial inequality in K-12 education, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented

racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit."

* * * * *

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter* v. *Bollinger*, are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

JUSTICE SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained,

both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.[60]

* * * * *

C

[60] Justice Jackson reviews the history of government-sponsored race discrimination against Black Americans, beginning with slavery and continuing through the twentieth century.

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship. Five generations ago, the North Carolina Red Shirts finished the job. Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations." Two generations ago, North Carolina's Governor still railed against "'integration for integration's sake'"—and UNC Black enrollment was minuscule. So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information. But applicants are *not* required to submit demographic information like gender and race. UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[61]

* * * * *

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

* * * * *

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the

[61] Justice Jackson describes the holistic review procedure used by UNC.

Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

* * * * *

The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore). It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

Notes and Comments

1. The majority opinion mentions *Grutter* several times, with the strong implication that it is still good law. Is that correct? Justice Thomas, in his concurrence to the majority opinion, wrote "I have repeatedly stated that *Grutter* was wrongly decided and should be overruled," citing *Fisher I* (concurring opinion) and *Fisher I* (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails." Justice Sotomayor's dissenting opinion agrees: "As JUSTICE THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." Does it make a difference to the prospective interpretation of *SFFA* that the majority did not explicitly overrule *Grutter*?

2. Which aspects of Harvard's use of "holistic" review of each application caused the greatest concern for the majority? Could those aspects of the application review process have been severed and would that 1) have met Harvard's goals for a diverse student body and 2) have met Harvard's goals for encouraging philanthropy?

3. The trial court opinion, in its closing paragraphs, muses about the impact of "privilege" on the ability of low income and first generation students of any race or ethnicity to obtain the type of teacher or counselor letters that students who attend private schools with low student/teacher or student/counselor ratios can obtain. How could this problem be addressed? What could a college do to minimize this problem with respect to the type of information it requests?

4. Supreme Court jurisprudence has used the strict scrutiny test to evaluate claims that actions by public colleges and universities that allegedly violate the Equal Protection Clause are constitutionally protected. Is the strict scrutiny test subjective? Apart from relying on precedent in similar cases, how can a court make the test more objective? How can colleges adjust their recruitment and application review processes to reduce the subjectivity that was clearly challenged in *SFFA*?

SEC. 7.3.4. Affirmative Action in Financial Aid Programs

Podberesky v. Kirwan
38 F.3d 147 (4th Cir. 1994)

WIDENER, Circuit Judge:

The issue in this case is whether the University of Maryland at College Park may maintain a separate merit scholarship program that it voluntarily established for which only African-American students are eligible. Because we find that the district court erred in finding that the University had sufficient evidence of present effects of past discrimination to justify the program and in finding that the program is narrowly tailored to serve its stated objectives, we reverse the district court's grant of summary judgment to the University. We further reverse the district court's denial of Podberesky's motion for summary judgment, and we remand for entry of judgment in favor of Podberesky.

I.

The facts and prior proceedings in this case are set forth at length in our earlier opinion, *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992) (*Podberesky I*). In sum, Daniel Podberesky challenges the University of Maryland's Banneker scholarship program, which is a merit-based program for which only African-American students are eligible. The University maintains a separate merit-based scholarship program, the Francis Scott Key program, which is not restricted to African-American students. Podberesky is Hispanic; he was therefore ineligible for consideration under the Banneker Program, although he met the academic and all other requirements for consideration. Podberesky was ineligible for consideration under the Key program because his academic credentials fell just shy of its more rigorous standards.

In our earlier decision, we remanded the case because the district court had not made a specific finding on whether there was sufficient present effect of the University's past discrimination against African Americans so as to justify the maintenance of the race-based restriction in the Banneker scholarship program. *Podberesky I*, 956 F.2d at 57. The district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed. *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1076-77 (D. Md. 1993). The University claimed that four present effects of past discrimination exist at the University: (1) The University has a poor reputation within the African-American community; (2) African-Americans are

underrepresented in the student population; (3) African-American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students. 838 F. Supp. at 1082. The district court reasoned that if a strong evidentiary basis existed to support any of the four present effects articulated by the University, the Banneker Program would be justified. The district court then found that there was a strong evidentiary basis to support the existence of each of those four present effects. 838 F. Supp. at 1083.

The district court also found that the Banneker Program was narrowly tailored to remedy those four present effects of past discrimination that it found at the University. 838 F. Supp. at 1094. The district court then granted the University's summary judgment motion and denied Podberesky's summary judgment motion. This appeal followed.

II.

Because it chose the Banneker Program, which excludes all races from consideration but one, as a remedial measure for its past discrimination against African-Americans, the University stands before us burdened with a presumption that its choice cannot be sustained. As we have said before,

> "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

Wygant v. Jackson Board of Education, 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (Powell, J.)). The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989). While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome. . . . It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes. *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) (parallel citations omitted).

[The appellate panel criticized the trial court for its "restlessness" in applying the strict scrutiny standard, its rejection of relevant precedent from other federal appellate courts, and its analysis of the statistical evidence presented by the plaintiff.]

* * * *

We have established a two-step analysis for determining whether a particular race-conscious remedial measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a "'strong basis in evidence for its conclusion that remedial action [is] necessary;'" and (2) the remedial measure must be narrowly tailored to meet the remedial goal.[62] *Maryland Troopers*, 993 F.2d at 1076 (citing and quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion)). The purpose of our earlier remand in this case was to allow the district court to determine whether the University could prove that there were present effects of past discrimination that warranted such race conscious remedial action. *Podberesky I*, 956 F.2d at 56.

At the outset, we note that the district court held that any present effect of past discrimination found by the University would be sufficient under our *Maryland Troopers* decision and the Supreme Court's opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), to justify the program: "UMCP's finding that the consequences of its segregative past continues to be felt ipso facto establishes the necessity for relief." 838 F. Supp. at 1094. However, *Croson* itself makes clear that the district court's assumption is incorrect. To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. As to the effect justifying the remedial measure, "'absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Maryland Troopers*, 993 F.2d at 1076 (4th Cir. 1993) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)). Therefore, the district court was incorrect in stating that if the University found strong evidence to support any of its proffered effects, the program would be justified. The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a

[62] The district court sets forth an alternate analysis that it thinks should be used instead of an analysis grounded in *Croson* and *Wygant*. 838 F. Supp. at 1097-99. We reject the district court's contention that its proposed analysis is the correct one.

type that justifies the program. Only then could we consider affirming the district court's grant of summary judgment to the University on this issue.

A.

Turning to the present effects articulated by the University, we disagree with the district court that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, are sufficient, standing alone, to justify the single-race Banneker Program. As the district court's opinion makes clear, any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this one. Our decisions do not permit such a result. See, e.g., *Maryland Troopers*, 993 F.2d at 1079.

The hostile-climate effect proffered by the University suffers from another flaw, however. The main support for the University's assertion that the campus climate is hostile to African-American students is contained in a survey of student attitudes and reported results of student focus groups.[63] For an articulated effect to justify the program, however, there must be a connection between the past discrimination and the effect. *United States v. Fordice*, 120 L. Ed. 2d 575, 60 U.S.L.W. 4769, 4772 n.4, 112 S. Ct. 2727 (U.S. 1992). The district court recognized this and reasoned that there was a nexus because racial incidents have occurred with some frequency and regularity, which the district court called a "stream," 838 F. Supp. at 1092, since 1970, which is when the district court found that de facto segregation ended at the University. The district court found that "the very nature of the college experience is that younger students learn from older ones. . . . Since 1970, both black and white students have been handing down racial attitudes that perpetuate a hostile racial climate." 838 F. Supp. at 1093. The district court appears to have found the connection between the University's previous discriminatory acts and the present attitudes obvious, but we have not so found it. The frequency and regularity of the incidents, as well as claimed instances of backlash to remedial measures, do not necessarily

[63] The hostile climate is claimed to manifest itself in the student newspaper, the fraternity and sorority system, and in the fact that students tend to segregate themselves in classrooms, social situations, and the dining halls. In addition, there have been claimed instances of racist and patronizing comments by faculty members. Some instances of white and black backlash have occurred when the University has either implemented or trimmed minority-student programs. See 838 F. Supp. at 1092-93.

implicate past discrimination on the part of the University, as opposed to present societal discrimination, which the district court implicitly held.

Podberesky argues that the claimed hostility did not have its genesis in the University's discriminatory acts of the past. He points to several northern universities that suffer from comparable racial problems.[64] The district court rejected this argument for the reason that it found that most northern universities had experienced de facto segregation, and it held that racial hostility on the northern universities' campuses was the present effect of those universities' past de facto, not de jure, discrimination. 838 F. Supp. at 1090-91.

The district court's analysis cannot be sustained on this point. When we begin by assuming that every predominately white college or university discriminated in the past, whether or not true, we are no longer talking about the kind of discrimination for which a race conscious remedy may be prescribed. Instead, we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy. *Podberesky I*, 956 F.2d at 55 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion)). There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (majority opinion).

B.

We next turn to the two effects that rely on statistical data: underrepresentation of African-American students at the University and low retention and graduation rates for African-American students. The district court found that there was strong evidence of African-American underrepresentation in the University's entering student classes. With respect to the low retention and graduation rates, the district court found that the statistics showed that African-American students had higher attrition rates than any other identifiable group on campus.

The district court erred in its analysis of the underrepresentation evidence and the attrition evidence for a fundamental reason: the posture of the case before the district court was that cross-motions for summary judgment had been filed. We review grants of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

[64] [Footnote omitted].

* * * *

Taking the facts in the light most favorable to Podberesky, the nonmoving party, we find that the district court erred in granting the University's motion for summary judgment. As to the low retention and graduation rates, there is a dispute in the evidence about why African-American students leave the University of Maryland in greater numbers than other students. Podberesky offered evidence tending to show that the attrition rate revealed by the statistics was the result of economic and other factors and not because of past discrimination. The district court rejected Podberesky's study by reasoning that economic concerns are often more pressing for African-American students because many of those students come from less wealthy backgrounds. The district court then reasoned that the disproportionate number of less wealthy African-American families is the result of past discrimination in society. The district court also found some evidence in some of the University's exhibits that showed that the University's poor reputation and hostile climate have an effect on attrition rates. 838 F. Supp. at 1091-92.

As to the underrepresentation, our decisions and those of the Supreme Court have made clear that the selection of the correct reference pool is critical. The district court must first determine as a matter of law whether it is appropriate to apply a pool consisting of the local population or whether another pool made up of people with special qualifications is appropriate. In the employment context, this determination is made by looking at the job requirements. If the job is an unskilled one, the general population is more likely the relevant pool. If, however, the job requires some special skills or training, the relevant pool is made up of only those people who meet the criteria. E.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076-77 (4th Cir. 1993). The method of determining the relevant pool by looking at the qualifications needed to take advantage of the opportunity from which minorities historically have been excluded and the prevalence of those qualifications in the population is not limited to the employment context. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (majority opinion) (applying analysis to Richmond's minority set-aside program).

The district court rejected a pool that consisted of all graduating high school seniors because that pool "does not take into account even flexible minimum admission requirements." 838 F. Supp. at 1089. Thus, the district court correctly determined the legal issue of whether the appropriate pool was the general population or a smaller qualification specific pool. The district court erred, however, in its attempt to resolve the factual dispute[65] about what are the effective

[65] The district court also should have determined as a matter of fact that part of the population that possessed the qualifications. In this case, however, the number of students meeting the criteria advocated by Podberesky was not determined because the University did not submit sufficient data to allow the

minimum admission criteria.[66] The district court declined to decide the requisite qualification for membership in the reference pool, but mentioned the percentage of students taking the SAT in Maryland, the minimum course curriculum required, and minimum math and verbal SAT scores. It later found that the percentage of African-American incoming freshmen at UMCP (13%) was less than any of them (17.9% for required course curriculum to 22% of students taking the SAT in Maryland who were African-American).[67] 838 F. Supp. at 1088-1089. It rejected Podberesky's proposed effective minimum criterion for admission, which was based on a combination of SAT scores, high school curriculum requirements, and grade-point averages, because the use of those numbers "ignores the variables in the admissions process and the intergenerational effects of segregated education on the applicant pool." 838 F. Supp. at 1089.[68] We are of opinion that the goal of the program, remedying any present effects of past discrimination, cannot be used to lower the effective minimum criteria needed to determine the applicant pool.[69] Additionally, the district court erred in resolving, on a summary judgment motion, the factual dispute about the effective minimum criteria for admission.

The factual disputes in this case are not inconsequential and could have been resolved only at trial. A district court may not resolve conflicts in the evidence on summary judgment motions, and the district court erred in so doing here.

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corresponding percentage to be determined. The fact that the numbers are not in the record is not a sufficient basis, however, for rejecting the pool. The pool must be determined based on the qualifications, not by determining which numbers exist in the record and then adopting the corresponding qualifications, which is one way of characterizing what occurred in the district court. The district court could have denied the University's motion for summary judgment and given it more time to come up with the relevant figures.

The above note and associated text assumes the statistical validity of any pool. See Part III.C., *infra*.

[66] The University has no formal requirements for admission with respect to SAT scores and grade-point averages (GPA). Thus, for the years in question, the district court should have determined what the effective minimum criteria for admission were by determining the lowest GPA and SAT scores achieved by admittees to the University that year.

[67] The district court also rejected several pools advocated by the University, including a pool of all African-American students graduating from Maryland high schools. 838 F. Supp. at 1089.

[68] Like the University, Podberesky presented several possible pools to the district court. As to the qualifications needed to be eligible for admission, Podberesky argued in part that the appropriate reference pool consisted of those African-Americans who completed the required high school curriculum, maintained a grade-point average of 2.0 or above, attained a verbal SAT score of 270 or better, and attained a math SAT score of 380 or better. Podberesky contends that the University's admissions data reveal that these were the effective minimum criteria for admission. 838 F. Supp. at 1087.

[69] In addition, any intergenerational effects of segregated education are the product of societal discrimination, which cannot support a program such as this one. *Maryland Troopers*, 993 F.2d at 1076 (citing *Wygant*, 476 U.S. at 274-76 (plurality opinion)).

III.

[The court then reviewed the district court's denial of Podberesky's motion for summary judgment and its granting of summary judgment to the University.]

* * * *

Even if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination,[70] we could not uphold the Banneker Program. It is not narrowly tailored to remedy the underrepresentation and attrition problems, and the district court erred in its analysis of this issue as well.

It is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of past discrimination when the proof of present effects is so weak. See *Croson*, 488 U.S. at 507 (majority opinion). In determining whether the Banneker Program is narrowly tailored to accomplish its stated objective, we may consider possible race-neutral alternatives and whether the program actually furthers a different objective from the one it is claimed to remedy.[71] See *Croson*, 488 U.S. at 507.

A. Attraction to Only High-Achieving Black Students

The district court found that the Banneker Program attracted "high-achieving black students" to the University, which "directly increases the number of African-Americans who are admitted and likely to stay through graduation. Even more importantly, the Program helps to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students. Continuation of the Program thus serves to

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[70] We do not discuss here the hostile environment and poor reputation effects because they are not sufficient to justify the program. See Part II.A, supra.

[71] Because the Banneker requirement of African descent does not establish the same kind of racial quota as a 50% promotion requirement, the tests articulated in Justice Brennan's plurality opinion and Justice Powell's concurring opinion in *United States v. Paradise*, 480 U.S. 149, 171 & 187, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987), and adopted by this circuit in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993), may need some slight adjustment when applied in the context of a raceexclusive minority scholarships case. Although *Croson*, too, involved an outright racial quota – a 30% minority business enterprise set-aside –- it also involved a claim of present effects of past discrimination. Therefore, we will consider the factors that the Court used in *Croson*. We note, however, that even if we were to apply the five-factor Hayes test, the program would not withstand scrutiny under those factors, either.

enhance [the University's] reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on campus." 838 F. Supp. at 1094-95. In sum, the district court found that the Banneker Program is employed by the University as an effective recruiting tool that draws high-achieving African-Americans to the University. The district court further noted that the University's "success in curing the vestiges of its past discrimination depends upon it attracting high-achieving African-Americans to the College Park campus." 838 F. Supp. at 1095. As we demonstrate below, in conducting its analysis, the district court did not sufficiently connect the problems the University purports to remedy to the Banneker Program: low retention and graduation rates and underrepresentation. If the purpose of the program was to draw only high-achieving African-American students to the University, it could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past.

B. Including Non-Residents of Maryland

The district court also erred in giving no weight to Podberesky's argument that the Banneker Program is not narrowly tailored because the scholarships are open to non-Maryland residents.[72] The district court stated that the goals of the program would be served "whether Banneker Scholars are Maryland natives or not." 838 F. Supp. at 1095 n.74. It is at once apparent that the Banneker Program considers all African-American students for merit scholarships at the expense of non-African-American Maryland students.

The University, throughout this case, has taken the position that the pool from which the students eligible to enter UMCP is drawn are from "qualified African-American high school students in Maryland," A. 3476, and "the University expects that the racial composition of its student body will reflect the racial composition of qualified college eligible high school graduates." A. 3476. While all of the prerequisites for membership in the pool were a matter of dispute between the parties, that the University measured its desired number of black students against Maryland high school graduates who are qualified to attend the University is not a matter of dispute. That being true, it is obvious that awarding Banneker Scholarships to non-residents of Maryland is not narrowly tailored to correcting the condition that the University argues, that not enough qualified African-American Maryland residents attend at College Park. Cf. *Croson*, 488 U.S. at 508.

[72] In 1992, for example, 17 of the 31 Banneker scholarships were awarded to non-residents of Maryland. Podberesky says without refutation that in 1989 a Banneker scholarship was offered to a Jamaican. Thus, the University gives African-American a hemispheric meaning.

C. Arbitrary Reference Pool

The district court found the program to be narrowly tailored to increasing representation because an increase in the number of high achieving African-American students would remedy the underrepresentation problem. The district court so found because it reasoned that the Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students. The Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (plurality opinion).

Furthermore, the district court's analysis of underrepresentation, although it relied on various academic criteria to determine eligibility, relied on each relevant criterion item by item instead of in combination. It is axiomatic that if all of the relevant criteria (270 verbal SAT score, 380 math SAT score, UMCP general course-curriculum requirements, and 2.0 GPA) were applied simultaneously, as indeed UMCP itself claims it most commonly does in determining admissions qualifications, the percentage of eligible Maryland residents who are African-American might well be significantly lower than the percentage satisfying the least burdensome of those criteria relied upon.[73] In other words, even within the confines of its own analysis, the district court's conclusion is based on flawed reasoning, and results in a series of inconclusive and possibly inflated figures regarding the makeup of the reference pool.

Moreover, and more important, eligibility is not the only relevant criterion in determining the reference pool in this case. We note the critical fact that application for admission to college is voluntary rather than obligatory. In addition, the choice of which institution to attend is voluntary, and is dependent upon many variables other than race-based considerations. Further, economic concerns and other factors, offered by Podberesky below, may induce many otherwise eligible African-American high school graduates not to enter college in numbers which are proportionately higher than those of their nonAfrican-American peers.

In short, the district court failed to account for statistics regarding that percentage of otherwise eligible African-American high school graduates who either: (1) chose not to go to any college; (2) chose to apply only to out-of-state colleges; (3) chose to postpone application to a

[73] This is because the least burdensome criterion for admission to UMCP is a limiting factor: no greater number of people can be accepted to UMCP than those satisfying this criterion, whichever one it is, in any given year. In point of fact, many of those satisfying this least burdensome criterion will fail to satisfy some or all of the other criteria, and thus will not be eligible to attend UMCP. Accordingly, the district court's failure to determine what percentage of the Maryland high school graduates were African-American and also satisfied all of these criteria, may well have inflated its determinations of the size of the relevant reference pool.

four-year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions.[74] What if, for example, in some year only 2/3 of those academically eligible African-American Maryland high school graduates applied to any college, while 90% of eligible non-African-American Maryland high school graduates did? What then would be the relevance of measuring the percentage of those eligible against the percentage of African-Americans in the UMCP student body?

We will not speculate as to what extent these variables might reduce the size of the reference pool, since no definitive information regarding these types of statistics is in the record.[75] We can say with certainty, however, that the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny. In analyzing underrepresentation, disparity between the composition of the student body and the composition of a reference pool is significant in this case only to the extent that it can be shown to be based on present effects of past discrimination. In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity. This the district court simply has not done. The result is no more than a collection of arbitrary figures upon which it held UMCP may rely in its efforts to recruit African-Americans using facially racial classifications.

The Supreme Court has stated in *Croson*, which involved a 30% racial set-aside quota, that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. Although the percentage of African-Americans that was expected to be in each entering class was disputed, see *supra* Part II.B., it is clear that the district court has implicitly approved the use by UMCP of a similar quota, because it "rests on ... unsupported assumptions," *Croson*, 488 U.S. at 502, as to the appropriate levels, if any, to remedy the present effects of past discrimination.

The district court has approved the use of the Banneker Program to affirmatively admit African-American students solely on the basis of race until the composition of African-

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[74] We can infer that significant numbers of UMCP-eligible Maryland African-Americans do choose to go to the predominantly African-American Maryland schools, such as Coppin State, Bowie State, and UM Eastern Shore, whether their reasons are economic, academic, geographic, or cultural, because the percentages of African-Americans in the student bodies at those schools are so high.

[75] Although it is not necessary to this analysis, because the district court's conclusion on this point cannot withstand strict scrutiny for failure altogether to consider these variables, we are convinced, based on common sense and what evidence there is in the record, that if these variables were accounted for in determining the relevant reference pool, the percentage of African-Americans in that pool would be lower than any figure postulated by the district court, and the disparity between UMCP's African-American population and that of the reference pool would be correspondingly reduced to a point where there might well be no statistically significant underrepresentation.

Americans on the University campus reflects the percentage of African-American Maryland high school graduates who potentially might participate in higher education at UMCP. Without an accurate determination of either the extent to which the present disparity exists, see *supra*, or the extent to which that disparity flows from past discrimination, see *supra* part I. The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes. Without specific determination of what measure should be used, if any, to remedy the effects of past discrimination that still exist, "'relief' . . . could extend until the percentage of [African-American students at UMCP] mirrored the percentage of [African-Americans] in the population as a whole." *Croson*, 488 U.S. at 498. We are thus of opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all.

D. Race-Neutral Alternatives

The district court also suggested that an increase in the number of high-achieving African-American students would remedy the low retention and graduation rates for African-American students at the University. Podberesky submitted a 1993 study by two University of Maryland professors that indicates that after the freshman year, in which grades are the principal problem, students leave the University for financial and other reasons.[76] Specifically, students who left the University "tended to be more likely to provide their own expenses, live off campus with long commutes, have a job with long hours, spend few free hours on campus, and have few friends on campus." Roger W. McIntire & Sandra Smith, "Work and Life Styles Among Dropouts and Ongoing College Students," 4 *J.A.* 1062, 1067 (survey of 455 drop-out and 455 returning University of Maryland students). "Males, minority groups and transfer students show greater attrition because they are more likely to provide their own expenses and have little time for campus activities and friends due to off campus living and work." 4 J.A. at 1068. That study suggests that the best remedy is "campus job opportunities and convenient, attractive, and economically reasonable campus housing...available to a greater proportion of students." 4 J.A. at 1070-71.

The district court rejected Podberesky's argument because it found that, in addition to economic hardship, in given cases an absence of commitment to the school because of its poor reputation in the community from which a student comes, the lack of shared experience with

[76] Students participating in the survey were asked to check a list of factors that were factors in their decisions to leave the University. We note that the students had the opportunity to choose that they "felt discriminated against due to race, gender, religion, or sexual preference." 4 J.A. at 1075.

family members to help the student through the arduous process of higher education, the absence of African-American members of the faculty to serve as mentors and the existence of a hostile racial atmosphere on campus are other significant contributing factors. 838 F. Supp. at 1091-92.

The causes of the low retention rates submitted both by Podberesky and the University and found by the district court have little, if anything, to do with the Banneker Program. To the extent that the district court's opinion can be read as having found a connection between the University's poor reputation and hostile environment and the Banneker Program, it is on either a role model theory or a societal discrimination theory, neither of which can be sustained. In addition, there is no connection between the Banneker Program and shared experience with family members, African-American faculty members, or jobs and housing. Even if there is some connection between the two, the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the University's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

Because we find that the University has not shown that its programs and quota goals are narrowly tailored, we reverse the district court's grant of summary judgment to the University. We also reverse the district court's denial of Podberesky's summary judgment motion.

* * * *

The University has had two opportunities to justify its position and has failed.

Accordingly, on remand, the district court will enter its order denying the University's motion for summary judgment, granting Podberesky's motion for summary judgment, and requiring the University to re-examine Podberesky's admission to the Banneker Program as of the date it was made. On such re-examination, the University will be enjoined from enforcing that part of the qualifications for entry into the Banneker Program, which require that the applicant be of the African-American race. Following such re-examination, the district court will award appropriate relief if required.

The judgment of the district court is vacated, and the case is remanded for action consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.*

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* Podberesky has not asked for relief against the intervenors who have been awarded Banneker scholarships prior to this decision; therefore, none will be awarded against them except taxable costs and attorneys fees. Podberesky, also, has not asked for relief against any other student who has been awarded a Banneker scholarship prior to this decision; therefore, this decision has no effect on such students. We note that attorneys' fees are not awarded as a matter of course against unsuccessful intervenors, see *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), and we express no opinion as to whether or not the district court should make such an award on remand.

Notes and Questions

1. The *Podberesky* case, including the proceedings prior to the 1994 Fourth Circuit opinion, is discussed in the Text Section 7.3.4.

2. The court characterizes the racial tensions on campus and the under-representation of African-American students as the result of "societal discrimination," rather than as the present effects of the university's own past discrimination. For a discussion of U.S. Supreme Court treatment of "societal discrimination," see the Text Section 7.2.5. Apart from the evidence presented by the University of Maryland, is there any argument that could convincingly link prior de jure discrimination with current problems encountered by African-American (and other minority) students on college campuses?

3. The University proffered another justification for the program's constitutionality: the recipients of the scholarships would serve as role models for other African-American students. In rejecting this argument, the appellate court relied on the Supreme Court's reaction to the role model theory in *Wygant v. Jackson*, discussed in the Text Section 4.6.3.

4. The appellate panel also criticized the district court's acceptance of the University's argument that only Maryland high school graduates should constitute the reference pool. The issue of the relevant pool for comparison purposes in discrimination litigation has arisen frequently in the employment context. See *Hazelwood School District v. United States*, 433 U.S. 299, 306-309 (1977). If the University had used all high school graduates, rather than just Maryland high school graduates, would the court have reached a different conclusion about the program?

5. After *Podberesky*, on what grounds might a public college or university justify a race-exclusive scholarship program? Assuming that the institution no longer engages in de jure or de facto discrimination against racial or ethnic minority students, do any grounds remain to uphold these programs? How about scholarship programs that are not race-exclusive but use race as one of the factors to consider in making awards – could such programs be constitutional after *Podberesky*? Under what circumstances? To answer such questions, it is no longer sufficient to rely on *Podberesky*, even in the Fourth Circuit. This is because *Grutter* and *Gratz*, the Michigan cases on affirmative action in

admissions (see the Text Section 7.2.5) also have some application to affirmative action in financial aid. For discussion, see the Text Section 7.3.4.

SEC. 7.4.1. Housing Regulations

Board of Trustees of the State University of New York v. Fox
492 U.S. 469, 109 S. Ct. 3028 (1989)

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.

I.

The State University of New York (SUNY) has promulgated regulations governing the use of school property, including dormitories. One of these, Resolution 66-156 (1979), states:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events."

American Future Systems, Inc. (AFS) is a company that sells housewares, such as china, crystal, and silverware, to college students; it markets its products exclusively by the technique popularly called (after the company that pioneered it) "Tupperware parties." This consists of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward).

In October 1982, an AFS representative was conducting a demonstration of the company's products in a student's dormitory room at SUNY's Cortland campus. Campus police asked her to leave because she was violating Resolution 66-156. When she refused, they arrested her and charged her with trespass, soliciting without a permit, and loitering. Respondent Fox, along with several fellow students at SUNY/Cortland, sued for declaratory judgment that, in prohibiting their hosting and attending AFS demonstrations, and preventing their discussions with other "commercial invitees" in their rooms, Resolution 66-156 violated the First Amendment.

* * * *

The District Court...found for the university on the ground that the SUNY dormitories did not constitute a public forum for the purpose of commercial activity and that the restrictions on speech were reasonable in light of the dormitories' purpose, 649 F. Supp. 1393 (1986).

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded. 841 F.2d 1207 (1988).

* * * *

Viewing the challenged application of Resolution 66-156 as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the Court of Appeals concluded that it was unclear whether Resolution 66-156 directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The Court of Appeals therefore reversed the judgment and remanded to the trial court for "a suitable order" based upon "appropriate findings" on these points.[77] We granted certiorari, 488 U.S. 815 (1988).

II.

In reviewing the reasoning the Court of Appeals used to decide this case,[78] the first question we confront is whether the principal type of expression at issue is commercial speech. There is no doubt that the AFS "Tupperware parties" the students seek to hold "propose a commercial transaction," *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), which is the test for identifying commercial speech. . . . They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home. Relying on *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), respondents contend that here pure speech and commercial speech are

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[77] On October 3, 1988, the same day on which we granted certiorari, the District Court issued its decision on remand, striking down Resolution 66-156 because it did not accomplish the State's goals through the least restrictive means possible. 695 F. Supp. 1409 (NDNY). By stipulation of the parties the District Court stayed its mandate and all further proceedings pending our action. See Stipulation, No. 82-CV-1363 (Nov. 23, 1988).

[78] Besides attacking the judgment on the grounds that the Court of Appeals misperceived the constitutional principles governing restriction of commercial speech, the State argues that the resolution should be upheld even if the speech here was not commercial, because SUNY dormitories are not a public forum, and the restrictions constitute permissible "time, place, and manner" limitations. Pursuing such an analysis would require us to resolve both legal and factual issues that the Court of Appeals did not address. Since we find that the Court of Appeals must be reversed on the basis of its own analysis, we decline to go further.

"inextricably intertwined," and that the entirety must therefore be classified as noncommercial. We disagree.

Riley involved a state-law requirement that in conducting fund-raising for charitable organizations (which we have held to be fully protected speech) professional fund-raisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the State's contention that the statement was merely compelled commercial speech, we responded that, if so, it was "inextricably intertwined with otherwise fully protected speech," and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Ibid*. There, of course, the commercial speech (if it was that) was "inextricably intertwined" because the state law required it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 67-68 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S., at 563, n. 5." We discuss this case, then, on the basis that commercial speech is at issue.

We have described our mode of analyzing the lawfulness of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, *supra*, at 566.

The Court of Appeals held, and the parties agree, that the speech here proposes a lawful transaction, is not misleading, and is therefore entitled to First Amendment protection. The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility. The Court of Appeals did not decide, however, whether Resolution 66-156 directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made. It is the terms of the remand, however, that are the major issue here – specifically, those pertaining to the last element of the *Central Hudson* analysis. The Court of Appeals in effect instructed the District Court that it could find the resolution to be "not more extensive than is necessary" only if it is the "least restrictive measure" that could effectively protect the State's interests.

Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, see, e.g., *Central Hudson*, 447 U.S., at 566. . . .

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[W]e now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State.

* * * *

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding "far less restrictive and more precise means." *Shapero v. Kentucky Bar Assn.*, 486 U.S., at 476.

* * * *

On the other hand, our decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) "not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it." 478 U.S., at 344. Rather, we said that it was "up to the legislature to decide" that point, so long as its judgment was reasonable. *Ibid.*

* * * *

In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing...the harmless from the harmful,'" *Shapero, supra*, at 478, quoting *Zauderer, supra*, at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas, supra*, at 341 – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," In re *R. M. J.*, *supra*, at 203; that employs not necessarily the least restrictive means but, as we have put it in the other contexts..., a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer, supra*, at 647, it must affirmatively establish the reasonable fit we require. By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to

governmental regulation," *Ohralik v. Ohio State Bar Assn.,* 436 U.S., at 455-456. Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id*., at 456.

III.

Finally, we must address respondents' objection that, even if the principal First Amendment interests they asserted involve commercial speech and have not improperly been restricted, Resolution 66-156 must nonetheless be invalidated as overbroad, since it prohibits as well fully protected, noncommercial speech. Although it is true that overbreadth analysis does not normally apply to commercial speech..., that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground – our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators.

* * * *

Here, however, although the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to noncommercial speech, and that is what counts. . . .

On the record before us here, Resolution 66-156 must be deemed to reach some noncommercial speech. A stipulation entered into by the university stated that the resolution reaches any invited speech "where the end result is the intent to make a profit by the invitee." App. 87. More specifically, a SUNY deponent authorized to speak on behalf of the university under Federal Rule of Civil Procedure 30(b)(6) testified that the resolution would prohibit for-profit job counseling in the dormitories, *id*., at 133; and another SUNY official testified that it would prohibit tutoring, legal advice, and medical consultation provided (for a fee) in students' dormitory rooms, see *id*., at 162, 181-183. While these examples consist of speech for a profit, they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech, see *Virginia Pharmacy Board*, 425 U.S., at 761 (collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, e. g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

In addition to being clear about the difference between commercial and noncommercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in as-applied analysis that a statute regulating commercial speech must be "narrowly tailored," which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: The person invoking the commercial-speech narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Assn.*, 436 U.S., at 462, he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him," *id.*, at 462, n. 20.... Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same over breadth.

* * * *

Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else. Respondents' invocation of the doctrine in the present case is unusual in that the asserted extensions of Resolution 66-156 beyond commercial speech that are the basis for their overbreadth challenge are not hypothetical applications to third parties, but applications to the student respondents themselves, which were part of the subject of the complaint and of the testimony adduced at trial. Perhaps for that reason, the overbreadth issue was not (in the District Court at least) set forth in the normal fashion – viz., by arguing that even if the commercial applications of the resolution are valid, its noncommercial applications are not, and this invalidates its commercial applications as well. Rather, both commercial and (less prominently) noncommercial applications were attacked on their own merit – with no apparent realization, we might add, on the part of either respondents or the District Court, that separate categories of commercial speech and noncommercial speech, rather than simply various types of commercial speech, were at issue.

* * * *

It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is

unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma, supra*, at 615, and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

In the present case, it has not yet been properly determined that the restrictions on respondents' commercial speech are valid as applied. . . . [A] fortiori, we decline to resolve here the issue normally subsequent to rejection of the as-applied challenge, whether the statute is overbroad. We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial and noncommercial speech that is the subject of the complaint; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

* * * *

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The majority holds that "least-restrictive-means" analysis does not apply to commercial-speech cases, a holding it is able to reach only by recasting a good bit of contrary language in our past cases. I would have preferred to leave the least-restrictive-means question to another day, and dispose of the case on the alternative – and, in this case, narrower – ground of overbreadth. . . .[4]

[4] Although at times we have suggested that as-applied challenges should be decided before overbreadth challenges, see *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491 (1985), we have often felt free to do otherwise, see *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569 (1987); *Houston v. Hill*, 482 U.S. 451 (1987). Here, the Court has a choice between deciding the general question whether "governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end," *ante*, at 471, and the specific question whether this particular resolution is void because of unconstitutional overbreadth. Surely, the former question is the more sweeping one in terms of constitutional law.

That Resolution 66-156 is substantially overbroad in its potential application to noncommercial speech is readily apparent. As the university interprets the resolution, any speech in a dormitory room for which the speaker receives a profit is speech by a "private commercial enterprise," prohibited by the resolution. See *ante*, at 482-483. As the majority correctly observes, *ante*, at 482, the resolution so interpreted prohibits not only commercial speech (i.e., speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment. We have been told by authoritative university officials that the resolution prohibits a student from meeting with his physician or lawyer in his dorm room, if the doctor or lawyer is paid for the visit. We have similarly been told that the resolution prohibits a student from meeting with a tutor or job counselor in his dorm room. *Ibid*. Presumably, then, the resolution also forbids a music lesson in the dorm, a form of tutoring. A speech therapist would be excluded, as would an art teacher or drama coach.

A public university cannot categorically prevent these fully protected expressive activities from occurring in a student's dorm room. The dorm room is the student's residence for the academic term, and a student surely has a right to use this residence for expressive activities that are not inconsistent with the educational mission of the university or with the needs of other dorm residents (the distinction between tuba lessons and classical guitar lessons, or between drawing lessons and stone sculpture lessons, comes immediately to mind). See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); cf. *Kovacs v. Cooper*, 336 U.S. 77 (1949). It cannot plausibly be asserted that music, art, speech, writing, or other kinds of lessons are inconsistent with the educational mission of the university, or that a categorical prohibition of these activities is the "least-restrictive means" (or is even "narrowly tailored") to protect the interests of other dorm residents. Nor is there any possible basis for believing that in-dorm psychological or vocational counseling is incompatible with the university's objectives or the needs of other residents. Thus, the broad reach of Resolution 66-156 cannot be squared with the dictates of the First Amendment.

More important, the resolution's overbreadth is undoubtedly "substantial" in relation to whatever legitimate scope the resolution may have. See *Houston v. Hill*, 482 U.S. 451, 458 (1987); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569, 574 (1987). Even assuming that the university may prohibit all forms of commercial speech from a student's dorm (a proposition that is by no means obvious under our precedents),[80] the resolution's impermissible restrictions upon fully protected speech amount to a considerable portion of the resolution's potential applications. Because the resolution makes no effort to

[80] For example, it is highly doubtful that the university could prohibit students from inviting to their rooms a representative from a birth-control clinic, from whom the students seek information about services the clinic provides for a fee. Cf. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

distinguish between commercial and noncommercial speech, or to narrow its scope to the perceived evil it was intended to address, see *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), it sweeps within its reach far more protected expression than is tolerable under the First Amendment.

In this respect, the resolution here is equivalent to the one struck down on overbreadth grounds in *Jews for Jesus, supra*, a resolution that banned all "First Amendment activities" within the central terminal area of a major urban airport. By prohibiting all speech in a dorm room if the speaker receives a fee, the resolution in this case, like the resolution in *Jews for Jesus,* indiscriminately proscribes an entire array of wholly innocuous expressive activity, and for that reason is substantially overbroad. I therefore would hold Resolution 66-156 unconstitutional on its face now, in order to avoid chilling protected speech during the pendency of proceedings on remand.

Notes and Questions

1. In *Fox*, Justice Scalia requires the lower court to use a "narrowly tailored" or "reasonable fit" test, rather than a "least restrictive means" requirement, when evaluating the SUNY resolution at issue in this case. Which test is more difficult for universities to meet, and why?

2. What is the difference between commercial and non-commercial speech? How do the First Amendment protections for commercial speech differ from those for non-commercial speech? What is the justification for a different standard of protection for commercial speech?

3. Justice Scalia distinguishes between two types of constitutional analysis regarding prohibitions on speech: "facial overbreadth" analysis, in which a regulation is challenged as invalid on its face and in its totality, irrespective of its particular application in the case at hand; and "unconstitutional-as-applied" analysis, in which a regulation is challenged as invalid only as it applies to the particular parties and facts before the court (other potential applications remaining valid). The majority refused to determine whether the regulation was unconstitutionally overbroad under the first form of analysis. Why? What directions did the Court provide for the lower court regarding its consideration of

the overbreadth issue? Is the regulation at issue in *Fox* constitutionally overbroad, as Justice Marshall suggests in his dissent?

4. How might one draft a regulation that permits tutoring and "educational" services performed for a fee while still prohibiting the kinds of commercial transactions that stimulated the *Fox* litigation?

SEC. 7.4.2. Student Housing – Searches and Seizures

Commonwealth v. Eric W. Neilson
N.E.2d 984 (Mass. 1996)

OPINION BY: LYNCH

The defendant, Eric W. Neilson, is charged with illegal possession of marihuana and cultivating and distributing marihuana, in violation of G. L. c. 94C, §§ 32C, 34 (1994 ed.). A District Court judge allowed the defendant's motion to suppress evidence and contraband obtained in a search of his dormitory room at Fitchburg State College. A single justice of this court granted the Commonwealth's application for an interlocutory appeal from the allowance of the defendant's motion and transmitted the case to the Appeals Court. We transferred the case here on our own initiative and now affirm the decision of the District Court.

1. Facts. The motion judge did not recite the detailed findings, but there is no dispute as to the following facts. At the time of his arrest, the defendant was a twenty-three year-old student living in a dormitory at Fitchburg State College, a public institution. Before moving into the dormitory, the defendant signed a residence hall contract, which stated, in relevant part that "residence life staff members will enter student rooms to inspect for hazards to health or personal safety."

On the morning of April 30, 1993, a maintenance worker heard a cat inside a dormitory suite containing four bedrooms, including the defendant's. He reported the information to college officials, who visited the suite and informed one of the residents (not the defendant) that any cat must be removed pursuant to the college's health and safety regulations. That afternoon, a college official posted notices on all four bedroom doors of the suite, informing the students of the possible violation of college policy and alerting them that a "door-to-door check" would be conducted by 10 P.M. that night to ensure that the cat had been removed.

That night, the officials returned; the defendant was not present. While searching the defendant's bedroom, the officials noticed a light emanating from the closet. The officials, fearing a fire hazard, opened the closet door. There, they discovered two four-foot tall marhiuana plants, along with lights, fertilizer, and numerous other materials for marihuana cultivation and use.

The officials stopped their investigation at that point, and requested the assistance of the Fitchburg State College campus police, who have powers of arrest. G. L. c. 22C, § 63 (1994 ed.). The police arrived at the suite, entered the bedroom, and observed the marijuana plants and other apparatus. They took photographs of the evidence and then, with the help of the college

officials, removed it from the room. At no time did the police seek, obtain, or possess a warrant for the search.

2. Discussion. The District Court judge ruled that the warrantless search of the dormitory room by the campus police violated the defendant's constitutional rights and that all evidence obtained as a result of the search should be suppressed. We affirm that conclusion for the reasons set forth below.

The right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution applies when the police search a dormitory room in a public college. See *Morale v. Grigel*, 422 F. Supp. 988, 997 (D.N.H. 1976) ("dormitory room is a student's home away from home"); *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 435, 272 A.2d 271 (1970) ("dormitory room is analogous to an apartment or a hotel room"). See also *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (students do not "shed their constitutional rights . . . at the schoolhouse gate"). To be reasonable in the constitutional sense, a search usually must be supported by probable cause and be accompanied by a search warrant, unless there are circumstances excusing the use of a warrant.

The probable cause and warrant requirements are relaxed, however, in the case of searches that occur in elementary and secondary public schools. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341-342 (1985); *Commonwealth v. Carey*, 554 N.E.2d 1199 (1990). There is no constitutional violation when a high school official conducts a warrantless search that is "reasonable in all the circumstances." This reduced standard was prompted by "concerns about school officials' vital responsibility to preserve a proper educational environment" and "'the special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself . . . .'"

The Commonwealth urges us to extend the lesser protections afforded to high school students into the collegiate arena. Although the courts that have examined the issue are split on whether the Fourth Amendment requires probable cause and a warrant in college searches,[4] when police are involved and the evidence obtained is to be used in a criminal proceeding, courts generally require probable cause and a warrant, absent express consent or exigent circumstances. See *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971); *People v. Cohen*, 292 N.Y.S.2d 706

[4] Compare *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *State v. Kappes*, 550 P.2d 121 (Ariz. App. Ct. 1976); *People v. Kelly*, 16 Cal. Rptr. 177 (Cal. Ct. App. 1961); *State v. Hunter*, 831 P.2d 1033, 1037 (Utah Ct. App. 1992), with *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971); *Morale v. Grigel*, 422 F. Supp. 988, 997 (D.N.H. 1976); *Smyth v. Lubbers*, 398 F. Supp. 777, 785 (W.D. Mich. 1975); *People v. Cohen*, 292 N.Y.S.2d 706 (N.Y. Dist. Ct. 1968); *Commonwealth v. McCloskey*, 435-436, 272 A.2d 271 (Pa. Super. 1970).

(N.Y. Dist. Ct. 1968); *Commonwealth v. McCloskey*, supra at 434-436. Cf. *People v. Haskins*, 369 N.Y.S.2d 869 (N.Y. App. Div. 975) ("A more strict standard would certainly apply if the search had been instigated by law enforcement officials or if law enforcement personnel had participated in the search to any significant degree, thereby directly tainting the search by the school official with State action"); *State v. Hunter*, 831 P.2d 1033, 1037 (Utah Ct. App. 1992) ("Nor did university officials attempt to delegate their right to inspect rooms to the police, which would result in the circumvention of traditional restrictions on police activity"). See also *New Jersey v. T.L.O.*, supra at 341 n.7 (not deciding whether probable cause and a warrant might be required when police are involved in a high school search); *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill. 1976) (junior high school search by police required probable cause).

The defendant does not contend (and the District Court judge did not find) that the initial search of the dormitory room by college officials was improper. The defendant consented to reasonable searches to enforce the college's health and safety regulations when he signed the residence contract. . . . The hunt for the elusive feline fit within the scope of that consent. . . . Similarly, when the college officials opened the closet door they were reasonably concerned about health and safety. Thus, the initial search was reasonable because it was intended to enforce a legitimate health and safety rule that related to the college's function as an educational institution.[5] See *Piazzola v. Watkins*, supra at 289 (search must further legitimate educational function); *Morale v. Grigel*, supra at 998 (same); *Smyth v. Lubbers*, 398 F. Supp. 777, 790 (W.D. Mich. 1975) (same). See generally Annot., 31 A.L.R.5th 229, 337-338 (1995).

Instead, the crux of the defendant's argument is that constitutional violation occurred when the campus police searched the room and seized evidence. We agree. The police entered the room without a warrant, consent, or exigent circumstances. This search was unreasonable and violated the defendant's Fourth Amendment rights. The Commonwealth contends that, since the college officials were in the room by consent, and observed the drugs in plain view while pursuing legitimate objectives, the police officers' warrantless entry was proper. Furthermore, the Commonwealth argues, the police action was lawful because it did not exceed the scope of the prior search and seizure by college officials. We disagree.

First, there was no consent to the police entry and search of the room. "The [defendant's] consent [was] given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it." *People v. Cohen*, supra. While the college officials were entitled to conduct a health and safety inspection, they "clearly . . . had no authority to consent to or join in a police search for evidence of crime." *Piazzola v. Watkins*, supra at 290.

[5] The college officials could have reported their observations to the police, who could have used the information to obtain a warrant.

Second, the plain view doctrine does not apply to the police seizure, where the officers were not lawfully present in the dormitory room when they made their plain view observations. . . . While the college officials were legitimately present in the room to enforce a reasonable health and safety regulation, the sole purpose of the warrantless police entry into the dormitory room was to confiscate contraband for purposes of a criminal proceeding. An entry for such a purpose required a warrant where, as here, there was no showing of express consent or exigent circumstances.

We conclude that, when the campus police entered the defendant's dormitory room without a warrant, they violated the defendant's Fourth Amendment rights. All evidence obtained as a result of that illegal search was properly suppressed by the judge below.

Judgment affirmed.

Notes and Questions

1. Note that the student was not challenging the unannounced inspection of his room by college officials (at this public university). Assume that the university charged the student with a violation of the code of student conduct and, after finding him guilty in a disciplinary hearing, suspended him for a semester. Could the student successfully challenge the unannounced entry by a college official in a lawsuit to overturn the result of the disciplinary hearing?

2. Suppose that Neilson's roommate had been in the residence hall room when the police knocked on the door, and the roommate admitted the police to the room. Can a roommate give the police permission to search the room? If the closet door had been open, could the marijuana be seized lawfully? May the police search Neilson's closets and bureau drawers based upon the roommate's consent?

3. Under the reasoning of this case, would a student at a public institution have a cognizable expectation of privacy in a laboratory desk or cabinet assigned to him? In a gym locker? In a work space in the office of a student organization? If you were advising a college about this issue, what would you recommend that the institution do to minimize its legal risk with respect to searches of these areas?

SEC. 7.6.2. Campus Security – Protecting Students Against Violent Crime

Nero v. Kansas State University
861 P.2d 768 (Kan. 1993)

The opinion was delivered by ABBOTT, J.:

Shana Nero appeals from the trial court's grant of summary judgment to Kansas State University (KSU). At issue is whether KSU has a duty to protect residents of university residence halls and, if so, the nature and extent of that duty.

Shana Nero was sexually assaulted in a coed residence hall by a fellow residence hall student, Ramon Davenport.

Thirty-five days earlier, Ramon Davenport resided in Moore Hall, a coed residence hall at KSU. On that date, April 28, 1990, Ramon Davenport was accused of raping J.N., a female resident of Moore Hall.

The following Monday, April 30, 1990, because of the accusation of rape against Davenport and after consultation between KSU housing and student life administrators and staff members, Davenport was assigned temporarily to Marlatt Hall, an all-male residence hall on the other side of the campus. The Assistant Director of Housing, Dr. Rosanne Priote, sent Davenport a letter dated April 30, 1990, confirming the temporary residence hall assignment and requesting he not enter Moore Hall or Derby Food Center until further notice in order to provide "some physical distance" between J.N. and Davenport. After meeting with Davenport, Dr. Susan M. Scott, Associate Dean of Student Life, in a letter dated May 2, 1990, confirmed Davenport's voluntary agreement to be reassigned to Marlatt Hall for the remainder of the academic year. Dr. Scott also commented that because Davenport had agreed to the reassignment, KSU would not initiate immediately a university adjudication of the incident, but reserved the right to do so at a later date depending upon the outcome of the criminal charge. KSU does not have a set policy, practice, or procedure for removing from student housing a student accused of the rape or sexual assault of another student in a residence hall.

On May 2, 1990, Davenport was charged with rape in the Riley County District Court. He pleaded not guilty and was released on bond. The *Manhattan Mercury* and the *Kansas State Collegian* reported Davenport's arrest, the charge against him, his plea of not guilty, and his release on bond.

At the close of the 1989-90 academic year, only one residence hall, Goodnow Hall, was available for students attending intersession and summer school. Goodnow Hall was a coed residence hall.

Davenport moved into Goodnow Hall for the 1990 spring intersession, beginning May 18 and ending June 3. Shana Nero, a University of Oklahoma student, came to KSU for the intersession and was assigned to Goodnow Hall. Nero had two brief conversations with Davenport prior to June 2, 1990. She knew he was a KSU student living in the same residence hall.

On June 2, 1990, Nero was doing laundry and watching television in the basement recreation room of Goodnow Hall. Davenport came into the lounge and sexually assaulted her while the two of them were watching television.

On June 4, 1990, KSU terminated Davenport's summer school residence hall contract and instructed him to remove his belongings from Goodnow Hall by 8:00 p.m. that evening and not to enter any food service building or residence hall for any reason.

Nero brought a complaint against Davenport under KSU's Policy Prohibiting Sexual Violence, which had been adopted in 1989. Pursuant to Nero's complaint, Davenport was found to have violated the policy.

On August 29, 1990, Davenport pleaded guilty to the rape of J.N. In exchange for Davenport's plea on the rape charge, the sexual assault charge involving Nero was dropped.

Nero subsequently filed a negligence suit against KSU, alleging the university had a duty to protect her against Davenport's sexual advances and had failed to exercise reasonable care to do so. Nero also filed a claim of sexual assault and battery against Davenport. The trial court granted summary judgment against Davenport, and that judgment is not an issue in this appeal. The trial court granted KSU's motion for summary judgment. Nero appealed to the Court of Appeals. The case was transferred to this court, pursuant to K.S.A. 20-3018(c).

Nero claims the trial court erred in granting KSU's summary judgment motion because the court only partially analyzed whether KSU owed a duty of care to her. According to the plaintiff, KSU had a duty to protect her from Davenport's actions because of the university's "special relationship" with both Davenport and her and because she shared a landlord-tenant relationship with KSU.

> "In a negligence action, summary judgment is proper if the only questions presented are questions of law. To recover for negligence, the plaintiff must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered. Whether a duty exists is a question of law. Whether the duty has been breached is a question of fact." *Honeycutt v. City of Wichita,* 251 Kan. 451, Syl. P 8, 836 P.2d 1128 (1992).

The trial court, and this court on appeal, first must determine whether a duty exists. Without a duty, there can be no breach to support a plaintiff's claim. *Hackler v. U.S.D.* No. 500, 245 Kan. 295, 297, 777 P.2d 839 (1989).

In *Thies v. Cooper*, 243 Kan. 149, 151, 753 P.2d 1280 (1988), this court recognized:

> "It is the general rule that an actor has no duty to control the conduct of a third person to prevent that person from causing harm to others unless a 'special relationship' exists between the actor and the third party or the actor and the injured party. *Restatement (Second) of Torts* § 315 (1963)."

As far back as 1983, this court, speaking through Justice McFarland, stated:

> Although this court has never formally adopted...§ 315,... we discussed the concept of special relationship in *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982). . . . We observed a special relationship or specific duty has been found when one creates a foreseeable peril, not readily discoverable, and fails to warn. 231 Kan. at 364. *Durflinger v. Artiles*, 234 Kan. 484, 499, 673 P.2d 86 (1983).

The *Restatement (Second) of Torts* § 315 (1964), provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Comment c to § 315 explains:

> "The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319. The relations between the actor and the other which require the actor to control the conduct of the third persons for the protection of the other are stated in §§ 314A and 320."

> "A special relationship may exist between parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another. *Restatement (Second) of Torts* §§ 316-320 (1964)." McGee, 248 Kan. at 438.

Although Nero never explicitly argued that the distinctive nature of the university-student relationship imposed a duty of care upon KSU, our discussion commences with this argument because the converse view formed the basis of the trial court's grant of summary judgment in favor of KSU. The trial court ruled that the university-student relationship in and of itself was not a special relationship within the meaning of § 315 and, upon that basis, refused to impose a duty upon KSU to protect Nero from Davenport's actions. The court reasoned that a plaintiff cannot predicate a university's liability on "the outmoded doctrine of *in loco parentis*" and that, in general, universities today "have no legal duty to shield their students from the dangerous activities of other students." Finding no Kansas cases on point, the trial court relied upon cases from other jurisdictions. See *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied* 446 U.S. 909 (1980); *Tanja H. v. Regents of the University of California*, 278 Cal. Rptr. 918 (1991); *Crow v. State of California*, 271 Cal. Rptr. 349 (1990); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (1981); *Eiseman v. State of New York*, 518 N.Y.S.2d 608 (1987). With regard to the doctrine of *in loco parentis*, the weight of authority is in agreement with the trial court's ruling. See *Furek v. University of Delaware*, 594 A.2d 506, 519-20 (Del. 1991). For a general discussion of the *in loco parentis* doctrine, see Szablewicz & Gibbs, "Colleges' Increasing Exposure to Liability: The New *In Loco Parentis*," 16 J. L. & Educ. 453 (1987); Note, "The Doctrine of I*n Loco Parentis*, Tort Liability and the Student-College Relationship," 65 Ind. L.J 471, 472 (1990).

The trial court found no Kansas cases that considered "whether colleges and universities have a duty to protect students living in their residence halls from sexual assaults by other students living in the halls" or "whether colleges and universities have a duty to warn other students when an individual living in its residence halls has been charged with sexual assault or any other crime." None of the cases the trial court cited are exactly on point, and all can be distinguished factually. The same can be said for the cases Nero cites.

[The court then discusses several cases related to institutional liability for injuries to students. These opinions refused to find institutions liable because the injuries were not foreseeable. These cases are discussed in *LHE* 5th secs. 3.2.2.1 and 7.6.2.]

* * * *

Nero cites two cases in which courts have held that liability may be imposed upon a university, based, at least in part, upon the distinctive university-student relationship. See *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991); *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983).

[*Furek* is discussed in *LHE* 5th sec. 11.2.3, p. 1293; *Mullins* is discussed in *LHE* 5th sec. 8.6.2, p. 1025.]

* * * *

We hold the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life.

There are, however, other theories under which a university might be held liable. See, e.g., Note, "The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students," 16 J.C. & U.L. 119, 123-30 (1989). See generally Bazyler, "The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack," 21 Ariz. L. Rev. 727, 745 (1979); Browder, "The Taming of a Duty – The Tort Liability of Landlords," 32 Def. L.J. 497, 500, 540-50 (1983); Selvin, "Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline," 9 Real Estate L.J. 311 (1981); Note, "Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity," 33 Vand. L. Rev. 1493, 1503-07 (1980); "Annot.," 1 A.L.R.4th 1099 (discussion of a university's liability for failure to protect a student from crime); "Annot.," 43 *A.L.R.*3d 331, 348-53 (discussion of a landlord's duty to protect against crime).

Nero raises other theories. She initially claims the trial court erred in not addressing whether the evidence established a special relationship, other than one based upon the doctrine of *in loco parentis*, between KSU and Davenport or between KSU and herself.

The plaintiff focuses upon the relationship between KSU and Davenport. She claims KSU took charge of Davenport and was under a duty to exercise reasonable care to control him and prevent him from physically harming others because the university knew or should have known he was likely to cause such harm. The legal basis for her argument is *Restatement (Second) of Torts* §§ 315(a), 319 (1964).

Under § 315(a), a special relationship must exist between KSU and Davenport that imposes a duty upon KSU to control Davenport's conduct. . . . Nero alleges that special relationship is based upon § 319, the duty of those in charge of a person having dangerous

propensities. The fact that KSU changed Davenport's residence hall assignment, with his agreement, because of the rape accusation does not mean the university was "in charge" or "took charge" of Davenport within the meaning of § 319. This is exemplified by the illustrations following that section. One illustration involves a private hospital for contagious diseases permitting a patient who has infectious scarlet fever to leave the hospital with the assurance he is recovered and the hospital negligently allowing another infectious patient to escape. The other illustration concerns a private sanitarium for the insane negligently allowing a homicidal maniac to escape.

Cases in which this court has applied § 319 typically have involved prisoners. See *Cansler*, 234 Kan. 554, Syl. PP 2, 3 (the State has a duty to confine inmates securely and, if inmates escape, to notify area residents and area law enforcement); *Washington*, 17 Kan. App. 2d 518, Syl. P 2 ("Prison officials owe a duty of ordinary or reasonable care to safeguard a prisoner in their custody or control from attack by other prisoners."). *C.J.W. v. State*, 253 Kan. 1, 853 P.2d 4 (1993), involved the alleged assault and sexual molestation of a 12-year-old child by a 17-year-old bully, both of whom were in the custody of juvenile officials at the time of the alleged attack. SRS was aware of the older child's "history of violent and sexually deviant acts." 253 Kan. at 12. This court applied §§ 315, 319, and 321 of the *Restatement*, holding the State had a duty to warn the juvenile officials of the older child's propensity toward violence and to protect children who are taken into custody from others, including other children, in custody. In *Beck v. Kansas Adult Authority*, 241 Kan. 13, 735 P.2d 222 (1987), Bradley Boan, "a disturbed former prisoner...and a former mental patient," walked into the emergency room at the KU Medical Center and fired three shots, killing two people. This court held that the Medical Center did not have a common-law duty to warn because "the Medical Center did not take charge of Boan and did not have custody or control over him at any time after his release from the penitentiary or at the time he entered the Medical Center with shotgun in hand." 241 Kan. at 23. Here, KSU did not have the type of control or custody over Davenport contemplated by § 315.

The trial court found Nero's reliance upon *Cansler v. State*, 234 Kan. 554, misplaced in that "the duty of those in charge of persons with dangerous propensities has no application to the University residence hall setting." KSU urges this court to agree, stating the relationship between a university and its students is not analogous to the relationship between a prison and its inmates.

We believe the issue before us to be more basic. The trial court granted summary judgment. The law concerning the granting of summary judgment is well defined and has been stated in hundreds of cases; thus, we need not set it forth again. KSU is a landlord furnishing housing to its students in competition with private landlords. It owes a duty of reasonable care to its tenants. KSU has discretion whether to furnish housing to students. Once that discretionary

decision is made, the university has a duty to use reasonable care to protect its tenants. Generally, whether a landlord has breached the duty of reasonable care to a tenant is a question of fact.

"Whether risk of harm is reasonably foreseeable is a question to be determined by the trier of fact. Only when reasonable persons could arrive at but one conclusion may the court determine the question as a matter of law. [Citation omitted.]" *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 362, 819 P.2d 587 (1991).

"A proprietor of an inn, tavern, restaurant, or like business is liable for an assault upon a guest or patron by another guest or third party where the proprietor has reason to anticipate such an assault and fails to exercise reasonable care to forestall or prevent the same."

"The duty of a proprietor of a tavern or inn to protect his patrons from injury does not arise until the impending danger becomes apparent to him, or the circumstances are such that a careful and prudent person would be put on notice of the potential danger." *Gould v. Taco Bell*, 239 Kan. 564, Syl. PP 1, 3, 722 P.2d 511 (1966).

Other jurisdictions have applied the landowner-invitee analysis to determine whether a university has a duty to protect students from the criminal actions of third parties. See *Peterson v. San Francisco Community College Dist*., 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193 (1984); *Furek v. University of Delaware*, 594 A.2d 506, 520-21 (Del. 1991); *Relyea v. State*, 385 So. 2d 1378 (Fla. Dist. App. 1980), disapproved on other grounds *Avallone v. Bd. of County Com'rs Citrus Cty*., 493 So. 2d 1002 (Fla. 1986); *Setrin v. Glassboro State College*, 136 N.J. Super. 329, 346 A.2d 102 (1975); *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 309 S.E.2d 701 (1983). In analyzing the issue, all but the *Relyea* court relied upon *Restatement (Second) of Torts* § 344 (1964) which provides:

> "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to:
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."

The general rule is that a landowner has no duty to protect an invitee on the landowner's premises from a third party's criminal attack unless the attack is reasonably foreseeable. Prior similar acts committed upon invitees furnish actual or constructive notice to a landowner.

Relyea, 385 So. 2d at 1382-83. A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants. See *Peterson*, 36 Cal. 3d at 807.

We emphasize that a university is not an insurer of the safety of its students. Nonetheless, a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control.

Here, KSU knew of the alleged rape and had taken reasonable steps under the circumstances – i.e., it removed Davenport from the coed dormitory and moved him across campus and into an all-male dormitory. The university requested that Davenport stay away from the coed dorm and the food service building. School was ending, and Davenport was allowed to finish the semester.

When Davenport enrolled for intersession, KSU had the option of refusing to rent space to him. Instead, the university placed him in a coed dorm with the plaintiff, who is from a different state and presumably had no knowledge of the pending rape charge against Davenport. Nero knew Davenport was a fellow student living in the same dormitory, which may have given her a false sense of security. She ended up alone with Davenport in a public area. Had Davenport been a stranger and not living in the same dormitory, Nero might have been more likely to protect herself by immediately leaving the area.

We are of the opinion reasonable people would disagree whether Davenport's attack on Nero was foreseeable. Thus, that issue must be resolved by the trier of facts, and the trial court erred in granting summary judgment.

* * * *

[The University argued that it was immune from liability under the discretionary function exception to the Kansas Tort Claims Act.]

We conclude that KSU exercised its discretion to build, maintain, and operate housing units. Once that discretionary decision was made, KSU had a legal duty to use reasonable care under the circumstances in protecting the occupants of the coed housing unit from foreseeable criminal conduct while in a common area. A factual issue remains whether KSU used reasonable care in carrying out its legal duty to Shana Nero when it placed Ramon Davenport in a coed housing unit with her. A question also exists concerning a failure to warn her and a failure to institute adequate security measures to protect female students in the same housing unit based upon KSU's knowledge of the reported sexual attack by Ramon Davenport some three weeks earlier. Whether the second attack was foreseeable by KSU and whether KSU took

adequate steps under the circumstances to prevent the second attack are questions of fact, and the trial court erred in granting summary judgment.

Reversed and remanded for trial.

Notes and Questions

1. The *Nero* court looks to *Bradshaw* and its progeny (the Text Section 3.2.2.) for guidance on whether to resurrect the *in loco parentis* doctrine. Why does the court reject Nero's argument that a special relationship exists between the university and its students, requiring the university to protect her from physical assault?

2. Compare the *Nero* opinion with the outcome and reasoning in *Mullins v. Pine Manor*, the Text Section 7.6.2. Which is the better-reasoned opinion, in your judgment? What implications does each theory have for the way that colleges and universities design their residence halls? Implement security systems? Train residence hall staff? Monitor student conduct?

3. The court notes, in its recitation of the facts in *Nero*, that the university had not prosecuted the accused rapist under its student code of conduct because criminal charges were pending. Does this decision of the university have any bearing on its potential liability to Ms. Nero, since there had been no finding of guilt or innocence? For discussion of the issues involved when a student concurrently violates a criminal law and also violates the institution's code of student conduct, see the Text Section 9.1.4, pp. 674-675.

4. If a nonstudent, who was on the campus for a lawful purpose, was assaulted by a student whom the university knew had engaged in similar behavior before, would the analysis in *Nero* apply, or is it limited to situations in which the university is a landlord?

5. Many colleges argue that residence hall programming is an important part of a student's academic experience. Would the existence of such programming be relevant to a court's analysis of whether a college breached its duty under the landlord-tenant doctrines?

SECS. 7.4.1. and *7.6.2. Housing Regulations* and *Protection Against Violent Crime on Campus*

Problem 14

Richard Ropes is a 30-year-old sophomore at Green College, a private, four-year liberal arts college. Ropes is living in a coed residence hall on campus. College administrators were informed at the time of Ropes' matriculation that he had served six years in prison for assault and drug charges. Until last Saturday, however, he has not caused a problem for the residence hall staff or for anyone else, for that matter. Underage drinking is common in the residence hall, but there is no indication that Ropes has been involved in any of the drinking. Green College has a policy against underage drinking anywhere on campus, but enforces it only outside the residence halls.

After a big soccer match last Saturday, several residents of Ropes' residence hall invited him to a party. Ropes brought five six-packs of beer, as did several of the other sophomores, all of whom were under age 21. During the party, a dispute developed over one of the plays in the soccer match. One of the younger students shouted at Ropes and taunted him, calling him "old man." Ropes responded by striking the student in the face several times, causing severe facial injuries and permanent disfigurement.

The injured student's parents have sued Green College, its trustees, the president, the vice president for student affairs, and the residence hall advisor, a 23-year-old graduate student. They argue that the college should have advised all occupants of the residence hall that Ropes was an ex-felon, and that allowing Ropes to live with "young, impressionable students" was inappropriate and evidence of gross negligence.

Please advise the president and trustees of the likelihood of these parents prevailing in court. Also, please discuss any revisions that Green College might wish to make in its policies with regard to residence halls or student conduct.

H.

CHAPTER VIII: STUDENT ACADEMIC ISSUES

SEC. 8.2. Grading and Academic Standards

Regents of the University of Michigan v. Ewing
474 U.S. 214 (1985)

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Scott Ewing was dismissed from the University of Michigan after failing an important written examination. The question presented is whether the University's action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University's past practice. The Court of Appeals held that his constitutional rights were violated. We disagree.

I.

In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the Medical School.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both premedical courses and courses in the basic medical sciences. The student also must pass the "NBME Part I" – a 2-day written test administered by the National Board of Medical Examiners.

In the spring of 1981, after overcoming certain academic and personal difficulties, Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I. Ewing failed five of the seven subjects on that examination, receiving a total score of 235 when the passing score was 345. (A score of 380 is required for state licensure and the national mean is 500.) Ewing received the lowest score recorded by an Inteflex student in the brief history of that program.

On July 24, 1981, the Promotion and Review Board individually reviewed the status of several students in the Inteflex program. After considering Ewing's record in some detail, the

[1] The Inteflex program has since been lengthened to seven years.

nine members of the Board in attendance voted unanimously to drop him from registration in the program.

In response to a written request from Ewing, the Board reconvened a week later to reconsider its decision. Ewing appeared personally and explained why he believed that his score on the test did not fairly reflect his academic progress or potential.[2] After reconsidering the matter, the nine voting members present unanimously reaffirmed the prior action to drop Ewing from registration in the program.

In August, Ewing appealed the Board's decision to the Executive Committee of the Medical School. After giving Ewing an opportunity to be heard in person, the Executive Committee unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination. In the following year, Ewing reappeared before the Executive Committee on two separate occasions, each time unsuccessfully seeking readmission to the Medical School. On August 19, 1982, he commenced this litigation in the United States District Court for the Eastern District of Michigan.

II.

Ewing's complaint against the Regents of the University of Michigan asserted a right to retake the NBME Part I test on three separate theories, two predicated on state law and one based on federal law.[3] As a matter of state law, he alleged that the University's action constituted a breach of contract and was barred by the doctrine of promissory estoppel. As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his "substantive due process rights" guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U. S. C. § 1983.

The District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified, as well as on Ewing's allegation that other University of Michigan medical students who had failed the NBME Part I had routinely been given a second

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[2] At this and later meetings Ewing excused his NBME Part I failure because his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his makeup examination in pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the examination.

[3] A fourth count of Ewing's complaint advanced a claim for damages under 42 U. S. C. § 1983. The District Court held that the Board of Regents is a state instrumentality immunized from liability for damages under the Eleventh Amendment, and dismissed this count of the complaint. *Ewing v. Board of Regents*, 552 F. Supp. 881 (ED Mich. 1982).

opportunity to take the test. The District Court described Ewing's unfortunate academic history in some detail. Its findings, set forth in the margin,[4] reveal that Ewing "encountered immediate difficulty in handling the work," *Ewing v. Board of Regents*, 559 F. Supp. 791, 793 (1983), and that his difficulties – in the form of marginally passing grades and a number of incompletes and makeup examinations, many experienced while Ewing was on a reduced course load – persisted throughout the 6-year period in which he was enrolled in the Inteflex program.

Ewing discounted the importance of his own academic record by offering evidence that other students with even more academic deficiencies were uniformly allowed to retake the NBME Part I. See App. 107-111. The statistical evidence indicated that of the 32 standard students in the Medical School who failed Part I of the NBME since its inception, all 32 were permitted to retake the test, 10 were allowed to take the test a third time, and 1 a fourth time. Seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake it twice. Ewing is the only student who, having failed the test, was not permitted to retake it. Dr. Robert Reed, a former Director of the Inteflex program and a member of the Promotion and Review Board, stated that students were "routinely" given a second chance. 559 F. Supp., at 794. Accord, App. 8, 30, 39-40, 68, 73, 163. Ewing argued that a promotional pamphlet released by the Medical School approximately a week before the examination had codified this practice. The pamphlet, entitled "On Becoming a Doctor," stated:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." *Id*., at 113.

The District Court concluded that the evidence did not support either Ewing's contract claim or his promissory estoppel claim under governing Michigan law. There was "no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. With reference to the pamphlet "On Becoming A Doctor," the District Court held that "even if [Ewing] had learned of the pamphlet's contents before he took the examination, and I find that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination." *Ibid*.

With regard to Ewing's federal claim, the District Court determined that Ewing had a constitutionally protected property interest in his continued enrollment in the Inteflex program

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[4] [Footnote omitted].

and that a state university's academic decisions concerning the qualifications of a medical student are "subject to substantive due process review" in federal court. *Id.*, at 798. The District Court, however, found no violation of Ewing's due process rights. The trial record, it emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives;" to the contrary, the "evidence [demonstrated] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." *Id.*, at 799. To "leave no conjecture" as to his decision, the District Judge expressly found that "the evidence [demonstrated] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program." *Id.*, at 800.

Without reaching the state-law breach-of-contract and promissory estoppel claims,[5] the Court of Appeals reversed the dismissal of Ewing's federal constitutional claim. The Court of Appeals agreed with the District Court that Ewing's implied contract right to continued enrollment free from arbitrary interference qualified as a property interest protected by the Due Process Clause, but it concluded that the University had arbitrarily deprived him of that property in violation of the Fourteenth Amendment because (1) "Ewing was a 'qualified' student, as the University defined that term, at the time he sat for NBME Part I"; (2) "it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest"; and (3) "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Ewing v. Board of Regents*, 742 F.2d 913, 916 (CA6 1984). The Court of Appeals therefore directed the University to allow Ewing to retake the NBME Part I, and if he should pass, to reinstate him in the Inteflex program.

We granted the University's petition for certiorari to consider whether the Court of Appeals had misapplied the doctrine of "substantive due process." 470 U.S. 1083 (1985). We now reverse.

III.

In *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978), we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his

[5] In a footnote, the Court of Appeals stated: "Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims." *Ewing v. Board of Regents*, 742 F.2d 913, 914, n. 2 (CA6 1984).

continued enrollment in the Inteflex program.[6] But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (concurring opinion), we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University's invitation to "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,"[7] and hold 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.

As a preliminary matter, it must be noted that any substantive constitutional protection against arbitrary dismissal would not necessarily give Ewing a right to retake the NBME Part I. The constitutionally protected interest alleged by Ewing in his complaint, App. 15, and found by the courts below, derives from Ewing's implied contract right to continued enrollment free from arbitrary dismissal. The District Court did not find that Ewing had any separate right to retake the exam and, what is more, explicitly "[rejected] the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. The Court of Appeals did not overturn the District Court's determination that Ewing lacked a tenable contract or estoppel claim under Michigan law,[8] see

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[6] Ewing and the courts below reasoned as follows: In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." See *Goss v. Lopez*, 419 U.S. 565, 572-573 (1975). In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972), we held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests. See *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (implied contracts). According to an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events), "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N. W. 589, 591 (1909). From the foregoing, Ewing would have us conclude that he had a protectible property interest in continued enrollment in the Inteflex program.

[7] Tr. of Oral Arg. 3. Consistent with this suggestion, petitioner's answer to Ewing's complaint "[admitted] that, under Michigan law, [Ewing] may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." App. 21.

[8] Although there is some ambiguity in its opinion, we understand the Court of Appeals to have found "clearly erroneous" the District Court's rejection of Ewing's federal substantive due process claim solely because of the "undisputed evidence of a consistent pattern of conduct" – namely, the "substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it." 742 F.2d, at 915. The Court of Appeals found no "rule" to the effect that medical students are entitled to retake failed examinations. Indeed, it relied on the University's "promotional pamphlet entitled 'On Becoming a Doctor'" only to the extent that it

supra, at 220, and n. 5, and we accept its reasonable rendering of state law, particularly when no party has challenged it.[9]

The University's refusal to allow Ewing to retake the NBME Part I is thus not actionable in itself. It is, however, an important element of Ewing's claim that his dismissal was the product of arbitrary state action, for under proper analysis the refusal may constitute evidence of arbitrariness even if it is not the actual legal wrong alleged. The question, then, is whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination.

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for

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"memorialized the consistent practice of the medical school with respect to students who initially fail that examination." *Id*., at 916 (emphasis added).

A property interest in a second examination, however, cannot be inferred from a consistent practice without some basis in state law. Yet, in this case, the Court of Appeals did not reverse the District Court's finding that Ewing was not even aware of the contents of the pamphlet, and left standing its holding that the statements in this promotional tract did not "[amount] either to an unqualified promise to him or...a contract right to retake the examination" under state law. 559 F. Supp., at 800. We recognize, of course, that "mutually explicit understandings" may operate to create property interests. *Perry v. Sindermann*, 408 U.S., at 601. But such understandings or tacit agreements must support "a legitimate claim of entitlement" under "'an independent source such as state law. . . .'" *Id*., at 602, n. 7 (quoting *Board of Regents v. Roth*, 408 U.S., at 577). The District Court, it bears emphasis, held that the University's liberal retesting custom gave rise to no state-law entitlement to retake the NBME Part I. We rejected an argument similar to Ewing's in *Board of Regents v. Roth*. In that case Dr. Roth asserted a property interest in continued employment by virtue of the fact that "of four hundred forty-two non-tenured professors, four were not renewed during [a particular] academic year." Brief for Respondent in *Board of Regents v. Roth*, O. T. 1971, No. 71-162, p. 28 (footnote and citation omitted). Absent a state statute or university rule or "anything approaching a 'common law' of reemployment," however, we held that Dr. Roth had no property interest in the renewal of his teaching contract. *Board of Regents v. Roth*, 408 U.S., at 578, n. 16.

[9] "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 486-487 (1949). *Accord, Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983); *Leroy v. Great Western United Corp*., 443 U.S. 173, 181, n. 11 (1979); *Butner v. United States*, 440 U.S. 48, 58 (1979); *Bishop v. Wood*, 426 U.S., at 345-347.

the faculty's professional judgment.[10] 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. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. As JUSTICE WHITE has explained:

> "Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is...only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Moore v. East Cleveland*, 431 U.S. 494, 543-544 (1977) (WHITE, J., dissenting). See *id*., at 502 (opinion of POWELL, J.).

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).[11] If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require "an

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[10] "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6 (1978) (POWELL, J., concurring). See *id*., at 90-92 (opinion of the Court).

[11] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy v. New Hampshire*, 354 U.S., at 263 (Frankfurter, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university. *University of California Regents v. Bakke*, 438 U.S., at 312 (opinion of POWELL, J.) (quoting *Sweezy v. New Hampshire*, *supra*, at 263 (Frankfurter, J., concurring in result)) (internal quotations omitted).

expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S., at 89-90.

This narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the Inteflex program was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Certainly his expulsion cannot be considered aberrant when viewed in isolation. The District Court found as a fact that the Regents "had good reason to dismiss Ewing from the program." 559 F. Supp., at 800. Before failing the NBME Part I, Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load. Ewing's failure of his medical boards, in the words of one of his professors, "merely [culminated] a series of deficiencies. . . . In many ways, it's the straw that broke the camel's back." App. 79. Accord, *id*., at 7, 54-55, 72-73.[12] Moreover, the fact that Ewing was "qualified" in the sense that he was eligible to take the examination the first time does not weaken this conclusion, for after Ewing took the NBME Part I it was entirely reasonable for the faculty to reexamine his entire record in the light of the unfortunate results of that examination. Admittedly, it may well have been unwise to deny Ewing a second chance. Permission to retake the test might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. But it nevertheless remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NBME Part I examination.[13]

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[12] Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational. For example, the University might well have concluded that Ewing's sensitivity to difficulties in his personal life suggested an inability to handle the stress inherent in a career in medicine. The inordinate amount of time Ewing devoted to his extracurricular essay writing may reasonably have revealed to the University a lack of judgment and an inability to set priorities.

[13] Nor does the University's termination of Ewing substantially deviate from accepted academic norms when compared with its treatment of other students. To be sure, the University routinely gave others an opportunity to retake the NBME Part I. But despite tables recording that some students with more incompletes or low grades were permitted to retake the examination after failing it the first time, App. 105-111, and charts indicating that these students lacked the outside research and honor grade in clinical work that Ewing received, *id*., at 119-120, we are not in a position to say that these students were "similarly situated" with Ewing. The Promotion and Review Board presumably considered not only the raw statistical data but also the nature and seriousness of the individual deficiencies and their concentration in particular disciplines – in Ewing's case, the hard sciences. The Board was able to take

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

[Justice Powell, in a concurring opinion, characterized Ewing's interest as a state law contract right, and found no property interest at stake.]

Notes and Questions

1. Note the differences between the standard of review the Court applies to institutional decisions regarding student conduct (discipline) and that it applies to institutional decisions regarding student academic performance. What policy interests are served by this distinction?

2. In light of judicial deference to academic judgments, how can academic leaders ensure that such judgments are made fairly and that students' interests are protected?

3. Students can claim the protection of the due process clause only in situations where their "property" or "liberty" interests are at stake. Should students at public institutions be afforded a constitutionally protected property interest in continued enrollment at their institutions? On what grounds?

4. In his concurrence, Justice Powell stated that courts should not review challenges to academic decisions, particularly in cases where "orderly administrative procedures" were followed. Do you agree with this belief?

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into account the numerous incompletes and makeup examinations Ewing required to secure even marginally passing grades, and it could view them in connection with his reduced course loads. Finally, it was uniquely positioned to observe Ewing's judgment, self-discipline, and ability to handle stress, and was thus especially well situated to make the necessarily subjective judgment of Ewing's prospects for success in the medical profession. The insusceptibility of promotion decisions such as this one to rigorous judicial review is borne out by the fact that 19 other Inteflex students, some with records that a judge might find "better" than Ewing's, were dismissed by the faculty without even being allowed to take the NBME Part I a first time. *Id.*, at 165-166. Cf. *id.*, at 66 (nine Inteflex students terminated after suffering one deficiency and failing one course after warning).

5. For a discussion of procedural due process as applied to academic judgments, including a discussion of the *Board of Curators v. Horowitz* case cited in *Ewing*, see the Text Section 8.2.

6. Note the Court's discussion of the pamphlet as a possible source of contractual protection for Ewing. For a discussion of the contractual rights of students, see the Text Section 7.1.3.

SEC. 8.4. Evaluating Students with Disabilities

Guckenberger v. Boston University (Guckenberger II)
974 F. Supp. 106 (D. Mass. 1997)

Opinion by Patti B. Saris, U.S. District Judge.

INTRODUCTION

This is a class action[81] brought by students with Attention Deficit Hyperactivity Disorder ("ADHD"), Attention Deficit Disorder ("ADD"), and learning disorders (collectively "learning disabilities") against Boston University ("BU") under the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. § 12101 et seq. (West Supp. 1995), the Rehabilitation Act, 29 U.S.C.A. § 794 (West Supp. 1997), and state law. The class claims that BU discriminates against the learning disabled by: (1) establishing unreasonable, overly burdensome eligibility criteria for qualifying as a disabled student; (2) failing to provide reasonable procedures for evaluation and review of a student's request for accommodations; and (3) instituting an across-the-board policy precluding course substitutions in foreign language and mathematics. BU contends that its eligibility criteria are reasonably designed to ensure that a student is entitled to the requested accommodations, that its review procedures are adequate, and that it has the right to require that a student meet certain levels of proficiency in math and foreign language before it confers a liberal arts degree.

Particularly with respect to the issue of course substitution, this class action concerns the interplay between the rights of learning-disabled students to reasonable accommodation and the rights of institutions of higher education to establish and enforce academic standards.

The plaintiff class now seeks injunctive and declaratory relief against the continued implementation of BU's accommodations policy. Moreover, the named individuals request compensatory damages for the harm allegedly caused them by the university's purported violation of federal law, and by its alleged breach of the promotional promise to provide reasonable accommodations for students with diagnosed learning disabilities

[81] The plaintiff class consists of all students with learning disabilities and/or attention deficit disorder who are currently enrolled at BU. See *Guckenberger v. Boston Univ*., 957 F. Supp. 306, 327 (D. Mass. 1997). The Court certified a class pursuant to Fed. R. Civ. P. 23(b)(2) only with respect to declaratory and injunctive relief for alleged violations of the ADA and the Rehabilitation Act. The Court did not certify a class with respect to individual claims for compensatory damages, or the breach of contract claims.

After a two-week bench trial, and an evaluation of the witnesses and evidence in this case, I have made numerous findings of fact and conclusions of law. To assist the reader, the Court's fundamental conclusions are summarized as follows:

1. Federal law prohibits private and public universities, colleges and post-secondary educational institutions from discriminating against students with specific learning disabilities.

2. In the fall of 1995, BU imposed new documentation requirements that required students with learning disabilities to be retested every three years, and that provided that evaluations by persons who were not physicians, clinical psychologists, or licensed psychologists were unacceptable. These new documentation requirements, as initially framed, violated the ADA and the Rehabilitation Act because they were "eligibility criteria" that "screened out or tended to screen out" students with specific learning disabilities, and because BU did not demonstrate that the requirements were necessary to the provision of educational services or reasonable accommodations.

3. The documentation policies have changed, however, since the start of this litigation. Because BU now permits a student to obtain a waiver of the three-year currency retesting requirement where medically unnecessary, I conclude that the retesting requirement, as currently framed, does not screen out or tend to screen out learning-disabled students.

4. BU has also restructured its policy with respect to the qualifications of evaluators by permitting evaluators with doctorates in education (and in "other appropriate specialties") to document students' learning disabilities. Nevertheless, by precluding any evaluations by persons with masters degrees, BU's present policy still unnecessarily screens out or tends to screen out some students with specific learning disorders who have been evaluated by adequately trained professionals. BU has not demonstrated that an evaluator with a masters degree and appropriate training and experience cannot perform the testing for an assessment of learning disability as well as an evaluator with a doctorate. Accordingly, BU has not proven that a doctorate level of qualification is necessary to the provision of reasonable accommodations with respect to students with learning disorders.

5. However, with respect to students with ADD and ADHD, BU has demonstrated that its "bright line" policy of requiring current evaluation by a person with a doctorate is necessary because ADD/ADHD is often accompanied by co-existing physical and psychological

conditions, is frequently treated by medications, and is a rapidly changing condition that usually remits over the period from adolescence through early adulthood.

6. The administration of BU's new accommodations policy during the 1995-1996 school year violated the ADA and the Rehabilitation Act because it was implemented without any advance warning to eligible students, in such a way as to have the effect of delaying or denying reasonable accommodations. Moreover, BU President Jon Westling and his staff administered the program on the basis of uninformed stereotypes about the learning disabled.

7. However, because BU has recently hired an experienced clinical psychologist to review student accommodation requests, and because President Westling and his assistant Craig Klafter now review recommended accommodations primarily to ensure that they meet academic standards, the university's current procedure for evaluating requests for accommodation submitted by students with learning disabilities does not violate federal law.

8. The plaintiff class has no private right of action to challenge BU's violation of Rehabilitation Act regulations that require a university to adopt grievance procedures that incorporate appropriate due process standards.

9. In general, federal law does not require a university to modify degree requirements that it determines are a fundamental part of its academic program by providing learning disabled students with course substitutions.

10. Here, BU's refusal to modify its degree requirements in order to provide course substitutions, particularly in the area of foreign languages, was motivated in substantial part by uninformed stereotypes by the President and his staff that many students with learning disabilities (like the infamous, nonexistent "Somnolent Samantha") are lazy fakers, and that many evaluators are "snake oil salesmen" who overdiagnose the disability.

11. BU failed to demonstrate that it met its duty of seeking appropriate reasonable accommodations for learning disabled students with difficulty in learning foreign languages by considering alternative means and coming to a rationally justifiable conclusion that the available alternative (i.e., a course substitution) would lower academic standards or require substantial program alteration. Rather, the university simply relied on the status quo as the rationale for refusing to consider seriously a reasonable request for modification of its century-old degree requirements.

12. Plaintiffs have failed to demonstrate that a request to modify the degree requirement in mathematics is reasonable in light of the dearth of scientific evidence that any specific learning disability in mathematics (i.e., dyscalculia) is sufficiently severe to preclude any student from achieving sufficient proficiency in mathematics to meet BU's degree requirements with appropriate accommodations.

13. BU breached its contract with three of the named plaintiffs by failing to honor the express representations of its representatives about the students' ability to document their disabilities and to receive accommodations from the university.

FINDINGS OF FACT

I. BU's Recruitment of the Learning Disabled

BU is one of the largest private universities in the United States, with 20,000 students, 2,000 faculty members, and fifteen undergraduate and graduate colleges that offer 150 separate degree-granting programs. The College of Arts and Sciences is the largest college in the university. It has longstanding course requirements, including one semester of mathematics and four semesters of a foreign language. Degree requirements at all of BU's colleges are approved by the Provost, the President, and the Board of Trustees.

Before 1995, BU was a leader among educational institutions in seeking to provide comprehensive services to students with diagnosed learning disabilities. The university recruited learning-disabled enrollees by establishing the Learning Disabilities Support Services ("LDSS"), a renowned accommodations program that functioned as a unit within BU's Disability Services office ("DSO"). LDSS was often described as a "model program." Through LDSS, the university declared a commitment to enabling students with learning disabilities to reach their maximum academic potential. For example, LDSS promotional brochures offered learning-disabled students various complimentary accommodations including notetaking assistance and extended time on examinations. For a fee, students who enrolled at BU also had access to comprehensive services such as private tutoring and support groups, while potential enrollees of the university had the option of attending two different summer programs geared toward helping learning-disabled pupils make the transition from high school to college.

Before 1995, not only did LDSS often authorize in-class notetakers, tape-recorded textbooks, and time and one-half on final examinations for students with documented learning disabilities (the so-called "vanilla" accommodations), but LDSS staff also occasionally recommended that disabled students receive a course substitution for required mathematics and

foreign language classes. For example, students who received an LDSS recommendation for a math substitution were allowed to take classes such as Anthropology 245 ("Anthropology of Money"), Economics 320 ("Economics of Less Developed Regions"), or Geography 100 ("Introduction to Environmental Science") instead of the required math curriculum. Similarly, learning-disabled students who received a foreign language exemption might opt instead for one of several foreign culture courses including Art History 226 ("Arts of Japan") or History 292 ("African Colonial History").

In developing lists of "approved" course substitutions and recommending waivers of math and foreign language requirements for certain students, LDSS worked with the heads of the various academic departments at the College of Liberal Arts ("CLA") (now called the College of Arts and Sciences) ("CAS"). However, neither LDSS nor CLA notified or sought the approval of the President, Provost, or any other member of BU's central administration. Eighty-eight students requested foreign language waivers at CLA during academic years 1992-1993 and 1993-1994. On average, BU granted approximately 10 to 15 requests for course substitutions a year.

Prior to 1995, the process of applying for accommodations, including course substitutions, from BU was relatively straightforward. A learning-disabled student submitted to LDSS a description of her need for accommodation, a statement of her accommodations history, and a current medical or psycho-educational evaluation (one that had been conducted within three years of entering the university). Once the student's documentation was filed, members of the LDSS staff determined whether accommodation was appropriate. In 1995, LDSS was permanently staffed with a full-time director, two assistant coordinators and a secretary, and it also employed several part-time learning disabilities specialists. Several of these administrators had specific training in special education and in the provision of accommodations to post-secondary students with learning disabilities.

If LDSS granted a student's request for accommodation, the student would be notified. An LDSS staff member would also write letters, referred to as "accommodations letters," to the student's faculty members and to the dean of the student's particular school explaining the student's disability and recommending that the student be provided with the listed accommodations. Students were responsible for distributing these letters to their professors, and for meeting with their instructors to arrange the provision of in-class and exam accommodations.

The results of LDSS's "marketing" to students with learning disabilities were pronounced. In academic year 1990-1991, 42 students who self-identified as learning disabled applied, 24 were accepted and two enrolled. Four years later, 348 such students applied, 233 accepted and 94 enrolled. In late 1995, 429 learning-disabled students applied to the university. As its reputation developed, BU was recommended by guidance counsellors and college manuals

as a desirable academic setting the learning disabled. Between 1990 and 1996, hundreds of students with learning disabilities came to BU and registered for academic accommodations and/or comprehensive services through LDSS. By the 1995-1996 school year, BU had approximately 480 learning-disabled students.

II. Westling Orders Change

Current BU president Jon Westling became the university's provost (i.e., its chief academic officer) in 1985. A graduate of Reed College and a Rhodes Scholar, Westling has spent a total of 23 years at BU. He has served as both an administrator and as a teacher in the humanities core curriculum at the CLA. Westling holds no graduate degrees.

In the spring of 1995, Provost Westling discovered that LDSS and CLA had been allowing students with learning disabilities to substitute other classes for the mathematics and foreign language coursework that was otherwise a long-standing prerequisite to obtaining a baccalaureate degree in the College of Arts and Sciences. Chagrined that LDSS was facilitating alterations of the core curriculum without university approval, Westling assigned his assistant and troubleshooter, Craig Klafter, a Ph.D in Modern History, to research learning disabilities in general and LDSS's process of granting accommodations in particular. Confronting LDSS-director Loring Brinckerhoff, Klafter sought proof of the existence of a disability that prevented a student from learning a foreign language. Brinckerhoff referred Klafter to a book that he had co-authored concerning learning disabilities in post-secondary education. After reading Brinckerhoff's book and other secondary materials, Klafter determined that there was no scientific proof of the existence of a learning disability that prevents the successful study of math or foreign language.

As a result of Klafter's investigation, in June of 1995 Westling informed W. Norman Johnson, BU's Vice President and Dean of Students, and the College of Liberal Arts that the university was to cease granting course substitutions, "effective immediately." In addition, Westling told Johnson to direct LDSS to send all accommodation letters to the Provost's office for review before they were distributed to the students or faculty. Westling made the decision to end the course substitution practice without convening any committees or panels, and without speaking to any experts on learning disabilities or to any faculty members on the importance of math and foreign language to the liberal arts curriculum. With the course substitution "bee" in his academic bonnet, Westling decided to become personally involved with the accommodations evaluation process, even though he had no expertise or experience in diagnosing learning disabilities or in fashioning appropriate accommodations.

III. "Somnolent Samantha"

At around the time that Westling ordered the first changes in the accommodations practice at BU, he also began delivering speeches denouncing the zealous advocacy of "the learning disabilities movement." In addresses delivered in Australia and in Washington, D.C., Westling questioned the rapidly increasing number of children being diagnosed with learning disorders, and accused learning disabilities advocates of fashioning "fugitive" impairments that are not supported in the scientific and medical literature. Although Westling's orations recognized a need to "endorse the profoundly humane goal of addressing the specific needs of individuals with specific impairments," his public addresses resonated with a dominant theme: that "the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order."

At the beginning of one such speech entitled "Disabling Education: The Culture Wars Go to School," which was delivered on July 22, 1995, Westling introduced a student named Samantha, who was, he said, a freshman in one of his classes at BU. Westling recounted how Samantha approached him on the first day of class and how, "shyly yet assertively," she presented a letter addressed to him from the Disability Services office.

The letter explained that Samantha had a learning disability "in the area of auditory processing" and would need the following accommodations: "time and one-half on all quizzes, tests, and examinations;" double-time on any mid-term or final examination; examinations in a room separate from other students; copies of my lecture notes; and a seat at the front of the class. Samantha, I was also informed, might fall asleep in my class, and I should be particularly concerned to fill her in on any material she missed while dozing.

Westling's speech went on to name the student "Somnolent Samantha" and to label her "an unwitting casualty of the culture wars." To Westling, Samantha exemplified those students who, placated by the promise of accommodation rather than encouraged to work to achieve their fullest potential, had become "sacrificial victims to the triumph of the therapeutic." Throughout his twenty-page address, Westling reiterated the view that, by "seizing on the existence of some real disabilities and conjuring up other alleged disabilities in order to promote a particular vision of human society," the learning disabilities movement cripples allegedly disabled students who could overcome their academic difficulties "with concentrated effort," demoralizes non-disabled students who recognize hoaxes performed by their peers, and "wreak[s] educational havoc." In closing, Westling remarked:

> The policies that have grown out of learning disabilities ideology leach our sense of humanity. We are taught not that mathematics is difficult for us but

> worth pursuing, but that we are ill. Samantha, offered the pillow of learning disability on which to slumber, was denied, perhaps forever, access to a dimension of self-understanding.

Westling fabricated the student named Samantha to illustrate his point regarding students with learning disorders. Remarkably, at trial, Westling admitted not only that such a student never existed, but that his description of her did not even represent a prototype of the learning-disabled students he had encountered. Rather, Somnolent Samantha represented Westling's belief – fuelled mostly by popular press and anecdotal accounts – that students with learning disabilities were often fakers who undercut academic rigor.

As in the speech "Disabling Education," since the spring of 1995, many of Westling's addresses, statements, and letters regarding accommodations for the learning disabled have reflected his opinion that "hundreds of thousands of children are being improperly diagnosed with learning disabilities by self-proclaimed experts who fail to accept that behavioral and performance difficulties exist." Even though Westling has referred to students with learning disabilities as "draft dodgers" and has repeatedly voiced his concern that students without established learning disorders might be faking a disability to gain an educational advantage, to date, there has not been a single documented instance at BU in which a student has been found to have fabricated a learning disorder in order to claim eligibility for accommodations.

IV. The Twenty-Eight Files

By the fall semester of the 1995-1996 academic year, BU was at a bureaucratic impasse. LDSS head Loring Brinckerhoff was ignoring Westling's directives, and LDSS was continuing the practice of approving course substitutions and granting accommodations without Westling's involvement. Although Dean Johnson had specifically conveyed Westling's orders to Brinckerhoff in a memo dated June 29, 1995, LDSS issued 58 accommodations letters (some of which allowed course substitutions) to students between July and September of 1995 without seeking Westling's approval.

Irate that his mandates were being disregarded, in October of 1995, Westling directly ordered that all of the accommodations letters that LDSS had prepared but that had not yet been picked up by the affected students be delivered to his office. At the time, LDSS held 28 such letters. Westling also requested that he be given access to the documentation files for each of the students who were the subject of the 28 letters.

After receiving the letters and files, Westling and his staff reviewed the documentation to determine if the students' evaluations actually supported LDSS's recommended

accommodations. Specifically, when reviewing the files, the provost's office looked for current evaluations done by credentialed evaluators, clear diagnoses, an evaluator's recommendation listing specific accommodations, and an LDSS recommendation that was consistent with the recommendations made by the student's evaluator. None of the provost office staff members who were involved in this review had any expertise in learning disabilities.

In a letter dated November 2, 1995, Westling communicated his analysis of the letters and files to Brinckerhoff's supervisor, the director of the Office of Disability Services, William P. ("Kip") Opperman. Of the 28 files, Westling determined that, "in all but a few cases, the requested accommodations [were] not supported by the attached documentation." With respect to several of the students, Westling reached the reasonable conclusion that there was actually "insufficient information" to determine whether or not students were entitled to accommodation because the documentation provided by LDSS was not current, did not support the requested accommodation, or was missing. For example, in regard to one student, Westling states that the testing psychologist "does not say [the student] is incapable of learning a foreign language," only that the student "'has had a history of difficulty with foreign language.'" Rather than authorizing a course substitution as LDSS had done, Westling remarks that the student should be "encouraged to avail himself of the tutoring available to him through the University." With respect to other students, Westling incorrectly determined that the documentation did not support a claim of learning disability.

After describing in detail the perceived shortcomings of each file, Westling's letter to Kip Opperman concludes:

> It is clear to me that the staff of the Learning Disabilities Support Services does not meet any reasonable standard of professional competence in their field. There is also considerable evidence that in addition to being incompetent, the staff has willfully and knowingly undermined University academic standards, distributed false information about University policy, and directly disobeyed University policy. I do not know whether it is possible to make Learning Disabilities Support Services perform its appropriate functions under its current management and with its current staff. While I am still considering this issue, I strongly advise you to take the corrective actions indicated in this letter.

Among the "corrective actions" Westling suggests throughout the letter are: (1) that students "be required to provide current evaluations" in light of federal guidelines stating that evaluations that are more than three years old are unreliable; (2) that the evaluations provide actual test results that support the tester's conclusions; (3) that "individuals who provide

evaluations of learning disabilities should be physicians, clinical psychologists, or licensed psychologists and must have a record of reputable practice"; (4) that all requests for accommodation contain an analysis by LDSS staff, an academic history of the student, and the student's academic status at BU; and (5) that LDSS "should not misinform students that course substitutions for foreign language or mathematics requirements are available." Although Westling had no evidence that learning disabilities changed or abated after students finished high school, he mandated that BU students provide current evaluations (i.e., those that are less than three years old) on the basis of regulations promulgated by the Department of Education for grades kindergarten through twelve. In establishing standards for the credentials of evaluators, Westling relied on consultations with doctors at BU's School of Medicine that Klafter sought in late 1995.

In crafting the November 2, 1995 letter to Opperman, Westling did not intend for LDSS to deny all accommodations to the students whose files he reviewed. Rather, Westling hoped to castigate ODS officials regarding the office's method of approving accommodation requests for students who claimed to have a learning disability, and to obtain better documentation prior to granting a requested accommodation. Nonetheless, as a result of Westling's correspondence, Brinckerhoff sent a letter on behalf of LDSS to most of the 28 students whose files Westling had reviewed, denying the student's request for accommodation and informing the student of his right to appeal the decision to the Provost. For example, in a letter dated December 3, 1995, addressed to named plaintiff Scott Greeley, Brinckerhoff states that Greeley's request for accommodation "was reviewed" and that "the proposed accommodation of requiring the instructor to provide an opportunity to clarify test questions is not supported by the 'educational therapist' who evaluated you." As a further example, in the fall of 1995, plaintiff Michael Cahaly received an accommodations letter from the LDSS office authorizing him to receive up to double time on his exams and to use a notetaker in his classes. However, in December 1995, he received another letter refusing accommodation because his evaluation was not conducted within the past three years. Cahaly had never been informed that there was any problem with the qualifications of his evaluator.

LDSS staff members later told several worried students to disregard Brinckerhoff's letter denying accommodations; however, no formal letter or statement retracting the denial of accommodations was ever issued.

V. Chaos

On December 4, 1995, Brinckerhoff sent a form letter to all BU students who had previously registered with LDSS. The letter, which purported "to inform [students] of recent

policy changes at LD Support Services," stated that the following requirements must be fulfilled by January 8, 1996, if students were to remain eligible for accommodations through LDSS:

(1) Students whose documentation was more than three years old "must be reevaluated in order to continue to receive services and accommodations through the LDSS office;"

(2) Students must submit to LDSS documentation of a learning disability that has been prepared by "a licensed psychologist, clinical psychologist, neuropsychologist, or reputable physician;" and

(3) Students seeking accommodations for the spring semester of 1996 must provide LDSS with a high school transcript, a college transcript, and a current BU course schedule including course numbers, course descriptions, and the names and addresses of the professors.

Brinckerhoff distributed the letter to students just prior to final examinations for the fall semester of 1995. He did not forward a copy of the letter to Westling for his approval; nor did he check that it accurately conveyed Westling's policy directives. When Westling learned of the letter, he requested that Norm Johnson issue a statement retracting some of the requirements for accommodation that Brinckerhoff had articulated.

On December 22, 1995, approximately three weeks after Brinckerhoff's correspondence, Johnson sent a letter to the learning-disabled students at BU. Johnson's letter notified students that the university was deferring the deadline for submitting current documentation from January 8, 1996 – the date set forth by Brinckerhoff – until August 31, 1996. Moreover, it sought "to correct a significant error in Dr. Brinckerhoff's letter" regarding the need for reevaluation. Although Brinckerhoff's letter stated that students with old documentation must be retested if they were to continue to receive assistance from LDSS, Johnson maintained (without explanation) that "no such reevaluation will be necessary in order to continue receiving services from Learning Disability Support Services." Johnson also expressed his "regret" that students "were notified of these proposed changes during the examination period," and he apologized "for any inconvenience."

Throughout the first semester of the 1995-1996 school year, learning-disabled students, parents, and professors received mixed and inconsistent messages from university administrators regarding the requirements for seeking and receiving academic accommodations at BU. As a result of the confusing and chaotic climate occasioned by BU's new accommodations policy, there was a substantial reduction in the number of students with self-identified learning disabilities who have attended BU since 1995. Whereas 94 students with self-proclaimed

learning disabilities enrolled at BU in 1994, the number of such students had dropped to 71 by the 1996-1997 academic year.

VI. Resignation, Reorganization, and Restructure

Early in 1996, several members of the disability services office resigned, including Brinckerhoff and Opperman, and the Provost's office became the primary decision maker in determining whether a student was to receive an accommodation for a learning disability. In evaluating requests for reasonable accommodations, the Provost's office consulted with specialists like neuropsychologists or the remaining staff at LDSS. With the LDSS office virtually unstaffed, the university undertook to restructure the entire disability services department. Instead of having a self-contained unit within the disability services office to evaluate the accommodations requests of learning-disabled students, the new Office of Disability Services ("DS") was structured to manage accommodations for all students with disabilities, whether physical, mental, or in learning. The reconfigured DS staff consisted of a full-time director, an assistant director, a clinical director of learning disability support services, an LD coordinator, a coordinator of interpreter services, and two senior staff assistants. The office was also designed to employ several part-time learning specialists, tutors, interpreters, readers, and notetakers.

On March 25, 1996, BU hired Allan Macurdy, an adjunct assistant professor of law, as the new DS director. Macurdy, a quadriplegic, is a specialist in laws affecting the physically disabled. Soon after his arrival, in the absence of a complete staff, Macurdy personally undertook to review the accommodation requests of students with learning disabilities, even though the student files were in complete disarray (many were inaccurate, incomplete, or missing), and neither he nor the other newly hired DS staff members had any expertise in diagnosing learning disabilities or in fashioning appropriate accommodations. Between March of 1996 and January of 1997, Macurdy's office reviewed over 80 student files and made recommendations about the requested accommodations. During this time, BU also retained neuropsychologists with expertise in learning disabilities to review student files and make accommodations determinations with regard to learning-disabled students. All recommendations for accommodations made by the DS staff were forwarded to the Provost's office for approval.

By May 31, 1996, the Office of the Provost at BU had reviewed DS recommendations for 77 learning-disabled students. Students whose requests for accommodation were denied by Westling's office were often told to contact the Provost in order to seek reconsideration. However, because there was no established appeal procedure, students and their parents were occasionally not given any information at all regarding further review. As a matter of informal,

unwritten policy, the only appeal from the denial of a requested accommodation was to seek reconsideration by the Provost. Students with physical disabilities grieved any denials through the Section 504 procedure handled by the Office of the Dean of Students.

VII. Present Accommodations Process

In January of 1997, BU hired Dr. Lorraine Wolf as the new clinical director for learning disability support services. Before being appointed, Wolf was a practicing neuropsychologist and an assistant professor of Clinical Psychology at Columbia University. Wolf had also done consulting work for BU since November of 1996.

From early 1997 until the present, Wolf's responsibilities as clinical director have included reviewing the documentation submitted by learning-disabled students and making recommendations regarding the accommodations that should be provided to a student on the basis of a learning disability. Although Wolf officially began the clinical director's task of reviewing student files in January, she did so remotely – from her office in New York City – until late May, when she completed her maternity leave and moved to Boston to begin her full-time, in-house position.

At present, students with documented learning disabilities at BU may request accommodations such as reduced course loads, use of special computer technology, books on tape, extra time on examinations in a distraction-free environment, and note takers. BU's eligibility requirements for receiving such accommodations are summarized as follows:

> (1) Learning-disabled students must be tested for a learning disorder by a physician, licensed clinical psychologist or a person with a doctorate degree in neuropsychology, educational, or child psychology, or another appropriate specialty. The evaluator must have at least three years' experience in diagnosing learning disorders.
>
> (2) Documentation must be current, as it is recognized by BU for only three years after the date of the evaluation. A learning-disabled student whose documentation is too old at the time he matriculates, or whose documentation "expires" during his time at BU, must be reevaluated (including retesting). If retesting is deemed unnecessary by the student's evaluator, the evaluator is required to fill in a form explaining why it is not "medically necessary."

The procedure for requesting and receiving an accommodation for a learning disability at BU is as follows. First, a student requesting accommodations submits an application to the DS office. Wolf reviews the submitted documentation and makes a determination regarding the accommodations that are appropriate for the student. Then, the student's file and Wolf's recommendations are forwarded to the President's Office. Klafter reviews each student's documentation for consistency and, when necessary, discusses with university faculty and administrators how the recommended accommodation will affect a particular academic program or course of study. If the President's Office accepts Wolf's accommodation recommendations, as is mostly the case, the DS office notifies the student. Generally within two weeks of the request, the DS office also generates accommodations letters to be given to the affected faculty members

As of April 1997, the President's office endorsed most of Wolf's recommendations for a grant or denial of a request for accommodations due to a learning disability. In several situations, Westling consulted with Wolf and with the relevant department head and denied a requested accommodation where he believed the request was inconsistent with academic standards. For example, Westling rejected a request for a notetaker by a learning-disabled ROTC student in a course on manufacturing engineering; however, he authorized the student's use of a tape-recorder. In other situations, despite initial hesitation, Westling agreed to a notetaker for a student studying social work and a calculator for a student in a math course. In the Wolf era, the interaction between the President's Office and DS in evaluating student files focuses on determining which modifications of academic requirements are appropriate for a given learning-disabled student, rather than on ascertaining the nature and extent of a student's learning disability.

BU admits that it has yet to articulate a single, specific process for students to follow if their request for accommodation is denied. In this litigation, the university takes the position that either the appeal to President Westling or the university's Section 504 grievance procedure is adequate to address student concerns.

* * * *

CONCLUSIONS OF LAW

I. Discrimination Claims under the ADA and Section 504

The plaintiff class claims that BU discriminates against students with learning disabilities in violation of the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act of 1973 ("Section 504")

* * * *

These statutes protect individuals who have a "disability," explicitly defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2); accord 29 U.S.C. § 706(8)(B)(defining "handicapped person" for the purpose of the Rehabilitation Act). The regulations that interpret the statutes list "specific learning disabilities" among the physical or mental impairments that may render an individual "disabled" within the meaning of the acts. See 28 C.F.R. § 36.104 (implementing the ADA); 34 C.F.R. § 104.3(j)(2)(i)(B)(implementing Section 504).

B. Documentation Requirements

Plaintiffs argue that BU's new accommodations policy makes it unnecessarily difficult for students to document their learning disabilities when requesting accommodation. Specifically, plaintiffs allege that BU's documentation requirements violate the provision of the ADA that defines discrimination to include:

> the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations [42 U.S.C. § 12182(b)(2)(i)]

Under federal law, public entities cannot use eligibility criteria that screen out or tend to screen out individuals with disabilities unless they can show that the criteria are necessary. . . . This tend-to-screen-out concept, which is "drawn from current regulations under Section 504 (see

e.g., 45 C.F.R. § 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish an individual's chances of such participation." *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996). Plaintiffs need not show discriminatory intent to establish a violation of the ADA's tend-to-screen-out provision.

1. BU's Eligibility Criteria

At present, students who seek reasonable accommodation from BU on the basis of a learning disability are required to document their disability by: a) being tested by a physician, or a licensed psychologist, or an evaluator who has a doctorate degree in neuropsychology, education, or another appropriate field; b) producing the results of testing conducted no more than three years prior to the accommodation request; and c) providing the results of I.Q. tests in addition to the results of the normal battery of tests designed to assess the nature and extent of a learning disability. These requirements are "eligibility criteria" within the meaning of the ADA and Section 504 because they are policies that allow the university to judge which students are eligible for the learning disability services and to tailor reasonable academic accommodations provided by BU.

2. Screen Out

The ADA permits a university to require a student requesting a reasonable accommodation to provide current documentation from a qualified professional concerning his learning disability. . . Nevertheless, a university cannot impose upon such individuals documentation criteria that unnecessarily screen out or tend to screen out the truly disabled. 42 U.S.C. § 12182(b)(2)(i); see also 34 C.F.R. § 104.4(b)(4)(interpreting Section 504 so as to prohibit eligibility criteria that "have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program"). Just as a covered entity is prohibited from defining the offered benefit "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled," *Alexander*, 469 U.S. at 301, 105 S. Ct. at 720, so too is a university prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation.

In determining whether BU's documentation requirements "screen out or tend to screen out" students with learning disabilities, the Court considers separately each of the contested

eligibility criteria and takes into account the changes that BU has made to its policies in response to this litigation.

a. Currency Requirement

During the 1995-1996 school year, BU's policy required that a student seeking accommodations on the basis of a learning disability submit documentation that had been completed within three years of the request for accommodation. This meant that students essentially had to be retested every three years. Based on the evidence, I easily find that this initial "currency" requirement imposed significant additional burdens on disabled students. For example, Elizabeth Guckenberger testified that her retesting process took four days and cost $800.00. Jill Cutler's retesting took four hours and cost $650.00. Dean Robert Shaw testified that the evaluations could cost up to $1,000 and involve multiple visits. Cutler's tearful testimony was particularly compelling with respect to the emotional impact of the retesting because it was a poignant reminder that she was not "normal." BU's initial requirement mandating retesting for students with learning disabilities screened out or tended to screen out the learning disabled within the meaning of the federal law.

However, BU's retesting policy at present has been changed substantially to provide for a waiver of the reevaluation requirement. A recent statement of policy provides:

> Reevaluation is required to ensure that services and accommodations are matched to the student's changing needs. Comprehensive re-testing is not required. A student need only be re-tested for his previously diagnosed learning disability. The issue of what specific re-testing is required is, in the first instance, left to the discretion of the student's physician or licensed clinical psychologist. If the student's physician or licensed psychologist believes that retesting is not necessary to reevaluate the student's learning disability, the physician or licensed clinical psychologist should write to DS to explain why. Re-testing that is not medically necessary will be waived.

This waiver process was reconfirmed in the procedural pronouncements that BU distributed in March of 1997. Thus, it is clear that the retesting can now be obviated if a qualified professional deems it not medically necessary.

I am not persuaded that BU's current retesting policy tends to screen out disabled students. The university's new waiver position appears consistent with plaintiffs' position that the need for retesting should be examined on a student-by-student basis. This policy permits a qualified professional to evaluate the noncurrent testing data, examine issues of co-morbidity

(whether other psychological or physical problems are contributing to the learning problem), and talk with the student to determine whether re-testing is desirable, thereby meeting BU's goals without placing an undue burden on the students. In any event, the waiver provision is so new this Court has an insufficient record for determining how this policy is being implemented, and whether it tends to screen out students.

b. Credentials of Evaluators

BU accepts evaluations and test results that document a learning disability only if the student's evaluator has certain qualifications. Plaintiffs appear to concede that a university can require credentialed evaluators; however, they argue that BU's policy of accepting only the evaluations of medical doctors, licensed clinical psychologists, and individuals with doctorate degrees is too restrictive. With respect to BU's narrow definition of the acceptable qualifications of the persons performing an evaluation, plaintiffs have proven that, both in its initial and current form, these eligibility criteria tend to screen out learning disabled students.

Many students (e.g., Greeley) with long histories of learning disorders in elementary and high school were tested by trained, experienced professionals whose credentials do not match BU's criteria, but were deemed acceptable by the student's secondary school, and are acceptable under the guidelines set forth by the Association for Higher Education and Disabilities ("AHEAD"). BU's policy raises a high hurdle because it seemingly requires students with current testing to be retested if the evaluation has not been performed by a person with credentials acceptable to BU. As initially drafted and implemented, the policy tends to screen out students because of the time, expense, and anxiety of having to be completely retested, even if their documentation has been recently performed by an evaluator who specialized in learning disabilities and who had a masters degree in education or developmental psychology.

To complicate things further, BU's implementation of the credentials policy has been uneven. It has permitted some students with learning disabilities to fulfill the requirement via the much less expensive route of asking an evaluator with the requisite credentials to review and confirm the evaluator's test results, while other students have been required to undergo a complete reevaluation. For example, plaintiff Jordan Nodelman only spent $150 to obtain a review of his original ADD evaluation from a licensed clinical psychologist, and there is no evidence that he had difficulty procuring the confirmation letter. However, though Scott Greeley was offered a similar concession, BU ultimately refused to accept Greeley's confirmation correspondence. Assuming that the Nodelman review procedure is unavailable under the current policy for students who have been tested by evaluators with masters degrees, I conclude that

plaintiffs have proven that BU's present eligibility criteria concerning the credentials of the evaluators tend to screen out some students with learning disabilities.

One caveat. With respect to BU students who have not been tested for a learning disability prior to matriculation at the university, there is no evidence that testing by evaluators with doctorate degrees is significantly more expensive or burdensome than testing by a person with a masters degree. Also, there is no evidence that it is more difficult to locate or to schedule an appointment with a person with credentials acceptable to BU, particularly in an academic mecca like Boston. This Court finds that BU's credentials requirement does not tend to screen out students who do not have to bear the burden of being retested in order to satisfy BU's qualifications mandate.

c. I.Q. Tests

Finally, plaintiffs have offered no persuasive evidence that BU's requirement that a student provide his I.Q. test scores tends to screen out any students. Indeed, under the AHEAD guidelines, the diagnostic criteria in the DSM IV, and the standards in 29 states, IQ tests are administered as part of a learning disabilities assessment.

d. BU's Response

BU argues that neither its initial or its current documentation criteria "screen out" the learning disabled within the meaning of federal law because there is no persuasive evidence that its requirements have had the effect of actually preventing students with learning disabilities from getting accommodations from the university. The strongest evidence in support of BU's position is that all of the named plaintiffs, after much hassle, eventually received the requested accommodations (except course substitutions) from BU in spite of its new and more burdensome documentation requirements. BU also attempted to present data suggesting that roughly the same number of students are receiving accommodations under the current policy as during the prior LDSS reign.

Contrary to BU's assertions, plaintiffs have demonstrated that BU's initial eligibility criteria actually screened out students. The number of enrolled students who self-identify as learning-disabled dropped 40 percent between the 1994-1995 academic year and the 1996-1997 academic year. Moreover, as considered in detail above, plaintiffs have established that, as initially implemented, the currency and qualifications requirements were burdensome and, thus, they at least tended to screen out the disabled students. . . .

* * * *

1. Process for Reviewing Accommodation Requests

The ADA and Section 504 forbid both intentional discrimination against learning disabled students and "methods of administration" that "have the effect of discriminating on the basis of disability." See 42 U.S.C. § 12182(b)(1)(D); see also 34 C.F.R. § 104.4(b)(4). In considering these allegations, the Court distinguishes between the review process that existed during the 1995-1996 school year, when the policy was first implemented, and the procedure that exists at present.

The concerns about the nitty-gritty involvement of Westling and Klafter in the accommodations process during the 1995-1996 school year are well founded. There is no dispute that Westling and Klafter, who have no expertise in learning disabilities and no training in fashioning reasonable accommodations for the learning disabled, were actively involved in the process of approving accommodation requests at that time. Worse still, during that year, these administrators expressed certain biases about the learning disabilities movement and stereotypes about learning disabled students. Westling and Klafter indicated repeatedly that many students who sought accommodations on the basis of a learning disability were lazy or fakers (e.g., "Somnolent Samantha"), and Klafter labeled learning disabilities evaluators "snake oil salesmen." If not invidiousness, at the very least, these comments reflect misinformed stereotypes that, when coupled with Westling and Klafter's dominant role in the implementation of BU's accommodations policy during the 1995-1996 school year, conflicted with the university's obligation to provide a review process "based on actual risks and not on speculation, stereotypes, or generalizations about disabilities." H.R. Rep. No. 101-485, pt. II, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 388.

BU's internally contentious, multi-tiered evaluation process involving evaluators who were not only inexperienced but also biased caused the delay and denial of reasonable accommodations and much emotional distress for learning disabled students. The Court concludes that the implementation of BU's initial accommodations policy violated the ADA and Section 504 during the 1995-1996 academic year.

The issue for purposes of the requested declaratory and injunctive relief, however, is whether the current procedure is propelled by discriminatory animus or has the effect of discrimination on the basis of disability. . . . This Court concludes that it does not.

At present, Lorraine Wolf, a highly trained professional, makes the initial evaluation as to whether the student is learning disabled and whether the requested accommodations are reasonable. Plaintiffs do not claim she is a wolf in lamb's clothing. They do not challenge her

credentials or good faith. While she does forward all recommendations for accommodations to Westling's office, there is no evidence that her professional judgments have been second-guessed or that Klafter does anything other than "rubberstamp" her impartial recommendations. Although BU has occasionally refused a student's request to abrogate a substantial academic requirement since Wolf's arrival, there is no evidence to suggest that the decision not to modify that degree requirement was unreasonable or discriminatory. In sum, plaintiffs have not proven that the present method of administering the learning disability program has the effect of discrimination on the basis of disability, or is tainted by impermissible stereotypes. . . .

During much of the 1995-1996 academic year, the administration of the learning disability program miserably failed to achieve any measure of interactivity. The president's office did not communicate directly with LDSS and vice versa. Learning-disabled students desperately seeking information concerning the status of their reasonable accommodations requests received conflicting information from university officials, wrong information, or no information at all. When accommodations were denied, inadequate explanations of the documentation deficiencies were provided, and parental inquiries were fruitless. While DS head Macurdy did his best in March of 1996 to handle the problem, he was inadequately staffed and trained.

BU's administrative methods during 1995-1996 were also not sufficiently interactive to the extent that unwary students were ambushed by the new, unwritten requirements for accommodation, and the multi-tiered process for reviewing student files was not clearly developed or disclosed. For example, by Westling's insistence that the new policy on course substitutions be implemented "effective immediately" – without giving students any notice or time to adjust – and Brinckerhoff's precipitous letter requesting retesting at exam time, BU failed to communicate effectively its new accommodation mandates. Westling and Klafter point the finger at Brinckerhoff for much of the insensitivity, delays, poor communication, and bad timing at LDSS. Even if Brinckerhoff fairly shoulders the blame, he, too, is a university official. As a result of BU's representatives' poor implementation of the policy, many students who applied for accommodations at the beginning of the fall semester were not given the requested assistance or even told of the reason for the delay so that documentation deficiencies could be remedied until some time in November – long after classes had begun. At least one student was not accommodated until the following semester.

For the purposes of prospective relief, however, the bleak picture has brightened. No doubt as a result of this litigation, the university has now formulated harmonious written statements of policy that have been authorized by the relevant academic officials. Moreover, the university has hired a professional evaluator who, at trial, promised that she will meet with students and address their concerns as she assesses their need for accommodation.

This Court finds that BU's current review process – now that Wolf is back from maternity leave and the office is staffed up – is sufficiently interactive to withstand the attack under the ADA and Section 504. Plaintiffs have submitted no evidence that students requesting personal meetings do not get them, that phone calls are not returned, that misinformation is generated, or that accommodations requests are not timely handled. Even though BU no longer works as closely with students as it did under Brinckerhoff, this Court has no evidence that, as revamped, the administration of the current learning disabilities review procedure has the effect of discriminating against students.

2. Appeals Procedure

Since 1995, President Westling (or his staff) has reviewed the initial accommodations recommendations generated by LDSS (and now by Wolf), and in addition, Westling has served as the administrative officer who decides a learning-disabled student's specific appeal or denial. At the summary judgment stage of this litigation, plaintiffs urged this Court to find that such an appellate procedure fails to "incorporate appropriate due process procedures" as mandated by 34 C.F.R. § 104.7(b). In relevant part, 34 C.F.R. § 104.7 provides:

> (b) Adoption of grievance procedures. A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. [34 C.F.R. § 104.7]. The weight of the evidence at trial supports the plaintiffs' contention that BU offers no meaningful "appellate" review of a decision to reject a requested accommodation. Many students have been informed in writing and verbally that they must ask Westling, who had made the initial determination, to reconsider their denials.

Although BU now contends that the student handbook provides a Section 504 grievance procedure that involves appeal to an independent compliance officer, the Court is not persuaded that such an avenue is a realistic alternative for learning-disabled students seeking accommodations for essentially four reasons. First, the Lifebook (a student handbook), refers only to the grievance procedures in cases of alleged discrimination by reason of "physical disability" and does not mention requests for grievances by students with learning disabilities. Second, the evidence showed that no student seeking reconsideration for a denial of an accommodation was ever advised orally or in writing to use the 504 procedure. Third, it seems dubious that the dean of students or the head of the DS office, who purportedly handle Section

504 grievances, would have the authority (or the chutzpah) to review and reverse the determination of the boss, BU's president. Finally, most of the relevant officials (including Klafter and Westling) were seemingly unaware of this avenue of appeal as a means of rectifying improper denials of reasonable accommodation.

[The court concluded that there was no private right of action to challenge the method of appealing denials of accommodations.]

D. Course Substitutions

1. The Competing Contentions

Plaintiffs claim that BU's blanket refusal to authorize course substitutions for students with learning disabilities amounts to a failure to modify the university's practices to prevent discrimination as required by federal law. Specifically, the class argues that, because many learning-disabled students have extreme difficulty in taking and passing courses in mathematics and foreign language, allowing course substitutions for those class members is a reasonable accommodation, and, thus, BU's refusal to authorize such a modification is discriminatory.

BU asserts that its refusal of course substitutions is consistent with the law because exemptions of this nature would amount to a fundamental alteration of its academic liberal arts program, a course of study that has been in place for over a century. Also, BU emphasizes that it provides special programs for students with foreign language and math difficulties (like an oral enhancement program and one-on-one tutoring) in addition to the classroom accommodations that are available in any other course.

2. The Legal Framework

[The court discusses the statutory, regulatory, and judicial pronouncements on the limits to reasonable accommodation for colleges and universities. See *Southeastern Community College*, pp. 895-896 and 1749-1750 of *LHE* 5th edition].

3. The Analysis

Turning to the instant case, the Court must first consider whether plaintiffs have met their burden of establishing that course substitutions in math and foreign language are, generally, "reasonable" accommodations.

The plaintiffs are aided substantially in satisfying their initial burden by the mere fact that the administrative regulations interpreting Section 504 and the ADA specifically provide that modifying academic requirements to allow course substitutions may be a reasonable means of accommodating the disabled. . . . In addition, plaintiffs offered evidence at trial to support their contention that a course substitution is reasonable, at least in regard to BU's foreign language requirements. Even though the experts disagreed as to whether a language disability made acquisition of a foreign language literally impossible for some students, and plaintiffs' experts conceded there are no peer-reviewed scientific studies that indicate that it is impossible for a student with a learning disability to learn a foreign language, the weight of the evidence supports plaintiffs' arguments that students with learning disorders such as dyslexia have a significantly more difficult challenge in becoming proficient in a foreign language than students without such an impairment. The only evidence to the contrary was the testimony of defendants' expert, Professor Sparks, who has recently concluded that difficulties in learning foreign languages are not necessarily attributable to learning disabilities. However, Sparks conceded that his research was "preliminary." Although another defense expert, George Hynd, testified that most students had the potential to learn with appropriate accommodations, he agreed that persons with learning disabilities may have difficulty learning a foreign language because of neurological deficits. On all of the evidence, the Court is persuaded that plaintiffs have demonstrated that requesting a course substitution in foreign language for students with demonstrated language disabilities is a reasonable modification.

With respect to math course substitutions, however, I conclude that there was no scientific evidence introduced at trial to support plaintiffs' claim that a course substitution is a plausible alternative for a learning disability in mathematics (i.e., dyscalculia). Dyscalculia is specifically listed in the DSM-IV as a learning disorder; however, none of the named testifying plaintiffs had dyscalculia, and the record documents that only two students in CLA requested a course substitution in mathematics. Moreover, plaintiffs' witness, Dean Robert Shaw of Brown University, who is an Associate Professor of Education and the coordinator of the learning disability program, testified that he never met a student with a disability that prevented her from learning math. Professor Seigel, an expert called by the defense, found one student (out of the twenty eight files) who she claimed had a severe case of "dyscalculia" entitling him to accommodations; however, Professor Seigel testified that "with the appropriate accommodations," a student should be able to fulfill BU's mathematics requirements. Moreover, with regard to the one student whose file she reviewed, Seigel never said that the condition was so severe that a course substitution was needed. Essentially, the evidence at trial concerning dyscalculia was sketchy at best. Accordingly, plaintiffs have not demonstrated that a request for a course substitution in mathematics is a reasonable modification of BU's degree requirements.

Because plaintiffs have established that the request for a course substitution in foreign language is reasonable, the burden now shifts to BU to demonstrate that the requested course substitution would fundamentally alter the nature of its liberal arts degree program. . . [The court then reviews relevant cases, including *Wynne v. Tufts University School of Medicine*, discussed at pp. 1100-1101 of *LHE* 5th edition].

Based on a review of the relevant cases, I conclude that a university can refuse to modify academic degree requirements – even course requirements that students with learning disabilities cannot satisfy – as long it "undertake[s] a diligent assessment of the available options," . . . and makes "a professional, academic judgment that reasonable accommodation is simply not available." . . . That is to say, neither the ADA nor the Rehabilitation Act requires a university to provide course substitutions that the university rationally concludes would alter an essential part of its academic program. Accordingly, plaintiffs' front-line of attack against any across-the-board policy precluding course substitutions under the ADA and Rehabilitation Act fails.

* * * *

ORDER OF JUDGMENT

1. The Court orders BU to cease and desist implementing its current policy of requiring that students with learning disorders (not ADD or ADHD) who have current evaluations by trained professionals with masters degrees and sufficient experience be completely retested by professionals who have medical degrees, or doctorate degrees, or licensed clinical psychologists in order to be eligible for reasonable accommodations.

2. The Court orders BU to propose, within 30 days of the receipt of this order, a deliberative procedure for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of its liberal arts program. Such a procedure shall include a faculty committee set up by the College of Arts and Sciences to examine its degree requirements and to determine whether a course substitution in foreign languages would fundamentally alter the nature of the liberal arts program. The faculty's determination will be subject to the approval of the president, as university by-laws provide. As provided in *Wynne*, BU shall report back to the Court by the end of the semester concerning its decision and the reasons. In the meantime, the university shall process all requests for a reasonable accommodation involving a course substitution in foreign language, and shall maintain records of such students. BU is not required to grant such a course substitution in the area of foreign language until its deliberation process is complete.

3. The Court orders entry of judgment for plaintiffs in the following amounts:

a. Elizabeth Guckenberger: $5,800.

b. Avery LaBrecque: $13,000.

c. Benjamin Freedman $1.00

d. Jill Cutler $650.00.

e. Scott Greeley $10,000.

f. Jordan Nodelman $1.00

Notes and Questions

1. In response to *Guckenberger II*, Boston University appointed a faculty committee to consider whether a foreign language requirement was an appropriate requirement for a student enrolled in the College of Arts and Sciences. Despite the fact that elite universities such as Harvard did not have such a requirement, the faculty committee determined that the foreign language requirement was central to its arts and sciences majors. The court, in *Guckenberger III* [8 F. Supp. 2d 82 (D. Mass. 1998)] concluded that the university had complied with the law in determining that eliminating the foreign language requirement for students with disabilities would "fundamentally alter the nature of the degree." How does this ruling compare to other court rulings that deal with academic judgments?

2. After reviewing the court's opinion in *Guckenberger II*, how would you advise the head of the office of disability services with respect to balancing the institution's concern for upholding academic standards with the requirements of the ADA and Section 504?

3. The court seems to suggest that the provost, and later president, engaged in behavior that violated the law. If you had been advising the provost/president, what would your advice have been?

4. In light of the result in *Guckenberger* how should colleges and universities go about evaluating the accommodation needs of students with learning disabilities?

5. How should the institution respond to a student who did not disclose a disability prior to the end of a class, but who asked for accommodations for the final examination that would involve extra time and a different examination format? Assume that the student has the appropriate documentation to support the claim of a learning disability.

SEC. 8.4.2. Requests for Programmatic or Other Accommodations

Palmer College of Chiropractic v. Davenport Civil Rights Commission
850 N.W.2d 326 (Iowa 2014)

OPINION BY: HECHT, Justice.

A student requested a chiropractic school make accommodations for his visual disability. When the school denied the requested accommodations, the student filed a complaint with the civil rights commission in the community where the school is located. The commission found the school failed to comply with applicable federal and state disability laws and granted the student relief. The school sought judicial review, and the district court reversed the commission's ruling. Upon appellate review, we reverse the district court's ruling and remand to the district court for reinstatement of the commission's final agency action.

I. Background Facts and Proceedings.

Palmer College of Chiropractic (Palmer) is a chiropractic school with campuses located in Iowa, Florida, and California. At its Davenport, Iowa location, Palmer administers bachelor of science and doctor of chiropractic programs. Aaron Cannon applied to Palmer's bachelor of science program at its Davenport, Iowa location, in the early spring of 2004.

Cannon had informed Palmer he was blind early in the application process. Palmer directed him to its contact person for students with disabilities, and Cannon met with the representative that spring. At that meeting, Cannon explained he had sometimes taken examinations with the assistance of a sighted reader in the past, he planned on completing the graduate program's undergraduate prerequisites and matriculating in the graduate program in March 2005, and he was in the process of registering and exploring additional accommodations for his blindness with the Iowa Department for the Blind (IDOB). The Palmer representative told Cannon she would discuss this information further with key representatives of Palmer. She also revealed to Cannon, however, that Palmer had in the summer of 2002 adopted certain technical standards for admission to and graduation from its degree programs.

The technical standards adopted for each of Palmer's three campuses across the country require that degree candidates have "sufficient use of vision, hearing, and somatic sensation necessary to perform chiropractic and general physical examination, including the procedures of inspection, palpation, auscultations, and the review of radiographs as taught in the curriculum." Based on these standards, the Palmer representative explained, Cannon would find it difficult, if not impossible, to enter and complete Palmer's graduate program.

Despite the caution Palmer's representative expressed in the spring 2004 meeting, Cannon was admitted to Palmer's undergraduate program a few months later. He was also provisionally admitted to the graduate program, contingent on his successful completion of the required undergraduate coursework—without, apparently, any further inquiry as to if or how Cannon might satisfy Palmer's technical standards. Cannon enrolled in July 2004 and began coursework in the undergraduate program.

In August, shortly after enrolling, Cannon met again with Palmer's disability representative to discuss possible accommodations. The Palmer representative indicated she would arrange a meeting with Palmer's Disability Steering Committee in the next two weeks to further discuss possibilities. While waiting for that meeting to materialize, Cannon sent the Palmer representative an email detailing his skills and capabilities for dealing with certain visual challenges. He noted in the email his familiarity with various adaptive technologies, including technologies for note taking and producing tactile versions of images and diagrams, and his history of success in previous classes having significant visual components. Two trimesters later, Cannon had successfully completed the graduate program's required undergraduate coursework, achieving a cumulative grade point average of 3.44 on a 4.0–point scale.

As he neared completion of the undergraduate coursework, a meeting with Palmer's Disability Steering Committee was finally arranged in February 2005. Cannon reiterated his interest in preparing for and enrolling in the graduate program at the meeting. The steering committee again expressed doubt Cannon would be able to complete the program because Palmer's technical standards required sufficient use of vision. Cannon suggested several possible accommodations for the visual components of the curriculum, including a sighted reader and modifications of certain practical examinations, while acknowledging he could not yet anticipate each challenge that might present itself in the graduate program. The steering committee suggested these could not constitute acceptable accommodations for certain diagnostic portions of the curriculum and explained Cannon would therefore reach a "stoppage point," after which he would no longer be able to meet Palmer's requirements for advancement in the program. That point, the steering committee advised, would occur at the beginning of the fifth semester—the point at which students were slated to begin radiology and other diagnostic coursework. Cannon proposed that a sighted assistant might communicate to him the pertinent visual information in these courses enabling him to analyze it and to learn to make diagnoses accordingly.

The steering committee expressed doubt as to the feasibility of Cannon's proposed accommodation, suggesting it would place too much responsibility on the assistant. The committee thus repeated its position that the beginning of the fifth semester would constitute the stoppage point, but Cannon proposed they cross that bridge later after further investigation. Given the committee's apparent reliance on the recently adopted technical standards in

concluding Cannon's proposed accommodations were unacceptable, Cannon asked about the purpose of the standards and whether they might be modifiable. The committee explained modification would compromise Palmer's compliance with standards promulgated by the Council on Chiropractic Education (CCE), the national accreditation body. The CCE standards, the committee explained, were "not negotiable."

Cannon was undeterred and enrolled in the graduate program, apparently without objection from Palmer, a few days later. Cannon believed with further investigation, he and Palmer could find an accommodation that would allow him to continue in the program and eventually graduate. Two weeks after his meeting with the steering committee, Cannon sent a letter to Palmer's president, expressing his frustration with the trajectory the meeting had taken. In the letter, Cannon noted he was aware of numerous blind individuals who had become successful chiropractors in the past, including at least two who had graduated from Palmer. In addition, Cannon explained IDOB had at its disposal "a wealth of information about strategies and techniques" for coping with some of the challenges Palmer foresaw and suggested Palmer should consult with IDOB before rejecting out of hand his requests and suggestions for accommodation.

Palmer responded to Cannon's letter a month and a half later in mid-April. Palmer explained its adoption of technical standards was consistent with the purposes of the Americans with Disabilities Act (ADA) of 1990 and the earlier-existing Section 504 of the Rehabilitation Act (Rehabilitation Act). Those laws proscribed discrimination on the basis of disability, Palmer explained, but they did not require an institution to provide accommodations or curricular modifications if they would fundamentally alter the institution's educational program. The curricular modifications Palmer had granted to blind students in the past, Palmer explained, would not satisfy its current technical standards, and thus any similar modification now would constitute a fundamental alteration of its new program as defined by the technical standards. Nevertheless, Palmer explained, it would contact IDOB to inquire about other possible accommodations.

A month later, two Palmer representatives met with a representative from IDOB. Notes from the meeting indicate "no new information" was presented—Palmer explained its technical standards were necessary for accreditation and the accommodations proposed by Cannon would not satisfy these standards. The IDOB representative pointed out a blind individual had recently graduated from medical school in Wisconsin and the school had maintained its accreditation, but the Palmer representatives declined to explore further the investigation and accommodations the school had made. Instead, they stressed the importance of their own technical standards and their concern about the time, effort, and money Cannon had already expended and would continue to expend despite their indications he would be unable to complete the program. Although the

IDOB representative noted the meeting "concluded with no real progress made," the Palmer representatives stated they remained open to further guidance from the IDOB.

Cannon received a meeting report, summarizing the Palmer-IDOB conversation, from the IDOB representative shortly thereafter. Frustrated, and without any indication Palmer intended further investigation, Cannon filed a notice of withdrawal from the graduate program a few weeks later in early June 2005, before completing final coursework for his first trimester in the program. His grade report for the incomplete trimester indicated two grades of "C," five grades of "No Credit," and withdrawal from one class. Cannon later testified that prior to withdrawal, he had been confident he would receive strong grades for the term given his prior record at Palmer, but because he had withdrawn before final examinations and therefore missed and received no credit for them, he was left with the weak record on the report.

Cannon filed a complaint with the Davenport Civil Rights Commission (commission) in July, contending Palmer had discriminated against him on the basis of his disability in violation of the Davenport Civil Rights Ordinance (DCRO), the Iowa Civil Rights Act (ICRA), and federal antidiscrimination laws. After reviewing the facts and applicable laws, the commission found probable cause existed to demonstrate discrimination, and the matter came before the commission for public hearing in February 2010. The two-day hearing featured testimony and exhibits from Cannon, Cannon's wife, three Palmer faculty members and officials, and a blind graduate of Palmer who now works as a chiropractor.

A few months after the hearing, the commission hearing officer issued a proposed order, finding Cannon had proved by a preponderance Palmer had discriminated on the basis of his blindness and granting proposed relief of damages equal to Cannon's previous cost of attendance, emotional distress damages, and attorney fees and costs. Cannon submitted exceptions to the proposed order, requesting readmission with reasonable accommodation and an order enjoining Palmer's strict application of its technical standards to blind individuals. Palmer submitted its own exceptions, requesting that the commission reject the proposed order in its entirety, dismiss the complaint, and assess costs to Cannon.

The parties addressed their exceptions at oral argument before the commission in August. After deliberations at its next two closed sessions, the commission issued a final order adopting the hearing officer's proposed conclusion that Cannon had proven disability discrimination by a preponderance of the evidence. The commission supplemented its final order with the injunctive readmission and accommodation Cannon had requested.

In support of its order, the commission set forth extensive findings of fact and conclusions of law. More specifically, the commission found Cannon was a person with a disability and "an otherwise qualified" student under the relevant federal, state, and municipal code provisions; he had requested specific accommodations for his blindness from Palmer on

multiple occasions; and Palmer had denied these requests and failed to engage in the interactive investigative process required by federal and state disability law. Further, the commission found, Cannon's requested accommodations would not fundamentally alter Palmer's curriculum, because Palmer had previously graduated blind students from its Iowa campus, Palmer's California campus already waived certain vision-specific competencies in its technical standards based on California antidiscrimination law, Palmer had presented no evidence its accreditation had been compromised by accommodations similar to those Cannon had requested or by the California competency waivers, and Palmer had presented no evidence state licensing boards would exclude blind individuals from practice. Based on these factual findings, the commission concluded Cannon was otherwise qualified to participate in Palmer's graduate program and was denied participation in the program on the basis of his disability. The commission therefore concluded Palmer's strict application of its technical standards to Cannon violated the DCRO, ICRA, and the ADA.

Palmer sought judicial review of the final order. The district court, explaining it was reviewing the commission's legal conclusions for errors of law and the commission's factual findings for substantial evidence, reversed the commission's order. Without explicitly suggesting the commission's factual findings were unsupported by substantial evidence, the district court determined the commission had failed, as a matter of law, to give appropriate deference to Palmer's identification of its curricular requirements, and therefore concluded substantial evidence supported Palmer's claims that Cannon's suggested accommodation was unreasonable and would constitute a fundamental alteration of the Palmer curriculum.

Cannon appealed the district court decision and we retained the appeal.

II. Scope and Standards of Review.

Our general assembly has directed that final decisions of municipal civil rights commissions shall be reviewable to the same extent as final decisions of the Iowa Civil Rights Commission (ICRC). *See* Iowa Code § 216.19 (2013). . . .

III. Discussion.

Section 216.9 of ICRA provides, in general terms, that "[i]t is an unfair or discriminatory practice for any educational institution to discriminate on the basis of ... disability in any program or activity." Iowa Code § 216.9. The DCRO sets forth the same general language in extending its own protections against disability discrimination, to "provide for the execution within the city of the policies embodied in the Iowa Civil Rights Act of 1965 and" related federal

civil rights laws. *See* Davenport, Iowa, Mun.Code § 2.58.010(B) (2013); *id.* § 2.58.125(A). Federal law extends its own disability discrimination protections in both the ADA and Section 504 of the Rehabilitation Act. *See* Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101–12213 (2006); Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

We have often explained we will look to the ADA and cases interpreting its language, as well as cases interpreting the Rehabilitation Act, for guidance as we analyze disability discrimination claims brought under ICRA. *See, e.g., Fuller v. Iowa Dep't of Human Servs.,* 576 N.W.2d 324, 329 (Iowa 1998). We have also explained we may look to the regulations underlying the federal acts in our analysis. *Id.* While these authorities are often persuasive, we note we are also guided by the breadth of the protections very clearly set forth in both ICRA and the DCRO. *See* Iowa Code § 216.18(1) ("This chapter shall be construed broadly to effectuate its purposes."); Davenport, Iowa, Mun.Code § 2.58.020 ("This chapter shall be construed broadly to effectuate its purpose.").

While ICRA and the DCRO set forth their protections in general terms, without language of limitation, the Rehabilitation Act and the ADA contain additional content in their statutory provisions. The ADA, applicable to all academic institutions receiving federal funding, provides that "no qualified individual with a disability shall, by reason of such disability ... be denied the benefits of the ... programs ... of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Rehabilitation Act sets forth a similar standard, providing "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability ... be denied the benefits of ... any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Both the ADA and the Rehabilitation Act specifically prohibit discrimination against those with disabilities based not just on "affirmative animus," but also any discrimination based on thoughtlessness, apathy, or stereotype. *See, e.g., Alexander v. Choate,* 469 U.S. 287, 295–97, 105 S.Ct. 712, 717–18, 83 L.Ed.2d 661, 668–69 (1985).

In the context of higher education, Rehabilitation Act regulations explain a qualified individual is one "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 34 C.F.R. § 104.3(*l*)(3) (2013). Educational institutions are required, however, to provide "such modifications ... as are necessary" to aid individuals in meeting these academic and technical standards, to ensure requirements do not discriminate on the basis of disability. *Id.* § 104.44(a). The ADA incorporates a closely related accommodation requirement in defining a "qualified individual with a disability" as one "who, with or without reasonable modifications to rules, policies, or practices ... or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided." 42 U.S.C. § 12131(2). Various courts have explained the ADA's "reasonable modification"

requirement and the Rehabilitation Act's accommodation requirement impose coextensive obligations, and the terms and standards may often be used interchangeably. *See, e.g., Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816 n. 26 (9th Cir.1999).

Evaluating these statutory and regulatory standards in cases involving claims of disability discrimination in higher education, courts have required a claimant establish the following elements: (1) the claimant is a person with a disability under the relevant statute or statutes; (2) the claimant is qualified to participate in the program or, in other words, can meet the essential eligibility requirements of the program with or without reasonable accommodation; and (3) the claimant was denied the benefits of the program because of his or her disability. . . .

1. *The meaning of "Qualified with Reasonable Accommodation."* As noted, the relevant federal acts and regulations define qualified individuals as those individuals who, with reasonable accommodation or "modification," can meet the "essential eligibility requirements" of the institution. 42 U.S.C. § 12131(2). In interpreting the meaning of reasonable accommodation, the United States Supreme Court has noted regulations implementing the Rehabilitation Act provide reasonable "[m]odifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted." *See Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 408 n. 9, 99 S.Ct. 2361, 2368 n. 9, 60 L.Ed.2d 980, 990 n. 9 (1979) (quoting 45 C.F.R. § 84.44); *see also* 29 C.F.R. § 1630.2(*o*)(2) (providing, in employment discrimination context, "[r]easonable accommodation may include but is not limited to: ... acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities" (emphasis omitted)).

Further, the Supreme Court has noted, reasonable modifications in the form of "[a]uxiliary aids may include taped texts, interpreters or other effective methods ..., readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions." *Davis*, 442 U.S. at 408 n. 9, 99 S.Ct. at 2368 n. 9, 60 L.Ed.2d at 990 n. 9 (quoting 45 C.F.R. § 84.44); *Nelson v. Thornburgh*, 567 F.Supp. 369, 380 (E.D.Pa.1983) ("[T]he provision of readers is an express HHS example of reasonable accommodation." (Internal quotation marks and brackets omitted.)). Reasonable modification need not include, however, " 'devices or services of a personal nature.' " *Davis*, 442 U.S. at 408 n. 9, 99 S.Ct. at 2368 n. 9, 60 L.Ed.2d at 990 n. 9 (quoting 45 C.F.R. § 84.44). In addition, an accommodation may not be reasonable, the Supreme Court has explained, if it imposes "undue financial [or] administrative burdens" on the institution, or if it requires "a fundamental alteration in the nature of [the] program" offered. *Id.* at 410–12, 99 S.Ct. at 2369–

70, 60 L.Ed.2d at 990–92. Because the parties have not raised below or on appeal an issue of undue burden with respect to possible accommodations, and because Cannon's requests fit plausibly within the range of accommodations recognized as reasonable by courts and the ADA's implementing regulation, we consider here only the issue of whether accommodation would constitute a fundamental alteration of Palmer's program.

2. *The general contours of the fundamental alteration analysis.* In *Davis*, the Supreme Court encountered a case of a student with substantial hearing loss who sought nursing training at Southeastern Community College, in pursuit of her eventual goal of state nursing certification in North Carolina. *Id.* at 400, 99 S.Ct. at 2364, 60 L.Ed.2d at 985–86. Upon learning of the student's hearing loss in the application process, Southeastern consulted its entire nursing faculty, an outside audiologist, and the director of the North Carolina nursing board, as part of its process of determining whether the student could be admitted to the Southeastern program and whether the student could later safely participate in Southeastern's clinical training program. *Id.* at 401–02, 99 S.Ct. at 2364–65, 60 L.Ed.2d at 985–86. Based largely on the views of the nursing board director that the student had "hearing limitations which could interfere with her safely caring for patients," and limitations that could make it "impossible for [the student] to participate safely in the normal clinical training program," Southeastern denied the student admission. *Id.* at 401–02, 99 S.Ct. at 2365, 60 L.Ed.2d at 985–86.

Relying on those conclusions, the Supreme Court explained "Southeastern, with prudence, could [therefore] allow [the student] to take only academic classes." *Id.* at 409–10, 99 S.Ct. at 2369, 60 L.Ed.2d at 990. Whatever benefits the student might have received from an academic course of study, the Court explained, "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410, 99 S.Ct. at 2369, 60 L.Ed.2d at 990. That kind of modification, the Court concluded, would constitute a "fundamental alteration" of Southeastern's nursing program far greater than the reasonable "modification" required by federal laws and regulations. *Id.*

In reaching its conclusion on the fundamental alteration question thirty-five years ago, however, the Supreme Court explained the line between reasonable accommodation and fundamental alteration would not always be so neatly drawn in the future. *Id.* at 412, 99 S.Ct. at 2370, 60 L.Ed.2d at 992. "It is possible to envision situations," the Court observed, "where an insistence on continuing past requirements and practices" may deprive "genuinely qualified" persons of opportunities for participation in educational programs. *Id.* Technological advances, the Court explained, should be expected to enhance and appropriately adapt opportunities for individuals with disabilities without undue burden, and refusals to modify programs accordingly may then constitute discrimination under the relevant laws. *Id.* at 412–13, 99 S.Ct. at 2370, 60 L.Ed.2d at 992. Identification of instances where refusal to accommodate constitutes

discrimination, the Court emphasized, would therefore remain an important and ongoing responsibility of those tasked with implementation and application of our disability discrimination laws. *Id.*

Courts later applying the teachings of *Davis* have explained it "struck a balance" between the statutory rights ensuring those with disabilities "meaningful access" to the benefits offered by educational institutions, and "the legitimate interests" of those institutions "in preserving the integrity of their programs." *Alexander,* 469 U.S. at 300, 105 S.Ct. at 720, 83 L.Ed.2d at 671; *Case W. Reserve Univ.*, 666 N.E.2d at 1384 (quoting *Alexander*). To strike that balance appropriately, the Supreme Court has observed, courts and educational institutions alike must take great care not to define the benefit or program "in a way that effectively denies otherwise qualified ... individuals [with disabilities] the meaningful access to which they are entitled." *Alexander,* 469 U.S. at 301, 105 S.Ct. at 720, 83 L.Ed.2d at 672.

Recognizing this fine line, lower courts have elucidated two principles in the fundamental alteration analysis that guide us in our inquiry here. First, courts have recognized that in considering the interests of educational institutions in the integrity of their programs, some deference to the institution's professional or academic judgment may often be appropriate. *See, e.g., Wong,* 192 F.3d at 817; *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25 (1st Cir.1991). Second, however, whether and the extent to which that deference is appropriate depends heavily on the institution's satisfaction of several obligations. *See Wong,* 192 F.3d at 817–18; *Wynne,* 932 F.2d at 25–26. The institution, for example, has a "real obligation" to seek out "suitable means of reasonably accommodating" individuals with disabilities and to submit "a factual record indicating" it "conscientiously carried out this statutory obligation." *Wynne,* 932 F.2d at 25–26; *see also Wong,* 192 F.3d at 818 ("Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability [and] to explore alternatives for accommodating the student[.]"). That obligation requires an individualized and extensive inquiry—an institution must "carefully consider [ ] each disabled student's particular limitations and analyz[e] whether and how it might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards." *Wong,* 192 F.3d at 826; *see Mark H. v. Hamamoto,* 620 F.3d 1090, 1098 (9th Cir.2010) (" '[M]ere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; [the Rehabilitation Act] create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.' " (quoting *Duvall v. County of Kitsap,* 260 F.3d 1124, 1136 (9th Cir.2001))); *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir.1988) ("[T]he determination of whether physical qualifications are essential functions of a job requires the [fact finder] to engage in a highly fact-specific inquiry. Such a determination should be based upon more than

statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." (Citation omitted.)); *see also Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287, 107 S.Ct. 1123, 1130–31, 94 L.Ed.2d 307, 320 ("[T]he [fact finder] will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear....").

Furthermore, institutions cannot merely look to "accepted academic norms," in exploring reasonable accommodations—because reasonable alternatives may often "involve new approaches or devices quite beyond 'accepted academic norms.' " . . .

We require institutions to fulfill these obligations, courts have explained, because "courts still hold the final responsibility for enforcing the [disability discrimination laws] ... [and w]e must ensure that educational institutions are not 'disguis[ing] truly discriminatory requirements' as academic decisions." *Wong*, 192 F.3d at 817 (quoting *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir.1999)). Only if we determine an institution has satisfied its obligation of detailed, individualized inquiry is it appropriate to defer to the institution's judgment regarding the integrity of its program. *See Zukle*, 166 F.3d at 1048; *see also Wong*, 192 F.3d at 817–18; *Pandazides v. Va. Bd. of Educ.*, 946 F.2d 345, 349 (4th Cir.1991) ("Accordingly, defendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications. To do otherwise reduces the term 'otherwise qualified' and any arbitrary set of requirements to a tautology.").

3. *The appropriate level of deference here.* On appeal, Palmer contends the commission erred, as a matter of law, in failing to grant appropriate deference to Palmer's position regarding Cannon's ability to complete the graduate program without fundamental alteration, and relies on two distinct grounds.

First, Palmer relies on an earlier Iowa higher education case where we explained we " 'may not override' " an institution's professional judgment " '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.' " *See North v. State*, 400 N.W.2d 566, 571 (Iowa 1987) (quoting *Ewing*, 474 U.S. at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532). In *North*, however, we were not faced with claims of disability discrimination under the ADA or ICRA—instead, we considered breach of contract, tortious interference, and substantive due process and § 1983 civil rights claims. *See id.* at 568–71. We imported that principle of academic deference from a Supreme Court case that had also considered a due process claim, where the Court had no occasion to consider the level of deference to be accorded in discrimination cases and had taken pains to note it was not considering claims beyond those before it. *See Ewing*, 474

U.S. at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532 ("It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing[.]"); *North,* 400 N.W.2d at 571 (quoting *Ewing*). Given that context, we are unpersuaded by Palmer's reliance on *North* because, as numerous courts have explained, the application of deference based on "accepted academic norms" is inadequate in the disability discrimination context—courts must go significantly further in their inquiries to ensure inappropriate generalizations do not deny individuals meaningful access to the benefits provided by educational institutions. *Wynne,* 932 F.2d at 26 ("[*Ewing*] was a context where no federal statutory obligation impinged on the academic administrators; their freedom to make genuine academic decisions was untrammeled."); *Strathie,* 716 F.2d at 231; *Pushkin,* 658 F.2d at 1383; *see also Guckenberger v. Boston Univ.,* 8 F.Supp.2d 82, 89 (D.Mass.1998) (noting "a court should not determine that an academic decision is a 'substantial departure from accepted academic norms' simply by conducting a head-count of other universities"); Laura F. Rothstein, *Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law,* 41 St. Louis U. L.J. 973, 995 (1997) [hereinafter Rothstein] (observing New Jersey federal court "recognized the importance of individualized determinations" in holding state medical boards' use of physical and mental health inquiries "as a screening device" "were likely in violation of Title II of the ADA" and observing "these judges were affirming the principle that discrimination on the basis of disability cannot be justified by generalizations about such disabilities").

Perhaps just as importantly for purposes of our analysis here, the Supreme Court in *Ewing* explained it was granting deference there *only after* noting "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career." *Ewing,* 474 U.S. at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532. To the extent the *Ewing* deference analysis may inform our analysis in the context of disability discrimination, then, we note the Ewing court's emphasis on the extensive individualized investigation suggests, much like courts actually considering disability discrimination claims have, application of any deference may only be appropriate after an institution has established it has fulfilled its obligations of conscientious inquiry. *Id.; see also* Edward N. Stoner II & 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, 611 (2004) (noting one principle "underlying judicial deference in ADA cases involving students is that persons trained to have educational judgment are not necessarily experts in disability accommodations").

Palmer's second ground for its contention the commission erred in failing to extend

appropriate deference—namely, that Palmer fulfilled its obligation of extensive individualized inquiry before denying Cannon the opportunity to participate in its program—is no more persuasive. Palmer advances a two-pronged exposition of its investigation with respect to Cannon. First, Palmer recounts the numerous discussions its faculty had in developing the technical standards it seeks to apply here, points to the evidence it presented below supporting its initial creation and adoption of the standards, and notes the "standards are based upon [Palmer's] teaching experiences with disabled students including those visually impaired." Second, Palmer explains the "technical standards are applied on a case-by-case basis depending upon whether or not the disabled individual meets those standards." Based on this exposition, we cannot conclude the commission's findings regarding Palmer's approach were unsupported by substantial evidence or that the commission erred in determining Palmer failed to advance evidence of an inquiry resembling anything like the fact-specific, individualized inquiry required by the caselaw.

On the first point, Palmer appears to concede it seeks to invoke its standards in Cannon's case as an "essential requirement" based on no investigation at all of Cannon's condition or ability to perform with a reader or the various technologies he noted he had or could have at his disposal. Instead, Palmer would invoke the standards based on its experiences with past individuals with disabilities. That strict, generalized invocation of Palmer's technical standard falls far short, we think, of the conscientious, interactive, student-specific inquiry required by the caselaw. . . .

Palmer fares no better on the second point—it invokes the phrase "case-by-case basis," but then concedes it applies its technical standards depending solely on whether the individual meets the standards. *See Case W. Reserve Univ.*, 666 N.E.2d at 1391 (Resnick, J., dissenting) ("[B]lanket requirements are not *ipso facto* bona fide. CWRU cannot exclude all blind medical school applicants without first investigating and considering reasonable accommodations ... any more than it can exclude an individual applicant without conducting such an investigation."); Rothstein, 41 St. Louis U. L.J. at 994 ("One theme that is consistent in virtually all disability discrimination decisions, even those involving academic institutions or health care professions, is that an assessment about whether a particular individual is otherwise qualified should be made on an individualized basis. Courts have usually been wary of generalized determinations that a particular condition renders all persons with that impairment unqualified to carry out a particular job."). If there is an inquiry hidden in that apparent tautology as to how or whether the standards might be modified in any individual case, or more importantly, an indication as to the way the inquiry was made for Cannon, we cannot discern it. Palmer's generalized application did little to satisfy its obligation of individualized investigation here.[9] . . .

Turning to the commission's analysis of the deference question, we note the commission

set forth extensive factual findings bolstering its conclusion Palmer failed to satisfy its investigative obligation. . . .

4. *The commission's fundamental alteration analysis: specific fundamental alteration principles and their application here.* Because Palmer has failed to establish it met the legal prerequisites for deference to its determination accommodation would constitute fundamental alteration here, we turn to the commission's analysis of the fundamental alteration inquiry. *Cf. Wong*, 192 F.3d at 819–20 (noting, in different appellate posture, court would "not defer to the institution's decision"—instead, it would "examine the rejection of Wong's request for an eight-week reading period de novo").

At the outset, we note numerous courts have explained determinations of reasonable accommodation and fundamental alteration within the meaning of the ADA generally require flexible, fact-specific inquiries and are typically resolved as questions of fact.

* * * *

Whether the plaintiff can perform the essential job functions with reasonable accommodations is a mixed question of law and fact, which involves primarily a factual inquiry.").

Before examining the commission's findings regarding fundamental alteration, however, we think it prudent to note several principles courts and commentators have developed to aid the fact finder in determining whether an accommodation is reasonable or might constitute a fundamental alteration in a given case. . . . Implementing regulations for the ADA's employment provision suggest courts consider several factors in determining whether particular duties constitute fundamental or essential functions of the job. *See* 29 C.F.R. § 1630.2(n)(3); *see also Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir.1998). Those factors include, among others: job descriptions prepared for advertising or used when interviewing applicants for the job; the amount of time spent on the job performing the function in question; consequences of not requiring the person to perform the function; the work experience of persons who have held the job; and/or the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n); *see also* Rothstein, 41 St. Louis U. L.J. at 976–77 ("The function may be essential because that function is the purpose of the position, because there are a limited number of employees among whom the function can be distributed, or because the function is highly specialized and the individual was hired specifically because of his or her expertise in that specialty.").

Applying these "essential functions" principles from employment cases, numerous courts in the education context have found the fact that institutions have previously granted accommodations the same as or similar to the accommodation at issue persuasive evidence the

accommodation is reasonable and does not fundamentally alter the institution's curriculum. . . .

Similarly, courts have considered the current and past job experiences of those with the same disability in considering whether modification might fundamentally alter a professional curriculum. . . . Courts have also looked to an individual's past academic success and considered whether later professional licensure actually requires performance of the institution's proposed function. *Shaywitz v. Am. Bd. of Psychiatry & Neurology*, 675 F.Supp.2d 376, 390–91 (S.D.N.Y.2009) ("Given Shaywitz's alleged competence and success as a medical student, resident, and fellow, and that the Board has largely eliminated its Part II Oral Exam, the Court finds it plausible that certifying Shaywitz without his having to pass the live-patient portion of the Part II Oral Exam, based on the facts as alleged at the pleading stage, would not 'fundamentally alter the nature of' the Board-certification process." (Internal citations omitted.)).

With those propositions in mind, we turn to the commission's findings with respect to fundamental alteration. . . .

As noted above, the commission made several noteworthy findings in support of its determination Cannon's proposed accommodation was reasonable. First, the commission found the record revealed no evidence state licensing boards required sight, or interpretation of radiographic images in precisely the manner required by Palmer, for purposes of licensure. Second, Palmer presented no evidence the course modifications and waivers it grants at its California campus have jeopardized its accreditation with national accrediting bodies. Third, at least two blind students had graduated previously from Palmer's Davenport campus and are currently licensed and practicing successfully.

Palmer asserts, however, that it cannot accommodate Cannon, and the commission's decision must therefore be reversed as a matter of law, because all chiropractic students must be able to see radiographic images. We find this contention unpersuasive. Palmer itself concedes at least twenty percent of current chiropractic practitioners practice without "the ability to take plain film radiographs in their office[ ]," and concedes the size of the fraction is currently on the rise. These concessions are at odds with the contention radiographic image interpretation—regardless whether in the narrow sense Palmer has defined it or even the more general sense of having the equipment available—must constitute an "essential" component of the education or practice of chiropractic. Furthermore, as Palmer has noted, frequent consultation between chiropractors and radiology specialists is "oftentimes" "part of the clinical practice [of chiropractic]."

We also find it instructive that numerous medical schools, ostensibly recognizing these realities, have admitted blind students and made accommodation in recent years. . . . The accommodations made by these schools, coupled with Palmer's own previous accommodations, weigh particularly heavily against Palmer's fundamental alteration defense. *See Am. Council of*

the Blind, 525 F.3d at 1272; *Tamara*, 964 F.Supp.2d at 1084–85. Recent proposed rulemaking by the Department of Justice bolsters this position, as it seeks "to ensure that medical diagnostic equipment, including examination tables, examination chairs, ... and other imaging equipment used by health care providers for diagnostic purposes are accessible to and usable by individuals with disabilities." *Medical Diagnostic Equipment Accessibility Standards*, 77 Fed.Reg. 6916, 6916 (proposed Feb. 9, 2012) (to be codified at 36 C.F.R. pt. 1195); *see also* Alicia Ouellette, *Patients to Peers: Barriers and Opportunities for Doctors with Disabilities*, 13 Nev. L.J. 645, 661 (2013) ("Congress also included incentives in the Affordable Care Act for accessibility.").

We conclude substantial evidence supports each of the commission's findings. Furthermore, given the widespread recognition that the fundamental alteration inquiry is fact-intensive and typically to be resolved as a question of fact, given the recognition in the caselaw that each of the factors considered by the commission may constitute persuasive evidence on the issue of reasonable accommodation, and given the high burden courts have imposed where the same institution or other institutions have made reasonable accommodation for the same deficit, we cannot conclude the commission has erroneously interpreted or irrationally applied the applicable law in concluding Palmer failed to establish provision of Cannon's requested accommodations would constitute fundamental alteration of its curriculum on these facts. *See* Iowa Code § 17A.19(10)(*c*), (*f*), (*i*), (*j*), (*l*).

IV. Conclusion.

We conclude substantial evidence supports the commission's factual findings and the commission has not erred in interpreting the relevant laws or applying them to the facts at issue here. We therefore reverse the decision of the district court and remand the case to the district court with instructions to affirm the commission's order.

* * * *

Notes and Questions

1. How, if any, was the court's analysis influenced by the fact that the chiropractic college had previously enrolled students who were blind at other campuses operated by the institution? If this had not been the case, do you think it would have changed the outcome in this case?

2. The college argued that its decision to deny the student's entry into the graduate program should have been afforded academic deference? According to the court, however, what obligations had the college failed to satisfy in considering the student's request for accommodations to merit such deference?

3. How did the court respond to the college's attempt to justify its decision on the basis of "accepted academic norms"?

SEC. 8.5. Sexual Harassment of Students by Faculty Members

Hayut v State University of New York
352 F.3d 733 (2nd Cir. 2003)

CALABRESI, Circuit Judge.

Plaintiff-Appellant Inbal Hayut seeks review of a grant of summary judgment by the United States District Court for the Northern District of New York, following a Memorandum-Decision and Order entered July 30, 2002, in favor of Defendants-Appellees on Hayut's harassment and discrimination claims brought under 42 U.S.C. § 1983, the New York Constitution, Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, and common law.

Hayut's claims arise out of what she alleged was a pattern of humiliating and derogatory comments directed at her while she was a student at Defendant-Appellee State University of New York College at New Paltz ("SUNY New Paltz"). Specifically, Hayut's 42 U.S.C. § 1983 claim alleges that, during the Fall 1998 semester, her political science professor, Defendant-Appellee Alex Young ("Professor Young"), targeted her with derogatory and sexually charged comments in violation of her equal protection rights under the United States Constitution. She makes analogous claims under the New York State Constitution. Hayut's Title IX claim against Defendants-Appellees State University of New York system ("SUNY") and SUNY New Paltz (collectively, the "SUNY defendants") is predicated upon their employment of Professor Young and specifically alleges the failure of officials at SUNY New Paltz to remedy Young's discrimination.

Hayut's claims against Defendants-Appellees Richard Varbero, Associate Dean of the College of Arts and Sciences at SUNY New Paltz ("Dean Varbero"), Gerald Benjamin, Dean of the College of Arts and Sciences at SUNY New Paltz ("Dean Benjamin"), and Lewis Brownstein, a tenured Professor and Chair of the Political Science Department at SUNY New Paltz ("Professor Brownstein") (collectively, the "individual defendants"), allege violations of her federal and state equal protection rights based on a respondeat superior theory, on grounds that the individual defendants failed timely and reasonably to respond to her complaints of Professor Young's harassment, and that she was singled out by the individual defendants in an effort to hinder the pursuit of her harassment claim. Hayut also asserts a common law tort claim alleging ministerial neglect against the individual defendants.

The district court – rejecting all of Hayut's claims--granted summary judgment to Young, the SUNY defendants, and the individual defendants. For the reasons set forth below, we hold the court properly granted summary judgment to the SUNY defendants and the individual defendants, but erred with respect to Young. Accordingly, we affirm its judgment in part and vacate and remand it in part.

I. BACKGROUND

A. The "Monica" Comments

After completing two years at Rockland Community College ("RCC"), Hayut enrolled at SUNY New Paltz for the 1998-99 academic year. Hayut, a political science major, registered for two courses with Professor Young, a tenured political science professor. Each course met twice weekly during the Fall 1998 semester. According to Hayut, Professor Young's sexual harassment of her began approximately three weeks into the semester. Initially, the harassment consisted of Professor Young referring to Hayut by the nickname "Monica," in light of her supposed physical resemblance to Monica Lewinsky, a former White House intern who at that time was attaining notoriety for her involvement in a widely-covered sex scandal with then-President William J. Clinton.

According to the testimony of some witnesses, Hayut initially laughed at the nickname, rolled her eyes, or simply shrugged her shoulders, giving no outward indication that the comments troubled her. However, Young's use of this nickname persisted even after Hayut requested that he stop. Despite her protestations, Professor Young would occasionally, in dramatic fashion, attempt to locate Hayut in the classroom by sitting in front of his desk and screaming the name "Monica." Hayut maintains that the "Monica" comments occurred at least once per class period throughout the rest of the semester and persisted even in her absence. Hayut also maintains that, on occasion, Professor Young addressed her as "Monica" outside of class when they happened to pass each other.

Professor Young's conduct was not limited to using the "Monica" nickname, but included other comments as well. These added context to the nickname by associating Hayut with some of the more sordid details of the Clinton/Lewinsky scandal. Specifically, Professor Young referred to some of Clinton's and Lewinsky's more notorious conduct, including "[h]ow was your weekend with Bill?," which question Hayut claims he asked virtually every Tuesday morning class session. In addition to this "weekend" comment, Professor Young also told Hayut to "[b]e quiet, Monica. I will give you a cigar later." Hayut testified that the "cigar" comment was uttered twice during the Fall 1998 semester, once in her afternoon class period with

Professor Young (after he had observed Hayut talking to another student during a lecture), and the second in the very next morning class session. Finally, Professor Young observed to Hayut, in front of her peers, that "[y]ou are wearing the same color lipstick that Monica wears." Hayut testified in her deposition that these specific comments by Professor Young – particularly the "cigar" comment – evoked shock and disbelief from students in the class.

Hayut also testified during her deposition that, on at least one occasion in the middle of the semester, Professor Young's remarks upset her to the point that she began crying and walked out during his lecture. Hayut did not, however, ever approach Professor Young after class, in the hallway, or in his office to discuss her disapproval of the "Monica" nickname and of his other comments, despite having the opportunity to do so.[2]

Hayut did not, moreover, report Professor Young's conduct to school officials early in the Fall 1998 semester. She clearly could have done so. Thus, after returning from a two-week absence mid-semester, Hayut met with Professor Brownstein. In addition to serving as Chair of the Political Science department, Professor Brownstein also served as Hayut's academic advisor. During this meeting, Hayut discussed the work she had missed in Professor Brownstein's course. She ultimately decided to withdraw from his class after determining that she would be unable to make up the work. Significantly, Hayut never mentioned Professor Young's conduct to Professor Brownstein at this Fall 1998 meeting.

Hayut maintains that the "Monica" comments affected her deeply, humiliating her in front of her peers, causing her to experience difficulty sleeping, and making it difficult for her to concentrate in school and at work. At times, Hayut feared that new developments in the Clinton/Lewinsky scandal would induce Young to come up with a new, off-color comment at her expense and, therefore, she avoided watching the news. Hayut also testified that, despite her protestations, Professor Young's "Monica" references led other students – primarily male – to address her as "Monica" in a ridiculing manner outside of class.

B. Hayut Complains to SUNY New Paltz

In early December 1998, prior to the final exam period, Hayut visited Dean Varbero to complain about Professor Young's conduct. Hayut's friend Merante proposed the meeting with Dean Varbero as Merante wanted to voice numerous complaints of her own about Professor Young's teaching style, including his classroom temperament, his alleged unfair treatment of the

[2] Hayut testified in her deposition that she accompanied her friend Diane Merante, also a student in Professor Young's courses and a witness to the "Monica" comments, to Professor Young's office during the semester to return some classroom materials. During the course of that visit, neither Hayut nor Merante mentioned anything to Professor Young about his remarks, nor did Professor Young make any "Monica" comments to Hayut during that meeting.

students, and his "dictatorial" teaching style. During the course of the meeting, Merante mentioned Professor Young's "Monica" statements. Dean Varbero turned to Hayut to inquire and Hayut confirmed that she felt Professor Young had harassed her with the "Monica" comments. Dean Varbero then discussed Hayut's allegations with her for over one hour. He said that, if true, Professor Young's conduct would be viewed by the administration as a serious matter. And he also referred Hayut to Professor Brownstein who, because of his position in Professor Young's immediate chain of command, would have a particular interest in this matter. According to Merante, Dean Varbero specifically instructed Hayut to report Young's conduct to Professor Brownstein. Although this was an informal avenue of redress, Dean Varbero made clear to Hayut that if she was at all dissatisfied with Professor Brownstein's response, she was to report back to Dean Varbero for action. Dean Varbero also indicated that, in accordance with school policy, if Hayut sought more formal action, she would ultimately need to reduce her complaint to writing.[3]

Merante recalled that Dean Varbero took the additional step of attempting to contact Professor Brownstein in order to arrange an appointment on Hayut's behalf. Professor Brownstein's secretary told Dean Varbero that, because students were taking final exams during that week, Professor Brownstein was not holding regular office hours and his availability was unpredictable. The secretary suggested that Hayut should simply visit Professor Brownstein's office. Hayut agreed to do so and left Dean Varbero's office.

Hayut went to Professor Brownstein's office but found him unavailable. She waited briefly and then left without indicating the nature of her visit or asking that Professor Brownstein contact her about the matter. Hayut maintains that she subsequently returned to Professor Brownstein's office but, again, found him unavailable. At no time did Hayut make further contact with Dean Varbero to discuss her inability to meet with Professor Brownstein or any

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[3] In his deposition, Dean Benjamin, Dean of the College of Arts and Sciences, explained the school's procedures that normally would be followed in a situation such as this:

> Generally, if a student has a complaint, he or she brings it to the Chair of the Academic Department. The Chair of the Academic Department may refer it to the Associate Dean who takes care of student complaints and faculty matters, which, was Dean Varbero. Alternatively, the student may approach the Dean's offices without approaching the Chair of the department which basically would refer the student to the Chair for an initial counseling and consideration of whether the Chair should intervene without engaging the Dean's office. So there's a process of complaint. If the complaint is oral and is regarded as sufficiently, potentially sufficiently important to require action by the Dean's office, formal or informal, the informal action might be taken by the Associate Dean following a potential action by the Chair. If formal action's required, the student is requested to provide a written complaint. The student is counseled that a written complaint will be taken in confidence so there will be no retribution taken against the student by the teacher.

possible dissatisfaction with how her informal complaint was being handled by the administration.

Hayut did not actually speak with Professor Brownstein until late January 1999, when she met with him to discuss her Spring 1999 class schedule. During this meeting, Hayut told Professor Brownstein of Professor Young's conduct. She did not, however, submit a written complaint to him or to anyone else. Nor did she make any other effort to pursue her verbal complaint with other members of the administration. After hearing about Professor Young's conduct, Professor Brownstein echoed Dean Varbero's advice that Hayut should submit a written complaint.

Despite Hayut's failure to re-visit Dean Varbero, Dean Varbero himself had notified Professor Brownstein and Dean Benjamin of the matter. And, on February 11, 1999, before Hayut submitted a written complaint, a number of college officials including Dean Benjamin, Dean Varbero, Professor Brownstein, Gail Gallerie, the Executive Assistant to SUNY New Paltz's President, and Grace Pell, SUNY New Paltz's Affirmative Action Officer ("AAO"), attended a meeting to discuss Professor Young's conduct. All officials agreed that Young's contract with SUNY New Paltz entitled him to written notice of the charges before SUNY could initiate any formal process and, if appropriate, impose disciplinary measures.[4] Likewise, SUNY New Paltz's internal grievance procedures required that, if formal action was sought through the Affirmative Action Office, all grievances of this sort had to be submitted by the claimant in writing to the AAO within 45 days of the discriminatory act. The various university officials readily agreed that, if true, the allegations were sufficiently serious to warrant a formal response.

On February 16, 1999, after the Spring 1999 semester had begun, Hayut delivered a written complaint to Professor Brownstein.[5] The day after receiving the written complaint, Dean Benjamin, Dean Varbero, and Professor Brownstein convened a counseling session with Young to address matters raised in the complaint. Young admitted to having made the remarks. He indicated at that counseling session that the "Monica" comments had been intended only as jokes, although he later conceded during a deposition in connection with this action that the

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[4] The terms of the collective bargaining agreement then in effect between SUNY and United University Professors, Professor Young's union, required that, before any disciplinary measures could be taken, a formal notice of discipline would need to be issued and served on Professor Young. What information the notice must contain is set forth in Article 19, § 19.4(a), and includes "a detailed description of the alleged acts and conduct including reference to dates, times, and places." Those collective bargaining agreement requirements alone mandate that a formal, written complaint must be received by the AAO before any formal further steps could be taken by the administration to discipline the individual committing the challenged conduct.

[5] Hayut alleges in her handwritten complaint that the harassment began during the first week of classes, although her later deposition testimony reveals that the conduct began during the third week of school.

"Monica" statements were also intended as a form of discipline, uttered when Hayut was disrupting the class by talking or eating. Dean Benjamin informed Professor Young that the matter would be taken seriously. Part of the administration's response, according to Dean Benjamin, included a formal letter to Professor Young emphasizing what behavior the school expected of its professors and explaining what actions Dean Benjamin would take.

Within days of the counseling session, Professor Young, who had nearly thirty years of teaching experience, discussed the possibility of retirement. Dean Benjamin agreed that Young's voluntary departure from SUNY New Paltz would be in the best interest of all parties. On March 18, 1999, Young tendered his resignation, which was promptly accepted.

Hayut had enrolled in various classes for the Spring 1999 semester, none of which were taught by Professor Young. Hayut admits she had no further contact with Professor Young and suffered no harassment from him after conclusion of the Fall 1998 semester. Sometime after delivering her written complaint, Hayut simply stopped attending classes. This led to her receiving failing grades in all courses for that semester. Hayut attempted to transfer to Pace University ("Pace") for the upcoming Fall 1999 semester, but – due to her poor academic performance at SUNY– was unable to do so without first completing one year of remedial education.

* * * *

II. DISCUSSION

Hayut appeals the district court's grant of summary judgment on all of the claims dismissed [by the district court], except for her state equal protection claim against Young and her state Human Rights Law claims, neither of which she now asserts . . . . The question at the heart of this appeal is whether Hayut has presented sufficient evidence to survive summary judgment on her remaining discrimination claims.

For the reasons discussed below, with respect to her section 1983 federal equal protection claim against Young, we find sufficient, disputed evidence in the record to make a summary judgment inappropriate. On the other hand, we find there is insufficient evidence supporting the claims against the SUNY defendants and the individual defendants to survive judgment as a matter of law. We, therefore, vacate and remand the judgment of the district court, which deals with Hayut's section 1983 claim against Young, but affirm the district court's grant of summary judgment on all other claims raised on appeal.

A. Standard of Review

. . . . Summary judgment is appropriate "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (quoting Fed.R.Civ.P. 56(c)) . . . .

In determining whether a genuine issue actually exists and, thus, whether or not summary judgment is appropriate, courts may "not ... weigh the evidence, but [are] instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst,* 101 F.3d 845, 854 (2d Cir.1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) . . . .

B. Section 1983 Claim Against Young

Hayut's section 1983 claim alleges that Professor Young violated her Fourteenth Amendment equal protection rights by engaging in sexual harassment. She claims that Professor Young's "Monica" comments had sexual overtones and created a hostile environment for her during her courses with him. Hayut has never asserted that Professor Young's harassment involved any conduct other than the nickname and the scandalous references.[6] She maintains, however, that, beginning approximately in the third week of classes, these comments occurred during every period of instruction with Professor Young, and that they were sufficiently offensive and humiliating to cause her great distress and to interfere unduly with her academic performance.

In order to survive a summary judgment motion on her section 1983 claim for sexual harassment, Hayut must proffer evidence that: (1) Young was acting "under color of state law" at the time he committed the conduct complained of, and (2) that his conduct deprived her of "'rights, privileges or immunities secured by the Constitution or laws of the United States.'" *Greenwich Citizens Comm., Inc. v. Counties of Warren & Washington Indus. Dev. Agency,* 77 F.3d 26, 29-30 (2d Cir.1996) (quoting *Parratt v. Taylor,* 451 U.S. 527, 535 (1981)).

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[6] Hayut testified at her deposition that Professor Young touched her "once." This touching occurred during the meeting in Professor Young's office during which Merante returned some classroom materials. When asked at her deposition about any touching by Professor Young, Hayut responded that Professor Young "put his hand on my shoulder, and I shrugged my shoulder, and he just let go and sat down at his desk." No other touching took place and Hayut's claims appear not to be in any way premised on this touching.

It is these questions, therefore, which we now address.

1. Color of State Law

The Supreme Court has recognized that an individual is acting under color of state law when exercising power "'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Polk County v. Dodson,* 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)); *see also West v. Atkins,* 487 U.S. 42, 49 (1988). As a general rule, "'state employment is . . . sufficient to render the defendant a state actor.'" *West,* 487 U.S. at 49 (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 936 n. 18 (1982)). For purposes of a section 1983 action, a defendant necessarily "acts under color of state law when he abuses the position given to him by the State." *West,* 487 U.S. at 50 . . . .

We think it clear that a professor employed at a state university is a state actor. A professor at a state university is vested with a great deal of authority over his students with respect to grades and academic advancement by virtue of that position. When a professor misuses that authority in the course of performing his duties, he necessarily acts under color of state law for purposes of a section 1983 action . . . . We, therefore, agree with the district court that Professor Young's position as a professor at SUNY New Paltz was such that if he abused the authority given him – as we think a reasonable jury could find – this threshold requirement would be satisfied. *See Hayut II,* 217 F. Supp.2d at 286. The question, then, is whether Hayut presented sufficient evidence to raise a triable issue of fact with respect to the severity or pervasiveness of Professor Young's conduct. We think she did.

2. Hostile Educational Environment

Hayut claims Professor Young's "Monica" comments created a hostile educational environment for her. Section 1983 sexual harassment claims that are based on a "hostile environment" theory, like Hayut's, are governed by traditional Title VII "hostile environment" jurisprudence. *See Annis v. County of Westchester,* 136 F.3d 239, 245 (2d Cir.1998); *Jemmott v. Coughlin,* 85 F.3d 61, 67 (2d Cir. 1996). As a result, surviving summary judgment on a hostile environment claim under section 1983 (as under Title VII) requires evidence not only that the victim subjectively perceived the environment to be hostile or abusive, but also that the environment was objectively hostile and abusive, that is, that it was "permeated with 'discriminatory intimidation, ridicule, and insult,' ... that is 'sufficiently severe or pervasive to alter the conditions'" of, in this case, the victim's educational environment. *See Harris v.*

Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) . . . .

Making a "hostility" determination in the educational context, as in the employment context, entails examining the totality of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with" the victim's academic performance. *See Harris*, 510 U.S. at 23. While the effect on a victim's psychological well being is relevant to the subjective component in the analysis, its presence, or absence, is not dispositive on the issue of severity, as "no single factor is required." *Id.* Finding the harassment "pervasive" means that the challenged incidents are "more than episodic; they must be sufficiently continuous and concerted." *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir.1989). There also must be evidence that the alleged discrimination was carried out because of sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Generally speaking, this analysis is fact-specific and, therefore, as in this case, is best left for trial.

As an initial matter, we note that Young does not dispute that he addressed Hayut as Monica" or that he made the other "Monica" comments. He stated that the comments were intended to be taken in a joking manner but, later, characterized them as a form of discipline. Professor Young articulates no defenses for his conduct and, specifically, has never expressly asserted that the comments complemented his classroom curriculum or had any other legitimate pedagogical purpose that might merit the kind of First Amendment protection that has long been recognized in the academic arena. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("[Academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom) . . . . We, therefore, express no view on (a) whether such a defense could have been, or could still be, made, or (b) if made, whether this claim would entail issues of fact or law.

Additionally, we agree with the district court and find that Hayut has put forth sufficient evidence (principally her own testimony) to permit a reasonable factfinder to conclude that she subjectively found Professor Young's conduct offensive. *Hayut II*, 217 F. Supp.2d at 286. Accordingly, our analysis focuses on whether a jury could also find that Professor Young's conduct created an educational environment (a) which rose to an objective level of hostility on the basis of sex, and (b) which had an adverse effect on the terms and conditions of her educational experience. *See Harris*, 510 U.S. at 21. We think a jury could so construe the evidence.

a. Pervasiveness

The evidence presented permits a reasonable trier of fact to find that the comments were sufficiently pervasive to create a hostile environment. Professor Young allegedly uttered some form of "Monica" comment during many periods of instruction with Hayut and even, on occasion, outside the classroom. The classroom comments routinely occurred shortly after each period of instruction had begun and in front of a fully assembled class. The evidence that Professor Young's conduct permeated the classroom atmosphere and set the tone for the whole class is sufficient to satisfy the "pervasiveness" requirement at the summary judgment stage.

We reject the district court's attempt to employ a mathematical equation of sorts to calculate the number of instances of misconduct in order to show that Professor Young's behavior did not pervade and color the classes throughout the entire semester. *Hayut II,* 217 F. Supp.2d at 287. The district court began, for example, by finding that during October 1998, Hayut missed approximately five classes in each of her courses with Professor Young (she took a two-week trip to Israel for her brother's bar mitzvah). *Id.* The court then calculated the remaining days in which Professor Young uttered a "Monica" comment in Hayut's presence, and deemed his remarks "sporadic and infrequent," and, hence, non-actionable. We believe the court's approach to be erroneous for several reasons.

First, a rigid "calculate and compare" methodology ignores the proper role of courts, which, at the summary judgment stage, is to construe all facts and draw all inferences in the light most favorable to the nonmovant. Also, such an approach, if strictly followed, disregards Supreme Court guidance that hostile environment analysis "is not, and by its nature cannot be, a mathematically precise test." *Harris,* 510 U.S. at 22. Because of the fact-specific and circumstance-driven nature of hostile environment claims, courts must be mindful that "'the appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable.'" *Whidbee v. Garzarelli Food Specialties, Inc.,* 223 F.3d 62, 70 (2d Cir.2000) (quoting *Richardson v. New York State Dep't of Correctional Serv.,* 180 F.3d 426, 439 (2d Cir.1999)). And courts should not, themselves, attempt to establish an absolute baseline for actionable behavior. *See id.*

Additionally, as applied specifically to the facts in this case, we think the district court's approach to be flawed. The court did not adequately consider the fact that, in just about half the periods of instruction taught by Professor Young that Hayut attended, Hayut was the target of "Monica" comments. These comments, moreover, were generally made at or near the beginning of the period, thereby setting the tone for the remainder of the class period. The court also ignored evidence that Professor Young continued the harassment by referring to Hayut, in her absence, as "Monica." Professor Young's persistent mention of "Monica" when speaking of

Hayut when she was not there can, of course, be relevant evidence in a discrimination claim. *See Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 190 (2d Cir.2001) (recognizing harassing remarks made outside a plaintiff's presence as germane to a hostile work environment claim). Whether a factfinder will, on balance, decide that the remarks reached the objective level of pervasiveness required by law is not for us to say. It is quite sufficient that there be enough evidence in the record from which a reasonable jury could so conclude. And of that we have no doubt.

b. Severity

We also find sufficient evidence to permit a trier of fact to find that the "Monica" comments were severe enough to transcend the bounds of propriety and decency, let alone harmless humor, and become actionable harassment based on Hayut's sex. The "Monica" nickname – pulled from the headlines covering the contemporaneous Clinton/Lewinsky scandal – can readily be understood as having powerful sexual connotations and overtones. This is especially so in light of Professor Young's "cigar" and "weekend" comments. Each remark, while brief, was made against a backdrop of classroom discussions and press coverage of the most salacious developments in the scandal. A reasonable jury could find that the "Monica" statements were more than mere joking comments or occasional vulgar banter, but were sexually charged and designed by Young to convey certain images about Hayut – that she "enjoyed the same sexual implements as the real Monica Lewinsky and that Ms. Hayut was a willing participant in deviant sexual activity with Young himself . . . ." [Plaintiff's] Brief at 7. There is, moreover, evidence in the record that suggests that, by discussing the sordid details of the Clinton/Lewinsky scandal, Professor Young made Lewinsky the focal point and object of ridicule of some of his classes. By then directing "Monica" comments toward Hayut, Professor Young likewise made Hayut the object of ridicule.

The district court characterizes Young's conduct as "highly offensive and obviously inappropriate." *Hayut II,* 217 F. Supp.2d at 287. We believe that this characterization of Young's conduct, and specifically of his comments of a sexual nature, given their frequency, compels the conclusion that a reasonable jury could find that his actions "transcend[ed] coarse, hostile and boorish behavior" and became actionable as a constitutional tort. *Annis v. County of Westchester,* 36 F.3d 251, 254 (2d Cir.1994).

The reactions of Hayut's peers and of various administrators at SUNY New Paltz are also significant to the mandated objective analysis. Hayut's testimony regarding the effect of Professor Young's behavior is corroborated by several individuals attending Professor Young's classes. These heard firsthand his "Monica" comments and testified that they, too, found the

behavior embarrassing and offensive. Likewise, when first informed by Hayut about Professor Young's conduct, Dean Varbero considered the allegations to be serious. When Dean Varbero, Dean Benjamin, Professor Brownstein, Gail Gallerie, the Executive Assistant to the College President, and Grace Pell, the SUNY New Paltz AAO, convened a meeting, they all agreed that, if substantiated, Professor Young's conduct warranted formal action.

Young has never disputed that he engaged in the challenged conduct and there is no evidence that he singled out any other student for similar, recurring, treatment. Young maintains, however, that, as a matter of law, his comments do not rise to the level of actionable harassment. He suggests that the response of others, including Dean Benjamin, "is not evidence of sexual harassment, but rather a layman's conclusion." But that is precisely the kind of question best reserved for the trier of fact. At a minimum, how others such as Dean Benjamin and Dean Varbero reacted upon learning of the conduct provides some evidence about the conduct's objectionable nature and, in this case, helps to create a triable issue of fact regarding the objectively offensive nature of Young's conduct.

c. Harassment Because of Sex

Targeting Hayut for her likeness to Lewinsky was, without question, driven by Hayut's gender. The "Monica" nickname served as a springboard for yet more vulgar "cigar," "weekend," and "lipstick" comments, which were also not likely to have been uttered but for Hayut's gender.[7] Moreover, targeting Hayut because of her gender is consistent with evidence that Young exhibited hostility toward women generally, and made negative references to their proper societal status. All this is, of course, relevant to her claim. *See Whidbee,* 223 F.3d at 70 n. 9 (the environment as a whole is germane to an individual plaintiff's hostile environment claim) (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir.2000)). Accordingly, we find sufficient evidence in the record from which a trier of fact could conclude that Professor Young's conduct was motivated, at least in part, by Hayut's gender.

[7] In this regard, we note that Young's remarks were potentially taking advantage of an offensive societal stereotype of the woman underling who uses her sexuality with a person in authority to further her career. The existence and arguable reference to such a stereotype makes Young's comments more likely to be gender-based than sexually charged comments which would as readily be addressed to males as well as females. *See* Reva B. Siegel, *Introduction: A Short History of Sexual Harassment, in Directions in Sexual Harassment Law* 16 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (noting that "judgments about whether practices discriminate 'on the basis' of sex or race may depend on evolving social intuitions about whether a practice unjustly perpetuates a status regime, rather than formal characteristics of the practice itself") . . . .

d. Injury and/or Interference with Educational Progress

We also find enough evidence that Hayut was adversely affected by Professor Young's actions and that a reasonable person similarly situated would have also been affected. Although Hayut's academic performance does not appear to have suffered during her time in Professor Young's classes (as compared to her prior performance at RCC and her later performance at Pace), she testified that, because of her treatment, she was unable to concentrate on her studies. Regardless of what external distractions may have weighed on Hayut during the Fall 1998 semester and contributed to her poor academic performance, Hayut also testified that she felt humiliation and emotional distress, did not want to attend classes, and was unable to sleep. That is enough to render this issue one for the trier of fact . . . .

Nor do Hayut's admitted participation in class discussions despite the "Monica" comments, her failure to object initially to the comments, and her failure to report the conduct earlier to one of Professor Young's supervisors negate Hayut's evidence that she found the comments offensive and humiliating. Given the power disparity between teacher and student a factfinder could reasonably conclude that a student-victim's inaction, or counter-intuitive reaction, does not reflect the true impact of objectionable conduct.

In this case especially, in view of the evidence of Professor Young's "dictatorial" lecture style, frequent angry outbursts, general intimidation of students, and non-receptiveness to student criticism or complaint, summary judgment cannot be based on Hayut's failure to object to, correct, or question Professor Young's conduct earlier in the period of alleged harassment. In order to be actionable, conduct need not be "unendurable" or "intolerable." *Whidbee*, 223 F.3d at 70. And what students put up with, without objection or protest, does not mark the bounds of permissible classroom conduct. *C.f. Vega v. Miller*, 273 F.3d 460, 468 (2d Cir.2001) (holding, in a section 1983 action by discharged professor who alleged violation of his academic freedom, that "what students will silently endure is not the measure of what a college must tolerate"). Under the circumstances, it is entirely reasonable to believe that Hayut, in her first semester at SUNY New Paltz, was herself intimidated by Professor Young, and was hesitant to speak out for fear of potential verbal and academic backlash.

For the foregoing reasons, we find genuine issues of material fact regarding Hayut's section 1983 claim against Young. Accordingly, the district court's grant of summary judgment on this claim is vacated, the claim is reinstated, and the matter is remanded to the district court for further proceedings consistent with this opinion.

C. Title IX Claim Against the SUNY Defendants

Hayut does not claim that she suffered any harm as a result of the official policies or procedures of SUNY or SUNY New Paltz. These include the internal grievance and complaint procedures for reporting and responding to allegations of harassment or discrimination. Rather, she alleges that SUNY and SUNY New Paltz are liable under Title IX by virtue of their employment of Young.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits sexual discrimination (including harassment) by federally funded educational institutions. The Supreme Court has recognized an implied private right of action under Title IX, *see Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979), and has held that money damages are available in such suits, *see Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992). "Discrimination" for purposes of Title IX liability, is not limited to disparate provision of programs, aid, benefits or services, or inequitable application of rules or sanctions. *See* 45 C.F.R. § 86.31 (2000). It has, instead, been recognized as also encompassing teacher-on-student hostile educational environment sexual harassment. *See Franklin*, 503 U.S. at 75 . . . .

Hayut seeks money damages as well as corrective action. As such, to survive summary judgment, her Title IX claim needs more than evidence that Professor Young's conduct created an educational environment sufficiently hostile as to deprive her of "access to the educational opportunities or benefits" provided by SUNY New Paltz. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Hayut must also provide evidence that one or more of the individual defendants, who admittedly are vested with "authority to address the alleged discrimination and to institute corrective measures" on Hayut's behalf, had "actual knowledge of [the] discrimination ... and fail[ed] adequately to respond." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

We determined above that Hayut presented sufficient evidence in connection with her hostile environment harassment claim against Professor Young to survive summary judgment. We also find that, to the extent the evidence suggests that Professor Young's conduct: (a) discouraged Hayut from more active involvement in his classroom discussions, (b) compelled her to avoid taking additional courses taught by Professor Young, (c) caused her to withdraw from SUNY New Paltz altogether, or (d) simply created a disparately hostile educational environment relative to her peers, the above-described harassment could be construed as depriving Hayut of the benefits and educational opportunities available at SUNY New Paltz. We therefore look to the actions of the officials involved – the individual SUNY defendants – to determine whether Title IX liability lies against them. In doing so, we examine whether one or

more of these defendants had actual knowledge of Professor Young's conduct and failed to respond adequately and appropriately.

1. Actual Notice

Requiring actual, as opposed to constructive, knowledge imposes a greater evidentiary burden on a Title IX claimant. It is this burden that we do not believe Hayut has met.

Hayut's oral and written complaint describes being subjected to harassment from Professor Young only prior to her meeting with Dean Varbero. And we find no other evidence suggesting that any of the individual defendants had actual knowledge of Young's conduct before Hayut's verbal report to Dean Varbero in December 1998. It follows that the SUNY defendants cannot be held liable under Title IX for any harassment that occurred during the Fall 1998 semester. *See Gebser*, 524 U.S. at 290. But that is the only time during which Hayut claims that she was harassed by Young. Hayut concedes as well that she had no further contact with Young and admits, therefore, that she endured no additional harassment from him after her complaint to Dean Varbero. Since, however, as Hayut alleges, some lingering, residual effects of Young's actions (*i.e.*, other students addressing Hayut as "Monica") may have extended into the Spring 1999 semester and may fairly be attributable to the hostile environment created and fostered by Professor Young, we examine the response rendered by the individual defendants, the SUNY New Paltz officials.

2. Adequate Response

The Supreme Court has held that Title IX's requirement of an "adequate response" is violated not only if school officials render no response, as alleged by Hayut, but also if the response that is rendered "amount[s] to deliberate indifference to discrimination." *Gebser*, 524 U.S. at 290 (1989); *see Davis*, 526 U.S. at 642 . . . . Deliberate indifference may be found both "when the defendant's response to known discrimination 'is clearly unreasonable in light of the known circumstances,'" *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir.1999) (quoting *Davis*, 526 U.S. at 648), and when remedial action only follows after "a lengthy and unjustified delay," *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 761 (2d Cir.1998). Because the evidence belies Hayut's contention that the individual defendants "did absolutely nothing to remedy the discrimination," we consider only whether Hayut proffered sufficient evidence to permit a finding that the timeliness or nature of the response by the SUNY defendants amounted to deliberate indifference.

Despite Hayut's conclusory allegations to the contrary, the uncontroverted evidence suggests that the individual defendants responded to Hayut's complaint reasonably, in a timely manner, and in accordance with all applicable procedures. In December 1998, upon first hearing of Professor Young's conduct, Dean Varbero discussed the complaint with Hayut and Merante for one hour. He advised Hayut to notify Professor Brownstein (both in his capacity as Hayut's academic advisor and as Chair of Professor Young's department), and to make a written complaint. Hayut chose not to provide such a complaint until early February 1999. Moreover, Dean Varbero advised Hayut to return to his office if she was dissatisfied with the response she received from Professor Brownstein. Hayut chose not to do so.

On his own, Dean Varbero contacted Professor Brownstein and Dean Benjamin regarding Hayut's verbal complaint and organized a meeting to be held when the Spring 1999 semester began. Attending this meeting was, among others, the SUNY New Paltz AAO. This action by Dean Varbero and the remaining individual defendants occurred prior to Hayut ever submitting a written complaint, which, under the applicable collective bargaining agreement, is a predicate step to pursuing any formal disciplinary action against a tenured professor. Immediately after receiving Hayut's written complaint, reassured about the sincerity of her desire to pursue her allegations against Young, the individual defendants convened a counseling session with Young. Although Young requested leniency, he was informed that the matter was serious, would be handled accordingly, and that disciplinary action might well follow. Within weeks, Professor Young had resigned from SUNY New Paltz.

All told, the uncontroverted evidence indicates that SUNY, by and through the actions of its officials, (the individual defendants), acted expeditiously and reasonably, and exhibited no indifference at all to Hayut's allegations. Hayut has presented no evidence, other than purely conclusory allegations, suggesting that the matter should have been addressed more swiftly. Indeed, the SUNY New Paltz AAO explained that, under the circumstances, even if Hayut had sought her assistance directly, she would have been unable to respond more quickly than was done by the individual defendants. This evidence is, moreover, corroborated by the SUNY Internal Grievance Procedure, and Hayut offers nothing to refute the AAO's testimony.

Nor is there any merit to Hayut's claim that Dean Varbero violated federal law and, therefore, exhibited deliberate indifference as a matter of law when he failed to report Hayut's verbal complaint immediately to the SUNY New Paltz Affirmative Action Office. The applicable federal regulations governing the promulgation of grievance procedures and appointment of responsible officials in federally funded institutions, on which Hayut relies, mandate no such action. Rather, the recipient of federal funds (here, SUNY New Paltz) is merely required to designate an AAO and notify its students and employees of the officer's name, office address, and telephone number. *See* 34 C.F.R. § 106.8. There is no dispute that the

SUNY defendants complied with this regulation and, in addition, did, in fact, inform the AAO within weeks of Hayut's oral complaint. That the individual defendants also sought to address the matter informally does not suggest any attempt to stymie more formal measures, as the grievance procedures for the SUNY defendants permit concurrent informal complaint processes.[14]

We, therefore, find that, on the undisputed facts of this case, no reasonable jury could conclude that the response by the individual defendants, on behalf of the SUNY defendants, exhibited deliberate indifference. It follows that there is no evidence supporting Title IX liability against the SUNY defendants. Accordingly, we affirm the district court's grant of summary judgment in this respect.

D. Claims against the Individual Defendants

1. Section 1983 Claim

In support of her section 1983 claim against the individual defendants, Hayut relies on several different theories, all of which lack merit. First, Hayut predicates her section 1983 claim against the individual defendants on a theory of respondeat superior. It is well settled, however, that the doctrine of respondeat superior standing alone does not suffice to impose liability for damages under section 1983 on a defendant acting in a supervisory capacity. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 (1978) (discussing municipal liability).

Evidence of a supervisory official's "personal involvement" in the challenged conduct is required. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir.2001) . . . .

As discussed above, Hayut makes no claim and provides no evidence that the individual defendants directly participated in any of Young's harassment. Instead, Hayut argues in her complaint that sexual harassment and discrimination at SUNY Paltz by other instructors was rampant and argues that the individual defendants knew or should have known about many instances of instructors *other than* Young who "exhibited bizarre, disturbing, harassing and discriminatory behavior" against students. Failure to act despite this "rampant" harassment, she contends, constitutes "direct and personal involvement." Once again, Hayut provides no evidentiary support for her contention of rampant harassment by scores of instructors. In addition, Hayut contradicts this allegation by testifying at her deposition that, to her knowledge,

[14] The formal Grievance Procedure for Review of Allegations of Discrimination for SUNY, enacted in accordance with Title IX, provides that "[t]his procedure ... is in no way intended to supplant or duplicate any already existing grievance procedures, including the informal resolution process presently in practice on many campuses."

there were no other instructors who exhibited any such behavior or harassed or discriminated against students.

There is also no evidence that, after becoming aware of the alleged harassment, any of the individual defendants failed to respond or remedy the situation, that any of these individual defendants created or allowed a policy to continue under which alleged harassment could occur, or that they were grossly negligent in monitoring Young's conduct. As discussed above in finding no Title IX liability as a matter of law, the response of the individual defendants to Hayut's allegations was timely and reasonable under the circumstances. We see no basis for reaching a contrary conclusion with respect to the individual defendants' liability under section 1983.

* * * *

We conclude that the district court properly granted summary judgment on Hayut's section 1983 claim against the individual defendants.

2. State Equal Protection Claim

Hayut's state equal protection claim against the individual defendants under Article I, Section 11 of the New York State Constitution mirrors her federal equal protection claim brought under section 1983.[16] Because the state constitutional tort action is analyzed under the same standard as Hayut's section 1983 suit, *see Brown v. State*, 89 N.Y.2d 172, 190, 652 N.Y.S.2d 223, 674 N.E.2d 1129 (1996) ("[Article I, section 11 of the New York State Constitution] was intended to afford coverage as broad as that provided by the Fourteenth Amendment to the United States Constitution ...."') (citing *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530, 87 N.E.2d 541 (1949)), and because Hayut relies on identical facts to support both claims, the state equal protection action suffers the same fate as the section 1983 claim against the individual defendants. Having found that summary judgment was properly granted on the section 1983 claim against those defendants, we also conclude that the district court correctly granted summary judgment in the state constitutional tort action.

[16] Article I, Section 11 provides that "No person shall be denied the equal protection of the laws of this State or any subdivision thereof." N.Y. Const. art. I, § 11.

3. Ministerial Neglect Claim

Hayut maintained below, and asserts on appeal, that federal regulations, *see* 34 C.F.R. § 106.8, and state regulations, *see* N.Y. Comp.Codes R. & Regs. tit. 9, § 4.19 ("Executive Order No. 19"), required the individual defendants (1) immediately to notify the AAO of any sexual harassment complaint, (2) expeditiously and thoroughly to investigate all such allegations, and (3) to follow up and make sure that any harm inflicted on the alleged victim as a result of the harassment was rectified. Because, the argument goes, none of the individual defendants notified the AAO, investigated the harassment, or followed up with Hayut in the months after her complaint, they committed ministerial neglect under New York law.

We note, however, that there is no independent cause of action for ministerial neglect in New York. Rather, a claim of ministerial neglect "merely removes the issue of governmental immunity from a given case." *Lauer v. City of New York*, 95 N.Y.2d 95, 99, 733 N.E.2d 184 (2000). In other words, "[m]inisterial negligence may not be immunized, but it is not necessarily tortious." *Id.* Accordingly, there must be some showing that the conduct by the official violated some duty to the injured party directly, as opposed to a "general duty to society." *Id.* at 100, 733 N.E.2d 184 (internal quotation marks and citations omitted). "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Id.* at 96, 733 N.E.2d 184. If, however, a duty to a particular individual or class is voluntarily assumed, even if it is one that would not otherwise exist except to the general public, the duty must be performed in a nonnegligent manner. *See Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763 (1978) ("[W]here a municipality assumes a duty to a particular person or class of persons, it must perform that duty in a nonnegligent manner, notwithstanding that absent its voluntary assumption of that duty, none would have otherwise existed.").

Hayut has identified no duty that the individual defendants owed directly to her, as opposed to the general public. Nor has she shown that the individual defendants voluntarily assumed a duty to her or to a specific class of persons, to which she belongs. And her assertions of a duty are not supported by the regulations upon which she relies. Moreover, to the extent that *any* duty arose under cited federal or state regulations, the individual defendants were in complete compliance with those regulations. Both 34 C.F.R. § 106.8 and Executive Order No. 19 require federally funded educational institutions to do no more than designate an employee as an AAO who is to receive complaints and to disseminate contact information to students. They do not impose a duty on each and every school official within that institution to report sexual harassment allegations to the designated AAO.

It follows that the district court properly granted summary judgment on this claim.

III. CONCLUSION

For the reasons stated above, we hold that the district court erred when it granted Young's motion for summary judgment on Hayut's section 1983 claim. Accordingly, we VACATE the district court's grant of summary judgment on this claim, and REMAND the case to the district court for further proceedings on this claim consistent with this opinion. With respect to all of Hayut's remaining claims against the SUNY defendants and the individual defendants, we hold that the district court correctly granted summary judgment. We, therefore, AFFIRM that portion of the district court's judgment.

Notes and Questions

1. The student (plaintiff) in this case sued the state university system and her particular college as well as her instructor and three administrators. The student also asserted a variety of claims. As an initial matter, it is important to sort out which claims are asserted against which defendants. The court's use of subheadings in its opinion provides considerable help in this regard.

2. The primary claims addressed by the court are a Section 1983 claim involving the federal equal protection clause and a Title IX claim. Section 1983 claims are discussed generally in the Text Sections 3.4 and 4.4.4; Title IX claims are discussed generally in the Text Section 11.5.3. Both the Section 1983 (equal protection) claim and the Title IX claim are based on allegations of sexual harassment. Sexual harassment of students by instructors is discussed in the Text Section 8.5, which includes several references to the *Hayut* case, and also includes a discussion of the U.S. Supreme Court's decision in the *Gebser* case, the key case on institutional liability under Title IX.

3. Note that, when addressing the student's "hostile environment" sexual harassment claim under Section 1983, the court turns to "traditional Title VII hostile environment jurisprudence." The reference is to Title VII of the Civil Rights Act of 1964, a statute prohibiting *employment* discrimination (see the Text Section 4.5.2.1). The court in *Hayut* used sexual harassment law developed under Title VII (see the Text Section 4.5.2.1) to determine the "elements" of the student's Section 1983 sexual harassment claim even

though the claim did not involve employment discrimination. For discussion of this point, see the Text Section 8.5.

4. In discussing the Section 1983 sexual harassment claim, the court notes that Professor Young had not asserted any defense to this claim based on "the First Amendment." What kind of defense did the court have in mind? Is there any viable variant of such a defense that Professor Young might have asserted? See generally the Text Sections 6.2.2 and 6.2.4.

5. Note that the appellate court in this case is reviewing the trial court's grant of "summary judgment" to the defendants. What part of the trial court's judgment does the appellate court reverse, and what part does it affirm? What happens next with respect to the part of the trial court's judgment that is reversed?

6. The court absolves the college and the three administrators of any liability for the claims asserted by the student. Do you agree with this determination? Did the college and the administrators do all that reasonably could be expected of them under the circumstances? What, if anything, would you have done differently?

7. *Hayut* involves instructor-student sexual harassment. For discussion of student-student, or peer, sexual harassment, see the Text Section 8.5.

8. The Title IX statute (see note 2 above) provides the primary means by which student victims of alleged harassment (either by instructors or by peers) assert claims against their institutions. As *Hayut* suggests, Title IX claims may be asserted, in the first instance, through the internal grievance process that Title IX requires each institution to have. Subsequently, such claims may be asserted not only in court, as in the *Hayut* case, but also in the administrative enforcement process established by the U.S. Department of Education (see the Text Section 8.5). The review procedures, available remedies, and applicable legal principles for a Title IX claim filed in court will differ from those for a claim filed with the Department; and the applicable legal principles may also vary somewhat depending on the identity of the alleged harasser. The Illustration on p. 635 of the Text, "A Typology of Title IX Claims," lists the variables, and organizes them into 18 categories of claims.

9. The following is an abridged version of the guidelines that the Department of Education's Office for Civil Rights (OCR) uses to review Title IX administrative complaints of sexual harassment.

*REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES**

TITLE IX

January 19, 2001

Outline of Contents

* The guidance in its entirety is available at: http://www.ed.gov/about/offices/list/ocr/docs/shguide.html. This Guidance is heavily footnoted. These very useful footnotes have been deleted here. The full Guidance also has an extensive and very helpful preamble, which also is deleted here.

I. Introduction

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Educations (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities. The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX. This guidance focuses on a school's fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the regulatory basis for a school's compliance responsibilities under

Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.

II. Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment. Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

* * * *

V. Determining a School's Responsibilities

* * * *

A. Harassment that Denies or Limits a Student's Ability to Participate in or Benefit from the Education Program

* * * *

2. Welcomeness

The section entitled "Sexual Harassment" explains that in order for conduct of a sexual nature to be sexual harassment, it must be unwelcome. Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive" [citing cases]. Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome. For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it. Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.

* * * *

B. Nature of the School's Responsibility to Address Sexual Harassment

A school has a responsibility to respond promptly and effectively to sexual harassment. In the case of harassment by teachers or other employees, the nature of this responsibility depends in part on whether the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

1. Harassment by Teachers and Other Employees

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX. Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed. The extent of a recipient's responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students.

A recipient is responsible under the Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. Recipients generally provide aid, benefits,

and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has "notice" of the harassment. (As explained in the section on "Notice of Employee, Peer, or Third Party Harassment," for purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.) Of course, under OCR's administrative enforcement, recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds.

Whether or not sexual harassment of a student occurred within the context of an employee's responsibilities for providing aid, benefits, or services is determined on a case-by-case basis, taking into account a variety of factors. If an employee conditions the provision of an aid, benefit, or service that the employee is responsible for providing on a student's submission to sexual conduct, i.e., conduct traditionally referred to as quid pro quo harassment, the harassment is clearly taking place in the context of the employee's responsibilities to provide aid, benefits, or services." In other situations, i.e., when an employee has created a hostile environment, OCR will consider the following factors in determining whether or not the harassment has taken place in this context, including:

- The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
- the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place;
- where and when the harassment occurred;
- the age and educational level of the student involved; and
- as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

* * * *

2. Harassment by Other Students or Third Parties

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature to deny or limit a student's ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence.

The type of appropriate steps that the school should take will differ depending on the level of control that the school has over the third party harasser. For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. (This issue is discussed more fully in the section on "Recipient's Response.")

If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits the student's ability to participate in or benefit from the education program. In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively.

C. Notice of Employee, Peer, or Third Party Harassment

As described in the section on "Harassment by Teachers and Other Employees," schools may be responsible for certain types of employee harassment that occurred before the school otherwise had notice of the harassment. On the other hand, as described in that section and the section on "Harassment by Other Students or Third Parties," in situations involving certain other types of employee harassment, or harassment by peers or third parties, a school will be in violation of the Title IX regulations if the school "has notice" of a sexually hostile environment and fails to take immediate and effective corrective action.

A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment. A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility. Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry" [citing Title IX reg. and cases].

* * * *

If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedures or otherwise inform the school of harassment.

D. The Role of Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a disseminated policy and procedure, a student does not know either of the school's policy against and obligation to address this form of discrimination, or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school's failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex, the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim that could reasonably have been prevented if the school's failure to comply with the procedural requirements had not hampered early notification.

VI. OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether (1) the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end

the harassment, prevent its recurrence, and, as appropriate, remedy its effects. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.")

If the school has taken, or agrees to take, each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases in which the school was in violation of the Title IX regulations (e.g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e.g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence). This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance. Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

VII. Recipient's Response

Once a school has notice of possible sexual harassment of students whether carried out by employees, other students, or third parties it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

* * * *

IX. Prompt and Equitable Grievance Procedures

Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment

occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties. Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.

* * * *

While these guidelines have not been rescinded, regulations implementing Title IX were published in 2020, then revised in 2024. The 2024 regulations have been enjoined in many states; counsel should be consulted with respect to which set of regulations are binding on recipients of federal funds at any point in time.

SEC. 8.6.3 Academic Dismissals and Other Sanctions – Constitutional Issues

Ward v. Polite
667 F.3d 727 (6th Cir. 2012)

The opinion is set out in the materials for Chapter 7, section 7.1.4.

Notes and Questions

1. The opinion in *Ward* is interesting in that the court did not defer to the faculty's interpretation of the ethical code, but instead relied on the "plain meaning" of the code with respect to its stance on referring clients. Can you suggest a way that the program faculty could have avoided this outcome?

2. Ms. Ward had apparently made her views on homosexuality clear throughout the program, and well before the incident that resulted in her dismissal. Can you think of other potential clashes between a student's moral or religious beliefs or values and certain academic disciplines or professions? For example, would a medical school have the legal right to deny enrollment to, or dismiss, a student whose religion or culture do not permit her to interact with men who are not family members?

3. Do you believe the outcome of *Ward v. Polite* might have been different if the program's recruiting materials and written policies had stated clearly that students would never be permitted to refer a client solely because the client's lifestyle or behavior conflicted with the student's values and beliefs?

4. Under what circumstances would a court entertain a student's legal challenge to an academic assignment that the student believed violated her religious, ethical, or moral beliefs? For a discussion of the resolution of faculty/student conflicts in this regard, see Sections 6.2.2 and 7.1.4 of the text.

SEC. 8.6.4

Discrimination Issues

Emeldi v. Univ. of Oregon
688 F.3d 715 (9th Cir. 2012)

Opinion by: Ronald M. Gould

In *Jackson v. Birmingham Board of Education*, the Supreme Court held that retaliation by a federally funded educational institution against someone who complains of gender discrimination is actionable under Title IX. 544 U.S. 167, 171 (2005). We must decide what a plaintiff must prove to prevail on a Title IX retaliation claim, and whether plaintiff Monica Emeldi adduced sufficient evidence of her claim to overcome summary judgment.

I

Monica Emeldi sued the University of Oregon, alleging that it prevented her from completing a Ph.D. program in retaliation for having complained of gender-based institutional bias in the University's Ph.D. program, and gender discrimination by her faculty dissertation committee chair.

Emeldi was a Ph.D. student in the University of Oregon's College of Education, in its Department of Special Education. Her advisor and dissertation committee chair, Edward Kame'enui, took a sabbatical starting in the fall of 2005. Emeldi asked Robert Horner, another professor, to replace Kame'enui as her dissertation chair. Horner agreed. During the time of Emeldi's work with Horner, Emeldi and other Ph.D. candidates complained to Mike Bullis, Dean of the College of Education, about lack of adequate support for female Ph.D. candidates. In May 2007, Emeldi produced a memo summarizing a meeting between Bullis and several graduate students. That memo lists, as one of fifteen topics discussed, the students' concern about the Department's lack of female role models. The memo says:

Students request that qualified Women be hired into tenured faculty positions [emphasis]. Students attempted and were unable to identify a current female appointment to a tenured faculty position. Students need to experience empowered female role models successfully working within an academic context [emphasis]. Doctoral students request that the college model a balance of gender appointments that reflect the proportion of student gender population ratios.

While the University maintains that no one other than Bullis knew of the memo, Emeldi's position was that she was told that all Department faculty received copies; that it was "common knowledge in the College of Education" that she was dissatisfied with the Department's level of support for women; that Horner, her dissertation chair, was treating her less favorably than his male graduate students and did not give her the same support and attention that he gave male candidates; that Horner often ignored her and did not make eye contact with her; that, when Emeldi attended Horner's group meetings with his graduate students, either she was not on the agenda, or no substantial or meaningful work of hers was discussed; and that Horner's male students had opportunities that were not available to his female students, such as access to more and better resources, including more office space and better technology for collecting data.

Whatever their teacher-student relationship at first, Emeldi's relationship with Horner as Ph.D. advisor soured. The reasons for this development are unclear. The University vigorously disputes that Horner treated his male students more favorably than his female students, and its position is that Emeldi's relationship with Horner deteriorated because Emeldi "refused to listen to Dr. Horner regarding the necessary changes to produce a dissertation that would be a focused piece of scholarship."[1] Emeldi attributes the worsening relationship to Horner's gender animus.

In October 2007, Emeldi met with University administrators Annie Bentz and Marian Friestad to discuss her worsening relationship with Horner. Emeldi says that she complained to Friestad about the Department's "institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates." To illustrate her experience of this "institutional bias," she said that she "identified the chair of [her] dissertation committee, Dr.

[1] The summary judgment record contains evidence of email communication between Horner and Emeldi in mid-2007. In July 2007, Emeldi submitted to Horner a "Dissertation Prospectus" that laid out her research plans. In September 2007, Homer provided feedback on Emeldi's proposal. Horner's feedback stated that Emeldi had proposed a "tremendously interesting project," and had "done brilliantly in [her] efforts," but also expressed concern that "the reader struggles to find the details that can be examined within a dissertation."

Rob Horner, as being distant and relatively inaccessible to me." According to Emeldi, Friestad then alerted Horner that Emeldi had accused him of discriminating against her. While Friestad does not dispute that she spoke with Horner, her version of the conversation Emeldi described is markedly different. Friestad, who is an administrator and professor, says that Emeldi never alleged discrimination in their discussion about Horner and that Friestad and Horner discussed only Emeldi's dissertation, not an allegation of discrimination. However, Emeldi in her amended declaration explicitly said that Friestad told Emeldi that Friestad had "debriefed" Horner on the conversation Friestad had with Emeldi. Within a few weeks, Horner, by email, resigned as Emeldi's dissertation chair. According to Emeldi, Horner then told other Department faculty members that Emeldi should not be granted a Ph.D., and should instead be directed into the Ed.D. program, which Emeldi says is a less prestigious degree. The University denies that this occurred.

Emeldi sought a new dissertation chair, but did not find one. According to Emeldi, she asked fifteen faculty members in her Department, some of whom said that they were too busy and some of whom said that they were not qualified to supervise her research. The University doesn't dispute that she inquired of fifteen faculty members, but criticizes Emeldi's efforts to obtain a new dissertation chair as inadequate, arguing that she did not try to recruit two faculty members who were qualified and available, including her former advisor Kame'enui. While seeking a new dissertation chair, Emeldi also pursued the University's internal grievance procedure, which, she says, contributed to her inability to find a willing faculty member. Unable to complete her Ph.D. without a dissertation chair, Emeldi abandoned her pursuit of the Ph.D. degree, thus effectively withdrawing from the University.

Emeldi then filed this lawsuit in Oregon state court. The University timely removed the action to federal court, but mistakenly said in its notice of removal that Emeldi's suit was filed in Linn and Multnomah Counties, when in fact the suit was filed in Lane County. The University then filed an amended notice of removal correcting these errors, but the amendment was filed after the 30-day removal deadline had expired. Emeldi sought remand on the basis that the defective notice of removal was fatal to federal jurisdiction, but the district court rejected this argument.

After a period of discovery, the University moved for summary judgment, which Emeldi opposed. The district court granted summary judgment for the University on the alternative grounds that Emeldi did not engage in protected activity and that she adduced no evidence showing that the University's adverse actions were causally related to her protected activity. Emeldi timely appealed.

II

We review a grant of summary judgment de novo. "Summary judgment is warranted when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'"

III

We start with the statutory premise that Title IX of the Education Amendments of 1972 bars gender-based discrimination by federally funded educational institutions. It provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." . In *Jackson*, the Supreme Court held that "[r]etaliation against a person because that person has complained of sex discrimination" is a form of gender-based discrimination actionable under Title IX.

Until now, we have not had occasion to say what a plaintiff must prove to prevail on a retaliation claim under Title IX. We join our sister circuits in applying the familiar framework used to decide retaliation claims under Title VII. In this framework, a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two. We have emphasized that to make out a prima facie case, a plaintiff need only make a minimal threshold showing of retaliation. As we have explained, "'The requisite degree of proof necessary to establish a prima facie case for Title VII claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence.'"

Once a plaintiff has made the threshold prima facie showing, the defendant must articulate a legitimate, nonretaliatory reason for the challenged action. If the defendant does so, the plaintiff must then "show that the reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

We stress three reasons for adopting the Title VII framework for Title IX retaliation claims. First, the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII."

Second, we have found the Title VII framework useful in assessing claims of discrimination and retaliation outside the Title VII context, even where its application is not mandatory.

Third, the Supreme Court has often "looked to its Title VII interpretations of discrimination in illuminating Title IX." Following this approach, we hold that the Title VII framework generally governs Title IX retaliation claims.

IV

A

The first requirement of a prima facie case of retaliation is that the plaintiff engaged in protected activity. Viewing the evidence presented at summary judgment in Emeldi's favor, we hold that Emeldi's complaints to Bullis and Friestad about gender-based institutional bias, and to Friestad about Horner's unequal treatment of female graduate students, were protected activity under Title IX.

As an initial matter, we have no doubt that Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally. Emeldi's complaint to Friestad that there was institutional bias against women in the Ph.D. program and that her dissertation chair, Horner, was treating his male graduate students more favorably than his female graduate students, is thus unmistakably a protected activity under Title IX. The

protected status of her alleged statements holds whether or not she ultimately would be able to prove her contentions about discrimination.

Emeldi says that she complained to Friestad about the Department's "institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates." Illustrating her experience of this "institutional bias" in speaking with Friestad, she says that she "identified the chair of [her] dissertation committee, Dr. Rob Horner, as being distant and relatively inaccessible to me."

It is a protected activity to "protest[ ] or other wise oppose[ ] unlawful . . . discrimination." In the Title IX context, "speak[ing] out against sex discrimination"—precisely what Emeldi says that she did—is protected activity. Accordingly, we hold that Emeldi has alleged facts that, if true, demonstrate that she engaged in an activity protected by Title IX.

B

The second requirement of a prima facie case of retaliation is that the plaintiff suffered an adverse action. Viewing the evidence presented at the summary judgment stage in Emeldi's favor, we hold that Horner's resignation constitutes an adverse action.

In the Title VII context, the Supreme Court has said that the adverse action element is present when "a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination."

We will not establish a different rule on adverse action for Title IX than for Title VII. Women students should not be deterred from advancing pleas that they be treated as favorably as male students. A student cannot complete the University's Ph.D. program without a faculty dissertation chair, and the loss of a chair is an adverse action.

This sort of adverse action bears analogy to the concept of constructive discharge, in which a retaliating employer creates working conditions so "'extraordinary and egregious [as] to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on

the job.'" Here, although the University did not formally dismiss Emeldi from the Ph.D. program, as a practical matter, it rendered her unable to complete the degree. A reasonable person in Emeldi's position—someone who had been abandoned by her dissertation chair and who was unable, despite diligent efforts, to secure a replacement chair—could justifiably feel unable to complete the Ph.D. program. A reasonable person would find these events "materially adverse" insofar as they "might have dissuaded" such person from complaining of discrimination in the Department. We therefore conclude that Horner's resignation was an adverse action.

C

The third requirement of a prima facie case of retaliation is a causal link between the protected activity and adverse action. "At the prima facie stage of a retaliation case, 'the causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative . . . action are not completely unrelated.'" Emeldi has met this standard. From the record, we conclude that Emeldi has produced evidence from which a rational factfinder could find a causal link between Emeldi's complaints of gender discrimination in the Department and the adverse actions identified above.

First, the proximity in time between Emeldi's complaint to Friestad about Horner and Horner's resignation as her dissertation chair is strong circumstantial evidence of causation.[5]

Second, Emeldi has articulated a theory of how Horner found out about her complaints: Friestad relayed them to him. Emeldi alleges that she complained of Horner's gender bias—among other things—at her October 2007 meeting with Friestad. Friestad admits that she relayed Emeldi's complaints to Homer, but denies that Emeldi raised concerns about discrimination at the meeting. Friestad also insists that she did not inform Horner of any allegations of discrimination. Nonetheless, a reasonable jury, crediting Emeldi's recollection that she complained specifically to Friestad about Horner's favoring of male Ph.D. candidates, could find a causal link between

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[5] Emeldi's conversation with Friestad took place on or about October 19, 2007. Horner resigned on November 19, 2007. In Horner's November 20, 2007 email to administrator Mike Bullis, Horner stated that Friestad had contacted him a few weeks beforehand.

Friestad's conversation with Horner and his resignation from the dissertation chair post. Stated another way, a jury reasonably could infer that Friestad passed Emeldi's complaint on to Horner, and that Horner's resignation not long thereafter[5] as Emeldi's dissertation chair was a response to Emeldi's complaint.

Third, Emeldi offered evidence that Horner exhibited gender-based animus in other contexts. Specifically, Emeldi said that Horner gave more attention and support to male students and that he ignored her and did not make eye contact with her. She contended that, when she attended Horner's graduate student group meetings, she was "not on the agenda, or when [she was] on the agenda, that no substantial/meaningful work [of hers was] discussed." She gave specific examples of Horner's male students being given opportunities that were not available to his female students. For example, Horner allegedly gave one male student access to more office space and better technology for collecting data than similar female students.

As the above discussion reveals, there is ample circumstantial evidence to establish causation. Emeldi also points to other evidence in the record that would support a jury inference of causation: (1) that Horner resigned as Emeldi's dissertation chair without designating or providing assistance in securing a replacement chair is circumstantial evidence of retaliatory intent; (2) that Horner praised Emeldi on the progress of her dissertation, could, together with other evidence, support the inference that his stated reasons for resigning as her dissertation chair were pretextual;[6] and (3) that Emeldi could not secure a replacement dissertation chair, despite asking fifteen faculty members, is circumstantial evidence that Horner poisoned his colleagues against her.

These items together provide a sufficient basis for a jury to find that Emeldi's protected activity brought about Horner's resignation.

The dissent argues that Emeldi's position is based on impermissible speculation. . . . We do not disagree with the principle that mere speculation cannot raise an issue of fact. But here, by contrast, Emeldi proffered non-speculative evidence supporting reasonable inferences of causation. Her declaration states that she complained to Friestad about gender discrimination in the Department and, at this stage, her assertions must be accepted as true. The dissent reaches a contrary conclusion only by disregarding tried and true principles governing summary judgment. The dissent first asserts that Emeldi's complaint to Friestad that Horner was "distant and relatively inaccessible" is not a claim of gender bias. However, the correct approach is to consider Emeldi's complaint in its context. Here, where the complaint that Horner was "distant and relatively inaccessible" immediately followed Emeldi's complaint of institutional bias, a jury could reasonably infer that she was giving an example of the institutional bias that led to inadequate support for women Ph.D. candidates, and indeed the normal reading of her "distant and relatively inaccessible" criticism of Horner in context is that he was relatively inaccessible by contrast to his accessibility for male Ph.D. candidates.

The dissent further argues that, even if "gender discrimination was discussed" between Friestad and Emeldi, it is only speculative to infer that Friestad relayed Emeldi's complaints of discrimination to Horner. Again, the dissent reaches this conclusion only by ignoring the general rules governing summary judgment. As noted above, as the nonmoving party Emeldi was to be believed and reasonable inferences given her. In her amended declaration, she explicitly states that Friestad told her that Horner was "debriefed" on their discussion. If we assume Emeldi's statements are true, a reasonable inference arises that Friestad "debriefed" Horner about Emeldi's complaints of gender discrimination. These facts are sufficient to state a prima facie case.

D

Because Emeldi established a prima facie case of retaliation, we inquire whether the University has stated a legitimate, non-retaliatory reason for the challenged action, and if so, whether Emeldi has shown that the reason is pretextual.

The University says that Horner resigned for a proper reason, that is, because Emeldi did not follow his research advice. Further, University administrators did not provide a dissertation chair

because, the University says, the faculty members who Emeldi solicited were unwilling to take Emeldi as a student for legitimate reasons, such as being unavailable or unqualified to advise her research. If credited by the jury, the University states legitimate, non-retaliatory reasons for Homer's resignation.

But Emeldi has presented evidence from which a reasonable jury could conclude that the University's account is pretexutal. For substantially the same reasons we concluded that Emeldi proffered sufficient evidence of causation, we likewise conclude that Emeldi's evidence is sufficient to show pretext. The proximity in time between Emeldi's complaints of unequal treatment and Horner's resignation as Emeldi's dissertation chair; Friestad's admission that she relayed Emeldi's complaints to Horner; Horner's resignation without providing assistance in securing a replacement chair; other evidence of Horner's gender-based animus; Horner's praise for Emeldi; and Emeldi's inability to secure a replacement dissertation chair, all considered together, could lead a reasonable jury to conclude that Emeldi's complaints of unequal treatment, and not Horner's dissatisfaction with her research, motivated Horner's resignation.

Because a reasonable jury could conclude from the evidence presented at summary judgment that Horner's resignation was gender-based retaliation, the district court erred in granting summary judgment.

E

We pause to elaborate on the sufficiency of evidence that Emeldi presented in response to the University's motion for summary judgment. When deciding whether an asserted evidentiary dispute is genuine, we inquire whether a jury could reasonably find in the nonmovant's favor from the evidence presented.

We cannot say that a reasonable jury would be compelled to reject liability. We are mindful that the University has offered evidence that would support a verdict in its favor. For starters, the testimony of Horner and Friestad contradicts Emeldi's account, and emails corroborate the University's version of events. Making matters worse for Emeldi, her own account at times may

appear to be inconsistent. In deposition, she testified that she "would be speculating" if she said why she believed Horner's resignation as her dissertation chair was gender-based retaliation.

Further, the record does not disclose why, despite unsuccessfully soliciting fifteen faculty members, Emeldi overlooked two professors who, the University says, were qualified and available to replace Horner as Emeldi's dissertation chair. All of this is to say that the University may have a convincing case at trial. However, that the University has presented strong evidence in its defense does not undermine our conclusion that there is a genuine dispute of factual issues that requires resolution by a jury.

VI

We reverse the district court's grant of summary judgment on Emeldi's state law claim for the same reasons as Emeldi's Title IX claim.[10] Also, we reverse the district court's award of costs because the University is no longer the prevailing party.

Dissent by: Raymond C. Fisher

I generally agree with much of what my colleagues have to say about extending the principles and jurisprudence developed under Title VII to the context of discrimination against women in colleges and universities under the rubric of Title IX. Ms. Emeldi, however, has not shown that the problems she experienced in her Ph.D. program, and particularly with her supervising faculty advisor, Dr. Horner, were the result of gender discrimination rather than an unfortunate — but not unlawful — breakdown in the academic relationship between a master professor and a graduate student. The record plainly reveals Emeldi's frustration with her lack of progress on completing her Ph.D. studies and her dissertation, including problems she attributed to Horner as her dissertation chair. She became so frustrated that she finally complained to University administrators. She may have believed these problems and Dr. Horner's actions were caused by his bias against her as a woman. But this is a retaliation case, where it is critical that she present evidence from which a reasonable jury could find that Horner (a) *knew* she believed him to be gender biased, and (b) resigned in retaliation *because* she made such an allegation. She simply has not done so, no matter how sympathetic one might be to her academic disappointments.

We need to be cautious when transporting the doctrines that govern the workplace into the university setting, where the roles of student and teacher, especially in a Ph.D. program, are so bound up in personal interactions and subjective judgments. To turn a falling out between a male professor and a female doctoral candidate into a jury trial over the professor's alleged bias against women should not happen unless there is good evidence to support the charge of discrimination based on gender. Because Emeldi's evidence has not met that threshold, I respectfully dissent.

In sum, Emeldi relies almost entirely on her own speculation and conclusory allegations, without any supporting factual data. I do not believe she has provided sufficient evidence of causation to make out a prima facie case of gender-based retaliation. Even assuming she has made a prima facie case, she has utterly failed to show that Horner's stated reason for resigning as her dissertation chair — that she had come to view his role as her dissertation chair as "a barrier to her advancement" — had anything to do with her being a woman and was merely a pretext.

I. Framework

The majority joins the First, Second and Tenth Circuits in applying the Title VII framework to a Title IX retaliation claim. I agree that this framework should apply to Title IX retaliation cases arising in the *employment* context. But extending the employment model wholesale into the *teacher-student* context — particularly to a graduate school Ph.D. program — is problematic because these contexts differ in significant ways. The academic process involves highly personal, idiosyncratic relationships that depend on various professional qualities. This is especially the case for dissertation chairs and their Ph.D. students, which are not run-of-the-mill relationships between managers and employees. A dissertation chair must have expertise in the student's area of research as well as be someone with whom the student can work closely, in a process that by its very nature requires the professor to be highly critical of the student's work and capabilities. The professor's role as a dissertation chair is voluntary, unlike a business manager whose very job is to supervise a group of subordinate employees. In agreeing to supervise a student, a dissertation chair enters a relationship where the responsibilities run both ways — the student owes the professor time, intellectual commitment and work product, and the dissertation chair implicitly agrees to provide the same in the form of guidance and critical evaluation. Unlike the

relationship between a manager and an employee, each relationship in a Ph.D. program is inherently unique and highly subjective. Of course, this does not mean professors can be permitted to discriminate against students because of their gender or other protected status, but we must be careful not to open them up to claims of discrimination based only on unsubstantiated allegations any time there is an intellectual disagreement about a research project.

Despite these cautions, however, I will accept that we should apply the Title VII framework to Emeldi's Title IX retaliation claims.

II. Burden-Shifting

* * * * *

Without accepting the majority's reasoning, I will assume that Emeldi has met the first two elements of a prima facie case — that she engaged in a protected activity and suffered an adverse action. She has not, however, shown enough to require a jury to decide whether Professor Horner's resignation as her dissertation chair was in retaliation for complaints she made against him (and the University) of gender discrimination. I have trouble seeing how her largely subjective and pervasive speculative interpretations of events are sufficient to make a prima facie case of causation. But even assuming she clears that hurdle, I think the University and Horner have established a legitimate, nondiscriminatory explanation for Horner's resignation and Emeldi's inability to find a replacement chair, and she has failed to present evidence from which a reasonable jury could find it to be mere pretext.

Emeldi complains that Horner resigned as her dissertation chair and also prevented her from finding a replacement so she could complete her Ph.D. He did this, she contends, because she sent a memo to University officials that included a criticism of the underrepresentation of women on the faculty, then later complained to other officials that Horner's treatment of her in class meetings and his supervision of her thesis reflected his own bias against her as a woman. Horner and the University vigorously deny these serious allegations — that Horner was biased against women generally or specifically against Emeldi, and that at the time he resigned he even knew

that Emeldi thought he was. The majority concedes this is a close case; but it concludes nonetheless that Emeldi has shown enough to warrant a jury trial. I think not. The majority is too generous to Emeldi's "evidence." Notably, almost all of her proof of Horner's gender bias and retaliatory actions is based on her own suspicions and speculation. She may in her own mind have believed her problems were the result of gender bias. The issue, however, is whether Horner was biased, knew she thought that and retaliated against her for saying so. Tellingly, Emeldi has not provided statements from other witnesses who might have corroborated her speculation, particularly on factual issues where one would expect her to have at least tried to find someone who would support her theory of the case. She offers no explanation or excuse — such as faculty or student witnesses who refused to cooperate by providing sworn statements, or the existence of some "code-of-silence."

I acknowledge that this is a summary judgment appeal, and we give substantial leeway to the plaintiff as the losing party below. Nonetheless, it is well-settled that, "[w]hen the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact."

Emeldi's claims come up short for these very reasons. She seeks to blame her failed Ph.D. dissertation effort on her master professor's gender bias and retaliatory motive, transforming academic judgment calls into a civil rights violation. In this context, I submit there is good reason to insist that the student provide specific and substantial evidence — not just speculation and circumstantial inferences that are not attested to by others and, importantly, are inconsistent with the contemporaneous documentary record.

A brief review of the evidence the majority relies on, and the University's rebuttal, shows why.

1. *May 2007 memo to Bullis*. In May 2007, Emeldi wrote a memo summarizing a meeting between several graduate students and Mike Bullis, the Dean of the College of Education. That memo, under the heading "Recommendations," listed as one of many topics that had been discussed the following bullet point:

Students request that qualified women be hired into tenured faculty positions [emphasis]. Students attempted and were unable to identify a current female appointment to a tenured faculty

position. Students need to experience empowered female role models successfully working within an academic context [emphasis]. Doctoral students request that the college model a balance of gender appointments that reflect the proportion of student gender population ratios.

This paragraph is the keystone of Emeldi's claim that Horner resigned in retaliation for Emeldi having complained to the University about gender inequality, Horner, however, in uncontradicted testimony states that he was never made aware of the contents of Emeldi's May 2007 memo before he resigned as her chair, learning its contents only during this litigation. Emeldi has provided no evidence of Horner's actual knowledge of the memo's contents, particularly the gender issue, before then. At most, she offers only uncorroborated hearsay from an unidentified source that all faculty got copies of the memo and, she says, its contents were "common knowledge."

2. *Meeting with Friestad and Bentz*. The next critical piece of evidence in Emeldi's attempt to link Horner's resignation to gender discrimination is a meeting she had with University administrators Marian Friestad and (possibly) Annie Bentz in October 2007. Emeldi says that after there had been no response or follow-up to her earlier May memo, she arranged the meeting:

regarding what I perceived to be relative lack of academic support and related diminishment of financial support... to complete my doctoral degree problem. I described one possible cause of that problem as an institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates. I mentioned the content issues in the Student Advisory Board Memo and my concern about gender inequity of the faculty. *I identified the chair of my dissertation committee, Dr. Rob Horner, as being distant and relatively inaccessible to me*.

This is the whole of Emeldi's proof that sex discrimination was discussed and, more importantly, of her supposed allegation of gender bias against Horner. She then theorizes that Friestad told Horner about Emeldi's allegation, triggering his resignation. Even assuming Emeldi's ambiguous characterization of Horner as being "distant and relatively inaccessible" was meant as an

accusation of gender bias, Friestad certainly did not understand that to be the issue. She denies that sex discrimination was discussed at all, much less any accusations of such against Horner.

Friestad's account is supported by a contemporaneous document that further undermines Emeldi's recollection of the discussion. In connection with the meeting, Emeldi sent Friestad a memo entitled "Reference Information for Requested Conflict Resolution Services," which chronicled what Emeldi obviously found to be a frustrating history with the Special Education Doctoral program from 2004 to October 2007. The memo detailed perceived slights, lack of cooperation or response and some disagreements or "conflicts" with various faculty members, including Horner in his capacity as chair of her dissertation committee and supervisor of her academic work. As the memo's "Introductory Comments" section states, however, it was "not intended as a criticism of the faculty members discussed. It is intended to describe the series of conflicts that have resulted in communication failures and the events that have contributed to a lack of progress made in my program." Friestad says that was her understanding of what the meeting was about, and reflects the nature of what she and Emeldi actually discussed — "what might best be termed as a series of perceived personality conflicts." Critically, Friestad states that "Ms. Emeldi did not discuss any issues related to sexual harassment or discrimination. Nor was there any inference [sic] or indication that she was concerned about sexual harassment or discrimination in the Memorandum." Reading Emeldi's memo confirms Friestad's account and understanding.

Although the evidence of a nonmoving party is to be believed, and all justifiable inferences are to be drawn in her favor, Emeldi's "evidence" regarding what took place at the October 19 meeting appears to fall into this category. Even if Emeldi's claim that gender discrimination was discussed is credited, however, Emeldi offers only speculation that Friestad informed Horner of any charges of discrimination following the meeting.

3. *Friestad phone call to Horner*. The next critical link in Emeldi's chain of causation is Friestad's phone call to Horner sometime after the October 19 meeting. With Emeldi's permission, Friestad called Horner to discuss Emeldi's concerns about her lack of progress in the doctoral program, including Horner's role in the delay. Horner acknowledges the phone call "with Marian Friestad in which she informed me that Ms. Emeldi had filed a concern related to

her moving forward." Freistad did not share with him the contents of any documents; she "simply told me that there was a concern." Significantly, Emeldi's counsel did not ask Horner at his deposition whether Friestad mentioned gender bias. And Friestad, as quoted above, denies that she and Emeldi ever discussed gender discrimination at any of their meetings. On this record, there is no evidence that Horner understood from the phone call that Emeldi's "concerns" about her progress and Horner's role involved gender bias. Equally important, although Horner readily acknowledges that Emeldi's concerns about him ultimately led to his resignation, he said his decision came only after receiving an email memo from Emeldi on November 12, well after Friestad's phone call.

4. *Emeldi's November 2007 memo/email exchanges with Horner*. Horner attributes his decision to resign as Emeldi's dissertation chair, and his timing, to a November 12 email memo he received from Emeldi, "identifying me as a barrier to her advancement and indicating that she was concerned about my unwillingness to move her doctoral committee forward"; "she was significantly concerned that I was a barrier to her advancement. That is not a role I am interested in playing, therefore it seemed that the logical step was for her to work with someone who would be able to promote her objectives. I chose to stop being the chair of her dissertation committee." Horner's description of the lengthy and detailed memo is accurate; and — consistent with Friestad's account of her initial and subsequent meetings with Emeldi — it contains no suggestion of gender discrimination. Emeldi wrote to Horner, "Though support has been requested, and you have acknowledged my patience in waiting for your involvement, we have, to date, not collaborated to progress my dissertation research forward." She continued, "The extinction plan that's been implemented over the last year particularly has prevented me from accessing support in weekly research meetings to progress dissertation prerequisite and project work and from directly communicating, accessing support, and collaborating with you, committee, and other faculty members causing my program to be unnecessarily extended." On November 19, Horner sent Emeldi the following email in response:

I am sorry you were unable to come to the research meeting today, because I think it is important for us to resolve the issues you frame in your message without delay. . . . [¶] Your message is clear that you see my feedback as a barrier to your progress, and not helpful in moving your dissertation forward. [¶] I have great respect for your personal and professional judgement and I

do not wish to be a barrier to your advancement. [¶] At the same time, I think we have differences in our view of your research plan. [¶] After some serious thought, I believe the most logical move is for you to work with an advisor who is more in tune with your research vision. As such I resign as of today as chair of your dissertation committee.

Significantly absent from this contemporaneous documentary exchange between Emeldi and Horner (like Emeldi's memo to Friestad) is any hint of gender discrimination being at issue or having been surfaced. Rather, Horner describes the intellectual and interpersonal conflicts that led to his resignation:

Ms. Emeldi developed a dissertation proposal but was dissatisfied with my critiques about the scope and substance of her proposal. In my judgment Ms. Emeldi's dissertation proposal was insufficiently developed to allow presentation to a dissertation committee. The conceptual foundation was not established, and her methodology would not have met the standards for a doctoral dissertation.

Horner explains that Emeldi "did not respond well to [my criticisms]. . . . [S]he resisted my suggestions, and went to University administration complaining that I was an obstacle to her progress."

I submit that, even making allowances for Emeldi's need in some instances to rely on circumstantial evidence, and giving her the benefit of permissible inferences on summary judgment, there is nothing but speculation to supply the vital missing element in Emeldi's gender discrimination claim: that the cause of and true reason for Horner's resignation (and his alleged undermining of finding a replacement chair) was gender-based retaliation. Not only do Horner and Friestad deny it, the documents created at the time corroborate them. onetheless, leveraging off her disputed complaint about Homer's gender bias to Friestad, Emeldi now theorizes that Horner's resignation as her chair had to be because Friestad reported that accusation in her call to Horner. However, when asked why she believed Horner's resignation was "gender based retaliation," she candidly — and correctly — replied, "I would be speculating. I think that's a question for Rob Horner."

The majority, however, believes a jury should decide this question. To justify allowing Emeldi to get that far, it cites three items of "ample circumstantial evidence" to establish causation and pretext. The first and "strong" circumstance is the proximity in time between Emeldi's protected conduct — her assumed complaint of gender discrimination — and Horner's resignation. Of course, in *Cornwell* we held "the record did not contain evidence that Sharp knew about Cornwell's complaint before Sharp demoted him, and thus Cornwell's complaint could not have caused Cornwell's demotion. Likewise, that is the record here. Emeldi has no evidence that Horner had any idea she was accusing him of gender discrimination.

To close this evidentiary gap, the majority credits Emeldi's "theory" on appeal of how Horner learned of her supposed gender-bias complaints about him. In her brief to this court, Emeldi speculates that "[a]s soon as [she] left the discussion with Friestad, [Friestad] called Horner and told him that [Emeldi] had accused him of discriminating against her." She contends that because of that contact, Horner resigned as her dissertation chair "that very day." In fact, events did not move anywhere near that fast. As documented by the record, Horner resigned on November 19, after receiving Emeldi's long email memo on November 12. As noted above, the Erneldi-Friestad meeting was on October 19, with the Friestad-Horner phone call occurring shortly after. The evidence shows that almost a month intervened between the call and Horner's resignation, during which time Horner and Emeldi had rather extensive email contacts, providing a contemporaneous documentary record that confirms Horner's nonpretextual explanation for his resignation.

Regardless of the timeline, Horner does not dispute that he resigned because of Emeldi's complaints about delays in her dissertation's progress — as relayed in general terms by Friestad and supplemented by Emeldi's email memo. But he does dispute — and there is no credible objective evidence to the contrary — that his resignation had anything to do with her being a woman rather than a grad student who had come to view him as a "barrier to her advancement."

The majority tries to bolster Emeldi's case by citing to Horner's supposed acts of gender bias "in other contexts," all of which are anecdotal, based largely on hearsay and unsupported other than by Emeldi's own accounts. For example, the majority credits Emeldi's assertion "that Horner

gave more attention and support to male students and that he ignored her and did not make eye contact with her."

The majority also credits Emeldi's complaint that when she attended Horner's graduate student group meetings, she was "not on the agenda," or when she was on the agenda, none of her "substantial/meaningful work" was discussed. Once again, there is no proffered testimony of other students or faculty members to give credence to Emeldi's perceptions that Horner was slighting her (and presumably other women students). The majority excuses this shortcoming because Emeldi "had direct percipient knowledge of what happened at the graduate student group meetings she attended." But this misses the point. She and the majority rely on these "facts" to prove Horner's actual gender-biased behavior — discrimination that took place not in one-on-one dealings between Horner and Emeldi where it would have to be a "he said, she said" dispute, but in front of many potential witnesses. Summary judgment standards do not require us to turn a blind eye to Emeldi's failure to make her affirmative case or to rebut the defendants' nonpretextual explanations with anything other than her own characterizations and perceptions.

This failure is particularly troubling with respect to what the majority invokes as Emeldi's "specific examples of Horner's male students being given opportunities that were not available to his female students," such as access to office space and technology. The majority refers only to Emeldi's declaration; Emeldi cites nothing at all. She describes favorable treatment given to four specified male students, and names a female professor and a female student, both of whom she says complained of "subordinating" and "derogatory" treatment resulting from this disparity. She also says these disparities were "observed by doctoral students interviewed for the Student Advisory Board Memo." But she does not offer declarations from any of these sources, or any direct evidence of Jason Naranjo's premature "assist[ance] to get a tenure-track position," Scott Ross' "three office spaces" and "number of palm pilots" or Scott Yamamoto's "several opportunities to work on research projects." This evidence, which Emeldi has not bothered to corroborate, is too anecdotal and lacking in specific evidentiary support to raise any reasonable inference that Horner was gender biased and actively discriminated between his male and female students.

Perhaps the most glaring example of Emeldi's speculative accusations, credited by the majority as supportive "other evidence" of Horner's retaliatory intent relates to her inability to secure a replacement chair despite asking 15 faculty members — which she attributes to Horner's gender-based animus against her. The majority cites Emeldi's contention that after his resignation, Horner "told other Department faculty members that Emeldi should not be granted a Ph.D., and should instead be directed into the Ed.D. program, which Emeldi says is a less prestigious degree."

Other than Emeldi's own speculation and hearsay, neither of which can establish a disputed issue of material fact, the evidence that this statement was made is nonexistent. The "evidence" is actually the excerpt of record Emeldi submitted in this appeal, which in turn is the statement of facts Emeldi submitted in opposition to the University's summary judgment motion in the district court. There Emeldi stated: "Horner announced to other faculty . . . that plaintiff should not be granted a Ph.D. degree but should be directed into a program for the lesser Ed.D. degree. Horner has never discussed that change with plaintiff." As support, she cites to her own declaration, in which she alleges, "[there was a] November 27, 2007 faculty meeting in which [Horner] advocated that I obtain a[ ] D.Ed. rather than a Ph.D. . . . Professor Cindy Herr described this statement by Horner to me immediately after it occurred, but I had never heard such a suggestion previously from Horner or anyone else." Where is the corroboration from Cindy Herr? All we have is a two-page excerpt of Herr's deposition. Nowhere does Herr testify that Horner made these statements, nor does she testify that she told Emeldi that Horner made these statements. Indeed, nothing in Herr's excerpted testimony refers to the Ed.D. program, a faculty meeting or even Horner at all. Emeldi's failure to ask Herr to confirm her alleged statement to Emeldi discredits the accusation against Horner as completely unfounded and certainly not "material to Emeldi's retaliation claim."

I am sympathetic to the majority's belief that the University could have done more for Emeldi in helping her find a replacement. That does not establish gender discrimination as the motivation for Horner's actions or the University's shortcomings, however. To posit, as the majority does, that she was unable to secure a replacement chair because Horner "poisoned" his colleagues against her is simply not credible on this record. Not only has Emeldi failed to support Herr's alleged statement, she has presented no evidence from (or about) any of the 15 faculty members

she asked, or from anyone else, suggesting that Horner did anything to dissuade them from acting as her chair, Rather, emails she placed in the record show that those she asked declined for a number of legitimate reasons: they did not believe they had the appropriate specialization to oversee her research; they were already overextended with other projects; they were ineligible to serve as chairs due to University policies. One was hesitant to make a commitment due to health issues. One had moved to Kansas, Another was retired. Further, these emails show that many of the faculty members offered to meet with her to discuss her project, and then wished her well when they determined they were unable to serve as her chair. Some referred her to other faculty members, and several volunteered to serve on her dissertation committee. These are not responses one would expect from colleagues who had been "poisoned." And equally notable, as the majority concedes, "the record does not disclose why, despite unsuccessfully soliciting fifteen faculty members, Emeldi overlooked two professors who, the University says, were qualified and available to replace Horner as Emeldi's dissertation chair."

Finally, the majority uses Horner's earlier praise for Emeldi's work as evidence that his explanation for resignation is pretextual. To do so seems a pure Catch 22. Had Horner never praised Emeldi, undoubtedly she (and the majority) would cite that as evidence of his longstanding, persistent gender bias. Horner praised Emeldi's work at various points in their relationship, but he also critiqued her work, as the majority itself notes. One would expect nothing less from a dissertation committee chair. Part of the chair's role is to offer the student advice and criticism on her dissertation's weaknesses as well as strengths, as well as on her own academic performance. That Horner did just that does not show that his stated reason for resigning as her advisor after she told him he was "a barrier to her advancement" was pretextual.

In sum, Emeldi's case should fail because she has not shown enough to warrant a jury's finding causation. But even if we give her the benefit of doubt on that requirement, she *certainly has not shown enough to rebut as mere pretext Horner's reason for resigning as her dissertation chair*. The evidence, including Friestad and Horner's testimony and Emeldi's own documented complaints, makes it clear that Horner's nondiscriminatory explanation was genuine: he resigned as dissertation chair because of intellectual and interpersonal incompatabilities with his Ph.D. candidate. Emeldi's unsupported statements and speculation do not overcome this evidence, and

she has not offered corroborative evidence that was available to her that would create triable issues of causation and pretext. We should not allow this case to go forward.

Title IX's worthy antidiscrimination objectives notwithstanding, to let Ms. Emeldi's claims go to a jury will serve only as a precedent-setting example of how little it takes to turn a failed supervisory relationship between a professor and his Ph.D. candidate into a federal case of gender discrimination. The district court properly granted summary judgment. I respectfully dissent.

Notes and Questions

1. What do you believe was the university's responsibility to provide a substitute dissertation advisor for Ms. Emeldi? The dissent notes that she attempted to obtain a substitute chair but was unsuccessful. The opinions do not discuss or opine about the university's responsibility. Should there be a policy in the event that another *Emeldi*-like situation occur?

2. Both the majority and the dissenting opinions discuss the nature of Ms. Emeldi's evidence. What would have strengthened her case before the trial court (that awarded summary judgment to the University). Why did the appellate court reject the trial court's ruling?

3. The university asked the full Ninth Circuit Court to rehear the case *en banc*, but the court refused, which means that the case must go to trial. Chief Judge Alex Kozisnki dissented from the court's refusal to review the case *en* banc, saying in part:

> [The decision of the Ninth Circuit] jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors. ... Defendants will go straight to trial or their checkbooks—because summary judgment will be out of reach in the Ninth Circuit.
>
> * * * * *
>
> If this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court. This is a loss for professors and students and for society, which depends on their creative ferment.

5. Note the dissent's last paragraph. What is the judge's policy concern about the potential precedent this opinion has created? What impact could it have on the relationship between doctoral students and their advisors?

5. The case went to trial in December, 2013. A statement by the Foundation for Individual Rights in Education (now the Foundation for Individual Rights in Expression) follows:

> After the Supreme Court denied review of the Ninth Circuit decision, Emeldi's case finally went to trial last Monday. After Emeldi finished presenting her case, UO moved for a directed verdict in its favor, arguing that Emeldi had failed to produce legally sufficient evidence from which a jury could find that the university retaliated against her for complaining of sex discrimination. The district court agreed and entered judgment for UO.
>
> Assuming Emeldi does not appeal the district court's judgment, this case is over. But the dangers warned of by Judge Kozinski have not abated. If a disgruntled student can force a trial (and a prolonged legal process) by showing only that negative academic results occurred close in time to some protected activity without any evidence of causation beyond speculation, students will have significant incentives to attempt to extract favorable results by threatening litigation.
>
> And as Judge Kozinski correctly noted, faculty members might think twice before providing honest evaluations of students' work, and universities might be forced either to capitulate or face protracted and costly litigation. If this came to pass, students would suffer from professors' reticence to provide legitimate critiques of their work—as would the academy and society at large, from the diminished quality of scholarship produced as a result.

(Ari Cohn, "Judgment for University of Oregon in Doctoral Candidate's Title IX Lawsuit," December 12, 20213, available at https://www.thefire.org/news/judgment-university-oregon-doctoral-candidates-title-ix-lawsuit)

SEC. 8.6.5.2. Procedures for Suspension, Dismissal, and Other Sanctions: Private Institutions

Napolitano v. Trustees of Princeton University
453 A.2d 263 (N.J. Super., App. Div. 1982)

The opinion of the court was delivered by Matthews, P.J.A.D.

When this action was instituted, plaintiff was a student in her senior year at Princeton University, a member of the Class of 1982. Were it not for the disciplinary action that precipitated this litigation, she would have been eligible to graduate on June 8, 1982. She is presently eligible to graduate in June 1983, at which time she will receive a Bachelor of Arts degree, with a major in English.

Defendant, The Trustees of Princeton University, is an educational corporation in the State of New Jersey. It operates a private institution of higher education known as Princeton University. Princeton offers undergraduate programs leading to the degrees of Bachelor of Arts and Bachelor of Science in Engineering.

[Defendant William G. Bowen is the President of Princeton University. Defendant Peter Onek is an Assistant Dean of Student Affairs at Princeton, one of whose responsibilities is chairing the Faculty-Student Committee on Discipline (COD). Defendant Sylvia Molloy is a Professor of Spanish in the Department of Romance Languages and Literatures.]

* * * *

During the Fall Term of the 1981-1982 academic year, Professor Molloy taught Spanish 341, a course entitled "The Spanish American Novel." Plaintiff elected to become a student in that course. It was her submission of a term paper for that course that gave rise to the disciplinary proceedings here under review.

Princeton maintains a bifurcated disciplinary system with nonconcurrent jurisdiction in two committees for the purpose of disciplining undergraduate students: the Princeton Honor Committee, which is concerned with examinations given under Princeton's Honor System, and the Faculty-Student Committee on Discipline (COD).

All disciplinary matters concerning undergraduates that do not involve in – class examinations are subject to the jurisdiction of the COD. This includes academic violations, such as plagiarism on essays, term papers, or laboratory reports, and nonacademic violations, such as disorderly conduct or drug-related offenses. The COD is a Standing Committee of the Faculty of

Princeton University. Rules and Procedures of the Faculty of Princeton University (July 1978 with Addenda). . . . [The court notes that possible penalties include a warning, disciplinary probation, suspension, required withdrawal, expulsion, and censure.]

A withheld degree, the penalty imposed upon plaintiff, is a less severe variation of suspension. It is imposed only upon second semester seniors. It permits them to finish their academic requirements and wait the prescribed period to receive their degree, rather than requiring them to lose their tuition and repeat their last semester in the following academic year. Excluding plaintiff's case, Princeton has withheld 20 degrees for disciplinary reasons since the 1972-1973 academic year.

There are two avenues of appeal from the decision and penalty of the COD: to the Judicial Committee of the Council of the Princeton University Community (Judicial Committee) and to the President of the University. Only the Judicial Committee avenue of appeal appears in the written material. A direct appeal to President Bowen from the COD is not mentioned in *RRR-1980* or any other University publication but, we are advised, is the avenue chosen in the overwhelming number of cases in which there is an appeal.

The appellate jurisdiction exercised by the President of the University is generally confined to a review of the penalty. It is accurately described in the *RRR* section concerning appeals from the Judicial Committee.

[The court quotes the university policies on acknowledgement of sources, quotations, paraphrasing, the acknowledgement of "ideas and facts," and the citation of sources in footnotes and bibliographies. It also quotes the University's definition of plagiarism.] . . .

Because of the importance of original work in the Princeton academic community, each student is required to attest to the originality of the submitted work and its compliance with University regulations:

> Student Acknowledgment of Original Work
>
> At the end of an essay, laboratory report, or any other requirement, the student is to write the following sentence and sign his or her name: "This paper represents my own work in accordance with University regulations." . . .

At the first class meeting of Spanish 341, Professor Molloy announced that the course requirements would be a term paper and midterm and final examinations. The term paper was to be a critical analysis of one of the works read for the course, on a topic that was to be chosen by the student but approved by Professor Molloy. The paper could be handed in at any time during the Fall Term, but no later than January 13, 1982, the last day of Princeton's reading period.

Plaintiff did not meet with Professor Molloy to seek approval of her topic until December 16, 1981, the last day of classes before the Christmas recess. She was one of the last, if not the last, to seek such approval from Professor Molloy.

[The plaintiff chose the topic of family ties in Gabariel Garcia Marquez's *One Hundred Years of Solitude*. Professor Molloy recommended that the plaintiff read *Cien anos de soledad: una interpretacion* by Josefina Ludmer (Ludmer), a book that Professor Molloy had put on library reserve at the beginning of the Fall Semester. The plaintiff admitted to taking notes from the recommended book and using those notes when writing her paper. When the professor read the plaintiff's paper, she sensed that the plaintiff had used portions of the Ludmer book without attribution.] . . .

A simple comparison of plaintiff's paper and Ludmer reveals numerous sections of the paper that are taken verbatim, or in other portions virtually verbatim, from Ludmer, but which are not put into quotation marks or indented and which are not footnoted. At the end of her paper plaintiff wrote and signed the acknowledgment of originality required by *RRR*, in Spanish: "This paper represents my own work in accordance with University regulations."

. . . On January 22, 1982, after completing her review of plaintiff's paper and Ludmer, Professor Molloy consulted *RRR-1980* and the Faculty Rules. Pursuant to the instruction at page 80 of the Faculty Rules, Professor Molloy telephoned Dean Onek and told him about plaintiff's paper. Dean Onek told her to send him a letter, with the paper and Ludmer, to present the copied material as clearly as possible and to turn in an "Incomplete" as plaintiff's grade in the course.

On January 26, 1982 Professor Molloy sent the letter Dean Onek had requested, setting forth her charge of plagiarism against plaintiff.

Between his receipt of Professor Molloy's letter and the date of the first COD hearing, Dean Onek met with plaintiff on four separate occasions. In the course of those meetings Dean Onek explained the various written and unwritten rules and procedures of the COD. He gave plaintiff copies of her paper, Ludmer and Professor Molloy's letter. He also sent plaintiff a formal letter notifying her of the hearing. At plaintiff's request Dean Onek spoke by telephone to her parents' attorney during one of their meetings.

The first COD hearing took place on Thursday, February 11. Plaintiff arrived at about 8 a.m. While she and her advisor waited in Dean Onek's office, the Dean distributed copies of Professor Molloy's letter, plaintiff's paper, and the photocopy of Ludmer to members of the COD for their review. Contrary to plaintiff's claim otherwise, Professor Molloy did not meet with the Committee during that 20-minute period. She was waiting in another office while plaintiff and her advisor were in Dean Onek's office. Professor Molloy entered the hearing room about one minute prior to plaintiff.

As Secretary of the COD, Dean Onek took notes at the hearing, which were transformed into the minutes sent to President Bowen. The minutes describe the hearing in some detail, but we do not have need to refer to them because the results of this hearing were mooted by the remand and rehearing ordered by the trial judge.

After the COD unanimously voted to find plaintiff guilty of plagiarism and withhold her degree for one year, Dean Onek informed her of the decision and subsequently met with her to explain the right of appeal.

Plaintiff met with President Bowen's assistant to discuss the appeal sometime before February 18, 1982, the date on which she wrote a letter to President Bowen, appealing to him for "clemency."

Plaintiff met with President Bowen and his assistant on Friday, February 26, 1982. President Bowen and plaintiff discussed her appeal. Although plaintiff claims that President Bowen stated that her conduct was an "unconscious act," there is no independent support of that found in the record.

President Bowen reviewed the file materials regarding proceedings before the COD and also received a letter on plaintiff's behalf from Professor Aarsleff. On March 1, 1982 President Bowen wrote to plaintiff to inform her that he had decided to uphold the determination of the COD.

A verified complaint was filed on April 22, 1982, at which time the trial judge entered an order to show cause scheduling a hearing on plaintiff's request for injunctive relief. Plaintiff's 14-count, verified complaint stated a wide variety of legal theories, all of which were directed to an attack upon the finding of plagiarism at Princeton University and the resulting penalty.

The first, second, and third counts alleged causes of action arising under N.J. Const. (1947), Art. I, par. I. The fourth and fifth counts sounded in contract, alleging that defendants' actions violated the terms of plaintiff's contract with Princeton University. The sixth count alleged a cause of action under the law of associations, claiming that defendants deviated from Princeton's own rules and regulations.

The seventh count alleged a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution. The eighth count alleged a cause of action under 42 U.S.C.A. § 1983.

The ninth and eleventh counts alleged causes of action sounding in defamation. The tenth count alleged a cause of action for intentional infliction of emotional harm. The twelfth count alleged a cause of action for invasion of privacy. The thirteenth count alleged a cause of action for malicious interference with plaintiff's prospective economic advantage, and the fourteenth count alleged a cause of action for malicious interference with plaintiff's contractual relationship.

Under all counts plaintiff sought actual and punitive damages, plus costs and attorneys' fees. Under the first through eighth counts, plaintiff sought temporary and permanent injunctive relief, primarily: (1) to require defendants to graduate her on June 8, 1982; (2) to restrain defendants from notifying any of the law schools to which she has applied of the disciplinary action taken against her, and (3) to require defendants to clear her record.

Defendants filed an answer denying the material allegations of the complaint and set forth separate defenses. . .

After several procedural motions, including a motion by defendants to disqualify the trial judge (which he denied), and various conferences among counsel and the judge, the parties were directed to bring cross-motions for summary judgment on the following issues: (1) whether the New Jersey Constitution imposes due process requirements on Princeton's disciplinary system; (2) whether the Faculty-Student Committee on Discipline applied the appropriate standard in finding plaintiff guilty of plagiarism; (3) whether there is a right to counsel in connection with disciplinary proceedings at a private university; (4) whether Princeton denied plaintiff a right to have certain witnesses speak on her behalf; (5) whether plaintiff was given adequate notice of her right to question Professor Molloy; (6) whether plaintiff violated Princeton's rules on plagiarism and (7) whether the penalty imposed on plaintiff breached an express or implied term of the "contract" between plaintiff and Princeton or her associational rights as a student at Princeton.

The first summary hearing was held on May 24, 1982, during which both sides chose to present oral argument and to rely upon the written materials previously submitted to the court, including affidavits, depositions and numerous exhibits. Although the trial judge had clearly stated, on numerous prior occasions, that testimony could be presented, neither party chose to call any witnesses.

After hearing oral argument the trial judge decided to remand the matter for a rehearing at Princeton. He found that a conviction for the academic fraud offense of plagiarism must be based upon a finding of "intent to pass off the submitted work as the student's own." He also required that plaintiff be permitted to call "any witnesses she wished on her own behalf, subject only to reasonable regulation by the presiding officer." He rejected plaintiff's argument that she was entitled to be represented by counsel at the rehearing.

The trial judge also directed counsel to prepare a set of instructions to the Faculty-Student Committee on Discipline, setting forth its responsibilities at the hearing. That document was prepared with the agreement of both counsel and presented to COD. The instructions provided, among other things: (1) the Committee was to proceed in its usual manner, except as specifically set forth in the "charge"; (2) the Committee was free to reach the same or a different result; (3) plaintiff could call any witness, subject to "reasonable limitation in terms of numbers, length of

presentation, and the like"; (4) the Committee was "not limited in any way to information presented at the earlier hearing"; (5) the decision was to "be based solely on the information presented at the rehearing"; (6) the entire proceedings, including deliberations, were to be tape-recorded and (7) the minutes or "summary" of the proceedings were to be prepared by the acting secretary and approved by each member of the Committee.

With respect to the COD's responsibilities in rehearing the accusation against plaintiff, the instructions provided, in full:

> The Committee should first focus upon whether the offense of plagiarism has occurred. In so doing, it should determine whether there has been deliberate use of an outside source without proper acknowledgment. In this regard, "deliberate" means "intention to pass off the work as one's own." If the question of a penalty is reached, the Committee should then focus upon: (a) the seriousness of the offense that has been found to have been committed, (b) the character and accomplishments of the person who has committed the offense, (c) the penalties assigned in other cases, and (d) the purposes – including educative – of the penalty to be assigned in this matter.

At plaintiff's request, the trial judge directed that the documents that were submitted to him be made available to the Committee prior to the rehearing. They included: (1) plaintiff's three-volume appendix; (2) the complete transcripts of all depositions; and (3) unannotated copies of the English translations of plaintiff's paper and the Ludmer text, which had been Appendix B to defendants' brief.

The rehearing took place on May 27, 1982, commencing at 8 a.m. Plaintiff was accompanied into the hearing room by her chosen advisor, Professor Jameson W. Doig, who spoke on her behalf. The COD agreed to hear from plaintiff's five character witnesses, plus Professor Aarsleff but, as permitted by the court below and the instructions, it limited each witness's presentation to five minutes. This limitation, however, was not strictly followed.

After hearing the opening and closing remark of Professor Doig, plaintiff's statement and the questioning of Professor Molloy, plaintiff and other witnesses, the COD excused plaintiff, her advisor and all of the witnesses in order to deliberate. The Committee unanimously found plaintiff guilty of plagiarism (8-0) and, with one abstention, imposed the penalty of withholding her degree for one year (7-1).

Dean Paulo Cucchi, who had replaced Dean Onek as the Secretary of the Committee for the purposes of the rehearing, prepared the summary of the hearing required by the instructions.

On May 30, 1982, plaintiff and Professor Doig met with President Bowen to discuss her appeal. Plaintiff's parents also met with President Bowen on that date. On June 1, 1982, President Bowen affirmed the decision reached by the COD at the rehearing.

The trial judge held a final summary hearing on June 2, 1982. After hearing the argument of counsel, he found that the decision on the remand was supported by the evidence. He stated that the "Committee's findings concerning intent are explicit and substantiated in the record as set forth in some detail on pages two and three of the summary of the hearing dated May 28, 1982"; that "there is no question from plaintiff's extensive use of unattributed material, that the committee was justified in concluding that she committed the offense with the intention to pass off the quoted material as her own." While he emphasized his personal disagreement with the severity of the penalty, he held that he could not find "that Princeton could not in good faith have assessed the penalties it did against plaintiff."

With this fairly detailed statement of the facts and proceedings before the University and the trial judge as a background, we proceed to a determination of the legal issues raised by plaintiff on this appeal.

The principal issue, as we see it, is whether the trial judge properly viewed his role as limited to a determination of whether Princeton substantially complied with its own regulations in disciplining plaintiff and, if so, whether Princeton's decision was supported by the evidence adduced at the hearing, and whether the penalty imposed was within Princeton's authority to impose.

Plaintiff first argues that the trial judge committed reversible error by failing to provide her with a testimonial hearing and by granting defendants' motion for summary judgment and dismissal of the complaint "notwithstanding that material facts remain hotly in dispute." In her second argument, which is intertwined with the first, she claims that the trial judge's deference to defendants' fact-finding and conclusions of law severely prejudiced her and constitutes reversible error.

Before discussing the merits of these controversies, we deem it important to clear the record of some confusion that we observe with respect to the offense with which plaintiff was charged. Plaintiff seems to contend that she has been disciplined for misconduct in the University and that the penalty imposed was the result of this misconduct. We believe that the infraction for which plaintiff was penalized constituted an academic offense under University regulations and therefore must be considered in the light of an academic disciplinary action on the part of the University authorities. It is clear that plaintiff was charged with plagiarism – in other words, that plaintiff attempted to pass off as her own work, the work of another. That act, if proven, constituted academic fraud. We do not view this case as involving an appeal from a

finding of general misconduct; instead, we are concerned with the application of academic standards by the authorities at Princeton.

In pursuing the arguments mentioned above plaintiff points to "several crucial matters [which] remained hotly disputed." Did she commit plagiarism? Was the penalty fair and/or consistent with penalties imposed by defendants in "similar" cases (and thereby within the parties' contract)? And, did the penalty serve an educative purpose and thereby come within the scope of the parties' bargain?

Plaintiff complains that the trial judge gave total deference to the results of the second hearing at the University and thereby abdicated his role as a Chancery Division judge. Contrary to plaintiff's contentions, the trial judge did not determine his role in reviewing the proceedings before the University and the penalty without recourse to authority. In the opinion he filed after the proceedings there may be found citation to several cases dealing with academic discipline and the role that courts should play in dealing with the rights of students vis-a-vis the university in which they are enrolled. Because of the lack of precedent in this jurisdiction, he referred to our law of private associations, as set forth in *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191 (1968). He also noted the comprehensive opinion filed by Judge Ackerman in the United States District Court in *Clayton v. Princeton University*, 519 F. Supp. 802 (D.N.J. 1981).

In *Higgins v. American Society of Clinical Pathologists*, Justice Proctor, speaking for the court, described the relationship between a private organization and one of its members, and the rights of each, in the following terms:

> While the general rule is that courts will not compel admission of an individual into a voluntary association, they have been willing to intervene and compel the reinstatement of a member who has been wrongfully expelled: "The law accords important rights and status to members of voluntary organizations not extended to mere aspirants to membership therein...."
>
> The rights accorded to members of an association traditionally have been analyzed either in terms of property interests – that is, some interest in the assets of the organization,...or in terms of contract rights – that is, reciprocal rights and duties laid down in the constitution and bylaws. . . . These theories, however, are incomplete since they often prevent the courts from considering the genuine reasons for and against relief...and have been extensively criticized. See, e.g., "Note, Judicial Control of Actions of Private Associations," 76 Harv.L.Rev. 983, pp. 998-1002 (1963); "Note," 15 Rutgers L.Rev. 327, pp. 330-333 (1960). Leading commentators have pointed out that the real reason for judicial relief

> against wrongful expulsion is the protection of the member's valuable personal relationship to the association and the status conferred by that relationship. . . . As Professor Chafee has noted, "the wrong is a tort, not a breach of contract, and the tort consists in the destruction of the relation rather than in a deprivation of the remote and conjectural right to receive property.". . .The loss of status resulting from the destruction of one's relationship to a professional organization ofttimes may be more harmful than a loss of property or contractual rights and properly may be the subject of judicial protection. . . .
>
> * * * *
>
> . . . . In determining whether the deprivation of plaintiff's status was justified, our examination of the reason for her expulsion must be limited. Courts ordinarily ought not to intrude upon areas of associational decision involving specialized knowledge. . . . Private associations must have considerable latitude in rule-making in order to accomplish their objectives and their private law generally is binding on those who wish to remain members. However, courts will relieve against any expulsion based on rules which are in conflict with public policy. . . . [51 N.J. at 199-202; citations omitted.]

We do not believe, however, that the law of private associations delineates completely the relationship between a student and a university. The relationship is unique. The status of a private university such as Princeton was referred to by Justice Handler in his opinion for the court in *State v. Schmid,* 84 N.J. 535 (1980), in these terms:

> A private educational institution such as Princeton University involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel, and the life and activities of the individual members of this community are directed and shaped by their shared educational goals and the institution's educational policies. [at 552]

The student comes to the academic community (the university) seeking to be educated in a given discipline. The student pays a tuition that might, in some instances, represent a contractual consideration. The university undertakes to educate that student through its faculty and through the association of other students with that student and the faculty. Transcending that bare relationship is the understanding that the student will abide by the reasonable regulations, both

academic and disciplinary, that the student will meet the academic standards established by the faculty and that the university, on the successful completion of studies, will award the degree sought to the student. Such a relationship, we submit, cannot be described either in pure contractual or associational terms. In those instances where courts have dealt with the relationship of a private university to its students in contractual terms, they have warned against a rigid application of the law of contracts to students' disciplinary proceedings. Thus, in *Slaughter v. Brigham Young Univ*., 514 F.2d 622 (10th Cir.1975), it was held:

> It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past parens patriae, and now include private associations such as church membership, union membership, professional societies; elements drawn from "status" theory, and others. Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doctrine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may also be different at different schools. There has been much published by legal writers advocating the adoption of various categories to be applied to the relationship. See 72 Yale L.J. 1387; 48 Indiana L.J. 253; 26 Stanford L.Rev. 95; 38 Notre Dame Lawyer 174. There are also many cases that refer to a contractual relationship existing between the student and the university, especially private schools. See *Carr v. St. John's University*, 17 A.D.2d 632, 231 N.Y.S.2d 410; *University of Miami v. Militana*, 184 So.2d 701 (Fla.App.); *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499; *Drucker v. New York University*, 59 Misc.2d 789, 300 N.Y.S.2d 749. But again, these cases do not adopt all commercial contract law by their use of certain elements. [at 626]

* * * *

In *State v. Schmid*, 84 N.J. at 543, a case involving Princeton University, although in a different milieu, it was noted:

* * * *

> ... [W]e must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. ...Hence, private colleges and universities must be accorded a generous measure of autonomy and self governance if they are to fulfill their paramount role as vehicles of education and enlightenment. . . . [at 566-567; citations and footnote omitted]

Courts have also recognized the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student. We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct. Plaintiff, apparently ignoring the distinction, seeks a full panoply of procedural safeguards under a claim of due process.

Courts have been virtually unanimous in rejecting students' claims for due process in the constitutional sense where academic suspensions or dismissal are involved. See *Slaughter v. Brigham Young Univ*., 514 F.2d at 625; *Jansen v. Emory Univ*., 440 F. Supp. at 1062; *Lyons v. Salve Regina College*, 565 F.2d at 202-203; *Mahavongsanan v. Hall*, 529 F.2d 448, 449-450 (5 Cir.1976); *Kwiatkowski v. Ithaca College*, 82 Misc.2d 43, 368 N.Y.S.2d 973, 976-977 (Sup.Ct.1975); *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 404 N.E.2d 1302, 1304 (Ct.App.1980).

* * * *

[The court then discussed the Supreme Court's ruling in *Board of Curators, Univ. of Mo. v. Horowitz*.]

Considering Princeton's status as a private university under our law, *State v. Schmid*, we believe that the principles set forth in the cases cited above, culminating with *Board of Curators, Univ. of Mo. v. Horowitz*, accurately state our law with respect to the proceedings here under

review. We agree with the trial judge that he should not have become a super-trier under due process considerations.

In support of our conclusion we note that deference has always been afforded to the internal decision-making process under our law of associations. In *Higgins v. American Society of Clinical Pathologists*, 51 N.J. at 202, our Supreme Court held that the members of an association are generally bound by its private law. . . .

Plaintiff persists, however, in her contention that the charge of plagiarism against her was not proved by the University before the COD and that the trial judge should have conducted a full hearing on the substantive offense. No authority is cited to us to support this view, and we know of none. The trial judge was required to review the evidence before the COD and to determine whether the evidence presented was sufficient to support the charge of plagiarism. He concluded, regardless whether he found the evidence sufficient, substantial or under any standard of evidence required, that the charge of plagiarism against plaintiff was proved. Having reached this conclusion, his task was completed. He was not obliged to conduct a full-fledged hearing on that substantive issue. As was stated in *Slaughter v. Brigham Young Univ., supra:*

> When the courts lay down requirements for procedural due process in these situations as required by the Constitution, and when the school administrators follow such requirements (and other basic conditions are met), some weight must then be given to their determination of the facts when there is substantial evidence to support it. Thus if the regulations concerned are reasonable; if they are known to the student or should have been; if the proceedings are before the appropriate persons with authority to act, to find facts, or to make recommendations; and if procedural due process was accorded the student, then the findings when supported by substantial evidence must be accorded some presumption of correctness. The adequacy of the procedure plus the substantial evidence element constitute the basis and the record to test whether the action was arbitrary. The fact-finding procedures were adequate [514 F.2d at 625].

Our independent examination of the record satisfies us that the COD properly concluded that plaintiff had plagiarized. Her paper constitutes a mosaic of the Ludmer work in an attempt to pass off Ludmer's ideas as plaintiff's own. While plaintiff persists in her argument that she did not intend to plagiarize and that there is nothing in the proofs to show that she did so intend, the mosaic itself is the loudest argument against her. The creation of that mosaic can only lead to one conclusion: that plaintiff intended to deceive her preceptor that the paper was original. An

excerpt from the summary prepared by the COD with respect to the basis of its finding of intent is illuminating:

> A series of questions and comments concerning the contents of the paper followed Ms. Napolitano's presentation. It was pointed out that the entire paper consisted almost exclusively of a literal or slightly paraphrased rendering of various portions of the one secondary source used, without proper attribution, except in occasional instances. In addition, Professor Molloy and some members of the Committee mentioned a number of points in the paper which at the very least suggested that Ms. Napolitano did indeed intend to give the impression that the borrowings from her source were in fact her own. Among these were:
>
> > 1) A few statements from the source had been put in quotation marks but not the rest. This could indicate, on the other hand, that Ms. Napolitano had made an effort to use outside sources and, on the other, that the portions of the paper that were not in direct quotations were her own work.
> >
> > 2) The use, in the paper, of phrases such as "it is evident that," "it is important to note that," "one can assume that," etc. suggests that what follows is Ms. Napolitano's own thoughts and words, when in fact, in virtually all instances, what follows are words borrowed from the one source without attributions.
> >
> > 3) In several instances, there are quotes from the novel that is the subject of the paper. These quotes were used by the secondary source [the Ludmer text] to illustrate various points. In making these same points (usually using the words of the secondary source), Ms. Napolitano used the same quotes but changed the page numbers of the quotes to correspond to the edition of the novel used in the course. This gives the appearance that Ms. Napolitano had found the quotes herself in the novel, which, in fact, she did not.

4) The verb tenses in the material borrowed from the source were all changed to the present tense for the sake of consistency in the paper.

5) Small words and phrases from the borrowed source were deleted in cases where these words may have seemed too technical or awkward.

The COD did not accept plaintiff's explanations, finding them unsatisfactory, especially in light of the signed statement at the conclusion of the paper that it was her work in accordance with University regulations.

Plaintiff next argues that defendants denied her liberty and property interests without due process of law under N.J. Const. (1947), Art. I, par. 1. Plaintiff's argument under this point is buttressed principally by the holding of our Supreme Court in *State v. Schmid*. In *Schmid* defendant was convicted of criminal trespass based upon his distribution of political leaflets on the Princeton University campus. Schmid appealed his conviction on federal and state constitutional grounds. Plaintiff relies principally on an observation made by Justice Handler: "On numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights. . . ." 84 N.J. at 555.

However, *Schmid* does not stand for the proposition advanced by plaintiff. Schmid's conviction was overturned by the Supreme Court because it was found that Princeton's regulations governing the distribution of literature and the promulgation of speech on the campus did not contain adequate standards. The arrest of Schmid for distribution, therefore, was arbitrary and, in the face of that finding, the conviction could not stand. This is a far cry from the argument that the New Jersey Constitution requires Princeton to grant its academic students due process rights not accorded to them under the federal constitution. We reject the argument.

Plaintiff's final argument relates to the penalty that was imposed upon her, the postponement of her degree for a period of one year until June 1983. The question of the penalty was troublesome to the trial judge. From the very institution of this action, until the time he rendered his final decision, the judge expressed personal disagreement with the decision of the COD and President Bowen to defer the granting of plaintiff's degree from June 1982 until June 1983. Despite that disagreement the judge correctly held that he could not substitute his own views for those of a duly constituted administrative body within a private institution. He reached this conclusion and the holding as to the correctness of the penalty on the basis of the law of contracts. Plaintiff persists in arguing, however, that the penalty imposed demonstrates bias on the part of defendants because (a) the penalty imposed is inconsistent with penalties imposed in

similar cases over the years and (b) it is actually "out of line" with the offense with which she was charged. We reject these arguments with the following observations.

Defendants in their brief describe plaintiff as maintaining a "strong" academic record at the University. [Here follows a list of laudatory comments about Napolitano, including the fact that she had earned a 3.7 grade point average and had completed all requirements for the baccalaureate degree in three years, while providing extensive support services for several athletic teams.]

It must be apparent that everyone involved in this action regarded plaintiff as a somewhat gifted if not unusual student of high achievement. She had obviously earned her place in the University community by her achievements. Under those circumstances should not the community of Princeton University have been entitled to expect more of plaintiff? Should not the reaction of a University community such as that at Princeton been one of dismay? We merely pose these questions. We do not answer them. We pose them principally because of plaintiff's persistent complaints that the University did not "prove" that she was a plagiarist, especially in the face of her continued denials of plagiarism or the intent to deceive Professor Molloy. It is apparent to us that plaintiff has neglected to view her position in the university community and the effect that the charges against her have had on the entire community.

Viewed in this light, we find little purpose in reviewing plaintiff's argument which attempts to demonstrate that in 20 or more disciplinary cases arising out of the same or similar incidents the individuals there involved were not penalized as severely as she was. To us, this is totally irrelevant. Each penalty obviously must be tailored to the offense committed, and the offense committed must be viewed with regard to the offender and the community. We believe it is readily ascertainable that the University softened the penalty because of the status that plaintiff had attained in the University community and the fact that she had never transgressed any of the University regulations before. Recall that this incident occurred at the beginning of the second semester. Precedent would permit the COD and the President to have imposed a penalty of suspension for the entire second semester, with the result that plaintiff would have had to repeat that semester during the winter and spring of 1983 at the additional expense of another tuition. Under the penalty imposed, plaintiff was permitted to continue her work and complete her requirements for her degree. Her penalty was that the degree was not awarded to her and will not be until June 1983. We find nothing unreasonable in this determination.

One last observation. Plaintiff claims that the penalty is supposed to provide something educative in its imposition. She argues that the penalty here is improper because there is no educational value to be found in it. Perhaps plaintiff's self-concern blinds her to the fact that the penalty imposed on her, as a leader of the University community, has to have some educative effect on other student members of the community. In addition, to paraphrase the poet, "the

child is mother to the woman," we believe that the lesson to be learned here should be learned by Gabrielle Napolitano and borne by her for the rest of her life. We are sure it will strengthen her in her resolve to become a success in whatever endeavor she chooses.

The judgment of the Chancery Division is affirmed, with no costs to any party.

Notes and Questions

1. Note the standard of review used by the trial judge. The infraction is characterized as academic fraud; if the court had viewed it as "general misconduct," would the plaintiff have been entitled to a different standard of review? To a *de novo* trial? Is the line between academic judgment cases and misconduct cases always clear? Was it as clear in this case as the court would have you believe?

2. Should the standard of review employed in this case be used for litigation involving student misconduct as well as for litigation involving academic performance? For litigation against public institutions as well as private?

3. The *Ewing* case (Section 8.2 above) had not yet been decided by the U.S. Supreme Court when the court in *Napolitano* issued its opinion. What guidance, if any, could this court have obtained from *Ewing*?

4. What if the professor who discovered the plagiarism simply gave the student an "F" and did not pursue the disciplinary process? Do faculty have the right to make such judgments as part of their academic freedom? Could the student have challenged such a faculty judgment if it were not preceded by notice and hearing or other procedural protections for the student?

5. For another plagiarism case, see *Walker v. President and Fellows of Harvard College*, 840 F.3d 57 (1st Cir. 2016), covered in the Text, pp. 619-620. In *Walker*, a federal appeals court rejected a law student's assertion that the draft of a student law journal note should not be subject to the law school's plagiarism policy.

SECS . 8.6.1 and *8.6.5. Academic Dismissals* and *Procedures for Academic Sanctions*

Problem 15

The Provost's office of a large public university has received a lengthy petition from a graduate student in psychology who was recently dismissed from the doctoral program. University records indicate that the student had been enrolled as a full-time doctoral student for 6 semesters. An explanatory note on the student's record indicates that "a pattern of insufficient academic performance in the past two semesters, in course work, clinical field work, and the qualifying exam," was the basis for the dismissal. The dismissal had been recommended by the graduate faculty of the psychology department's clinical psychology program, approved by the psychology department faculty, and further approved by the Dean of the Graduate School of Arts and Sciences.

The graduate school catalogue, along with various departmental announcements distributed to graduate students, sets forth the requirements for the award of doctoral degrees. For the doctoral degree in psychology, the catalogue establishes a dissertation requirement and states that, prior to beginning the dissertation, a student "must have: (1) successfully completed all course work specified by the departmental faculty, and (2) received a passing grade on the written and oral qualifying examination." The catalogue also states that "students must demonstrate competence in an area of specialization and the ability to meet the generally accepted academic or professional standards of the discipline in which the degree is to be obtained." Further, the catalogue states that "no official time limits have been imposed on acquiring the doctoral degree."

In his petition, the student challenges his dismissal and makes these points:

(1) "I had a good academic record during my first four semesters. I had a "B" average. This performance indicates that I am capable of meeting the psychology department's standards."

(2) "I did fail one course during my fifth semester, but that was because the professor misled me and others concerning the final exam instructions. (The course grade was based entirely on the final exam.) The professor told us during the course and again just before the exam that we would have to do 3 of the 5 questions on

the exam; instead, the actual directions, used in grading our exams, required that we do 4 of the 5 questions. I relied on the professor's statements in studying for the exam and in taking the exam, and I failed because I got a zero for the fourth question that I did not do."

(3) "I also did fail my clinical field work in my sixth semester, but I consider this assessment of my work to be very unfair. First, this was my very first clinical experience. Second, my field supervisor, upon whose recommendation the failing grade was based, spent very little time with me and gave me almost no feedback on my work either during or at the conclusion of my fieldwork. Third, the psychology department did not give me or my field supervisor any evaluative standards by which my work would be judged."

(4) "I took my qualifying exam near the end of my sixth semester. I had to have a combined score of at least 70.00 on the oral and written parts in order to pass. The score I actually received was 69.73! I think that this score should be rounded up to 70.00 and considered a passing score. If not, I at least think that I should be allowed to take the qualifying exam over again; other students in the past have been allowed to do so."

Based on current knowledge, there is no reason to believe that any of the facts stated in the petition are untrue. The Provost must now decide whether and how to respond to the petition and whether to take any other action as a result of having received the petition.

Does the law constrain the Provost in her decision making on this matter? How so? Is there any other information the Provost would need to have before ruling on this petition? If so, why is this information needed?

If the Provost denies the petition, would the student have substantial grounds for suing the school? What arguments might the student make, and what relief could he request?

I.

CHAPTER IX: STUDENT DISCIPLINARY ISSUES

SECS. 9.1.3. and *9.2.2.;* see also *SEC. 10.2.2. Codes of Student Conduct,* and *Public Institutions: Disciplinary Rules and Regulations;* and *Institutional Recognition and Regulation of Fraternal Organizations*

Problem 16

A few months ago, the local flagship campus of the state university promulgated an Off-Campus Misconduct Policy. This policy authorizes disciplinary sanctions against students who participate in "misconduct" that does not take place on the campus or other university property IF: "(a) the misconduct takes places at an event sponsored or sanctioned by the university or one of its schools or academic departments; or (b) the misconduct is detrimental to the interests of the university." "Misconduct" is defined to include most of the same types of actions that are covered by the Campus Student Code regarding on-campus misconduct. A notice was sent to all students informing them of the university's new policy.

Last Saturday evening, the university's largest fraternity held its annual "Drink 'til you Drop" party. The fraternity's house is located in a residential neighborhood just outside the university's campus. Students arrived by the dozens to celebrate.

There was enough beer to last through the night, and the D.J. cranked the music up so high that the walls began to vibrate. By midnight the house was packed, and students began to gather outside. Some sat around the firepit behind the house and sang the well-known university drinking song; others chased one another up and down the street, carelessly tossing their empty beer cups and half-eaten hot dogs on the neighbors' lawns.

On Monday morning, the university received many complaints from the residents of the neighborhood. Two of the students had mistakenly barged into a neighbor's house looking for the fraternity party. Several students urinated on the lawns of other neighbors. One woman claimed that a brick thrown by one of the party-goers shattered her dining room window. A man claimed that students drove a car across his lawn and left deep ruts. Other residents protested that they received little or no sleep as a result of the noise and thumping of the music that blared throughout the night.

University student affairs staffers have identified the officers of the fraternity who sponsored the party, the student who threw the brick, one of the urinating students, and a number

of other students who attended the party late into the night. The university plans to invoke its Off-Campus Misconduct Policy against all of these students, and has advised each student of its intentions. The students claim they will challenge the legality of the policy and its application to them. Is the policy valid? Can it validly be applied to each of the identified students? What changes in the wording of the policy, or its particular applications, would be advisable?

SECS. 9.1.3. and 9.3.2. *Codes of Student Conduct* and Public Institutions: Disciplinary Sanctions

Doe v. Valencia College
903 F.3d 1220 (11th Cir. 2018)

Before ED CARNES, Chief Judge, MARCUS, and EBEL, Circuit Judges.

Opinion

ED CARNES:

Accused robbers, rapists, and murderers have statutory and constitutional rights. So does a college student who is accused of stalking and sexually harassing another student. The question in this case is whether Valencia College violated Jeffrey Koeppel's statutory or constitutional rights when it suspended him for his conduct toward another student at the college. The district court did not think so, and neither do we.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Facts

Jeffrey Koeppel met Jane Roe (pseudonym) during the summer of 2014 when they were assigned to the same biology lab group at Valencia College, a public college in Florida. Because they were assigned to work together, they exchanged phone numbers and would occasionally talk outside of class. As the semester went on, the 42-year-old Koeppel began to develop feelings for the 24-year-old Jane that were not purely academic. He volunteered to do things for her. He tutored her in biology. He offered to give her his old computer. And he asked if he could buy her a gift certificate for a massage. Eventually Koeppel told Jane that he was attracted to her. Jane let him know that the feeling was not mutual. She told him that she already had a boyfriend; that her relationship with Koeppel was strictly related to their role as lab partners in the biology class; and that she did not want him to have the wrong impression. After that the two of them finished the summer semester without incident.

1. Koeppel Messages Jane

A few days before the fall semester began, Koeppel saw something online that made him

think that Jane was single. Ever hopeful, on August 3 he sent her a text message telling her once again that he had feelings for her: "So im saying I am interest[ed] in you ... but im not on any mission or anything ... i just don't enjoy feeling conflicted so I would rather talk about it."[1] That message came around 10:00 p.m. on a Sunday night while Jane was at home watching a movie with her son and her boyfriend.[2] Jane responded:

> I have told you that I just want this to be class related [because] I am with someone who I've been seeing for 3 years now .. And we live together .. So I don't know if i gave you the wrong impression or whatever the case may be .. But I do have a serious [boyfriend] and really just thought we were studying and getting through the class.

Koeppel replied that "[i]t really doesn[']t matter [because] you have been very fair with me ..." and that "I just kinda hoped you would come around ... be interested in me." He explained that he had asked her again because after looking at her Facebook page, he thought she had broken up with her boyfriend. And he told her that "U never sent any signals ... I guess i just wanna ask what your plans are."

Jane reiterated: "Listen I have a [boyfriend]. I have been busy with work. [W]hy are u texting me that when we already discussed this[?]" Then: "And saw what exactly on my Facebook? We are not even friends so how did u get on their [sic] ...." Jane and her boyfriend then called Koeppel, and Jane asked him why he was texting her, told him he had crossed a line by looking at her Facebook page, and told him that they were not friends.

That apparently was not what Koeppel wanted to hear. He responded with a message to Jane advising her: "Get a nosejob. [Your boyfriend] can pay with his foodstamp[s]." Jane and her boyfriend called Koeppel again and informed him that they were calling the police. Koeppel admits that he then sent Jane a series of "inappropriate" messages and pictures in the hopes of "hurt[ing] her feelings." Each of these quotations is from a separate text:

- "I wondered if u were a hussie and i guess so."
- "Dress like a hooker and now act like it too."
- "Just sucks i didn't wear your pussy out."
- "Them skinny legs i been thinkin about."

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[1] In our quotations from Koeppel's and Jane's messages, all punctuation, including ellipses, appears in the original messages. The bracketed parts we have added for clarity.

[2] It's unclear from the record whether the man was Jane's boyfriend, her ex-husband, her son's father, or some combination of the three. For consistency and ease of reference — and because it doesn't matter anyway — we will refer to him as her boyfriend.

• “Believe me i have had plenty of sex with you even if you weren[’]t present.”
• “What u think i was thinkin bout when ur in them tiny whore shorts.”
• “Your little butt cheeks hanging out.”
• “Yum yum!!!!!”
• “Ur cute with a LOT of face paint ...”
• “But I like that cute little mole by ur titty.”
• “A hussie is as a hussie does.”

Koeppel also sent her a picture of his bare chest, a picture of himself wearing a costume with his arm around a woman, and a picture of a woman pretending to perform oral sex on another person. He later conceded that given the content and the number of his text messages, it was possible that someone receiving them would have been concerned.

Meanwhile, Jane’s boyfriend called the Seminole County Sheriff’s Office. Deputy Brenton Rush responded and met Jane outside of her apartment. She told him what had happened and that she was scared. Deputy Rush looked at the messages and, at Jane’s request, called Koeppel to recommend that he stop talking to her. Despite his recommendation, Koeppel called her again around midnight from an unknown number.

After midnight that same night, Jane twice messaged Koeppel to “Stop calling me. Do not have any contact with me.” But Koeppel kept on texting her until 5:00 a.m.[3] The messages in those later texts included questions about Jane’s boyfriend, statements mocking Jane’s anxiety disorder, an apology, and, when Jane didn’t respond to his apology, this message: “Starbucks date — a 6.5 oz can of expresso [sic] and cream — despite the fact that it is not carbonated when opened it tends to eject some of its contents directly on one[’]s face.”

On August 6, Koeppel texted Jane again, but she did not respond until August 13, when she once again told him to stop: “You are crazy[. L]eave me alone and my [ ] life[. S]top stalking my Facebook[. L]eave us alone! The cops already informed u to leave me alone and you haven’t.” He didn’t stop.

2. Valencia Suspends Koeppel

On August 11, 2014, Jane, accompanied by her boyfriend and son, went to Valencia

[3] Koeppel asserts that the messages were all sent during a 17-minute span. Although he sent the bulk of the lewd messages from 10:57 p.m. to 11:18 p.m., Koeppel admits that he sent the first of those messages to Jane around 10:00 p.m. on August 3 and the last of them around 5:00 a.m. on August 4.

Dean of Students Joseph Sarrubbo's office to complain about Koeppel's messages. At that meeting Sarrubbo noticed that Jane was "visibly upset and shaken," and he recommended that she complete a witness statement with the campus safety and security office.

a. *Sarrubbo's Investigation*

* * * *

After completing his investigation, Dean Sarrubbo concluded that Koeppel had likely violated the Code of Conduct and sent Koeppel an email informing him that a disciplinary hearing was set for the following week. That email also informed Koeppel that the college was considering disciplining him for having engaged in the following four types of conduct prohibited in the Code:

> [1] Physical abuse, including but not limited to, rape, sexual assault, sex offenses, and other physical assault; threats of violence; or conduct that threatens the health or safety of any person.
>
> [2] Sexual harassment, as defined in College policy ... : Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: ... [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive College environment. In determining whether the alleged conduct constitutes sexual harassment, consideration shall be given to the record of the incident as a whole and to the totality of the circumstances, including the context in which the alleged incidents occurred.
>
> [3] Stalking behavior in which an individual willfully, maliciously, and repeatedly engages in a knowing course of conduct directed at a specific person which reasonably and seriously alarms, torments, or terrorizes the person, and which serves no legitimate purpose.
>
> [4] Disorderly or lewd conduct.

b. *Koeppel's Disciplinary Hearing*

Dean Sarrubbo, who oversaw Koeppel's disciplinary hearing, met with the Student Conduct Committee 30 minutes before the hearing began. At that pre-hearing meeting, he gave the committee members an overview of the charges and a folder that included his log, Jane's complaint, and the documents that Jane and Koeppel had submitted, including copies of the text messages. Jane did not attend the hearing, and Koeppel did not object to her absence.

The committee members questioned Koeppel for about 35 minutes. Some of them

expressed their skepticism about Koeppel and his comments: "[Y]ou're a 42-year-old man, just get over it"; "[H]ow could you have thought that it was in any way appropriate to have offered to buy a massage for Jane?"; and "[W]hen's the last time that you bought a massage for a male friend?" One member said: "I don't see what we even — what's even necessary to discuss. He was obviously stalking."

. . . After deliberating, the committee recommended to Sarrubbo that he find Koeppel responsible for the charged conduct and suspend him from attending the college for one year. Sarrubbo upheld the recommendation and emailed Koeppel to inform him about the suspension and the appeals process.

Koeppel appealed the committee's recommendation and Dean Sarrubbo's decision to the Vice President of Student Affairs, Dr. Joyce Romano. Koeppel contended in his appeal that the committee's conclusions were unwarranted and that the sanction was excessive. Romano denied Koeppel's appeal, explaining that:

> [T]he number of texts is not the main focus in this case as much as the continued behavior you exhibited in not controlling your impulses and continuing to engage with the other student when it was clearly communicated to you that such interactions were unwelcome and that you should have no further contact with her.

B. Procedural History

On October 23, 2015, Koeppel filed a lawsuit against Romano, Sarrubbo, and one other Valencia official in their individual capacities. (Because the claims against them are identical, we refer to the defendants collectively as Valencia.) . . .

II. STANDARD OF REVIEW

We review de novo a grant of summary judgment, viewing the facts and "drawing all reasonable inferences in favor of the nonmoving party." . . .

III. DISCUSSION

Koeppel contends that Valencia's policies violated his First Amendment right to free speech, that they were unconstitutionally overbroad and vague on their face, and that he was denied procedural and substantive due process in connection with his disciplinary hearing. . . [Koeppel also raised a Title IX claim, which the court dismissed because it concluded that

Koeppel failed to establish any genuine issue with the correctness of the disciplinary hearing.]

A. Koeppel's As Applied Claim That Valencia Violated His First Amendment Right To Free Speech

The Supreme Court has held that public schools may regulate student expression when it "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students." See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 89 S.Ct. 733, 738, 21 L.Ed.2d 731 (1969). Koeppel claims that as they were applied to him Valencia's policies violated his First Amendment rights because his messages to Jane were private, non-threatening speech, which did not cause a substantial interference at the school. Maybe so, but that goes to only half of Tinker's holding.

Tinker held that a public school may regulate student speech not only when it "substantially interfere[s] with the work of the school," but also when it "impinge[s] upon the rights of other students" to be secure and to be let alone. Id.; see also id. at 513, 89 S.Ct. at 740 ("[C]onduct by the student [that] ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.") (emphasis added); see also Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (explaining that "or" usually "indicates alternatives and requires that those alternatives be treated separately") (quotation marks omitted). We take it as given that when the Supreme Court stated that conduct involving an "invasion of the rights of others" is not constitutionally protected, it meant that conduct invading the rights of others is not constitutionally protected. See CSX Transp., Inc. v. Ala. Dep't of Revenue, 888 F.3d 1163, 1177 (11th Cir. 2018) ("[A] good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same.") (quoting Mathis v. United States, 579 U.S. ——, 136 S.Ct. 2243, 2254, 195 L.Ed.2d 604 (2016)).

Koeppel's conduct invaded Jane's rights, interfering with her rights "to be secure and to be let alone," free from persistent unwanted advances and related insults from another student. See Tinker, 393 U.S. at 508, 89 S.Ct. at 737. He sent her dozens of messages throughout the night making lewd references to her body, and he continued to send unwanted messages over a period of days. His persistent misconduct ignored Jane's repeated pleas that he stop contacting her, Deputy Rush's recommendation that he not contact her, and Dean Sarrubbo's order that he not contact her. As Vice President of Student Affairs Romano explained, the worst aspect of Koeppel's misbehavior was not the quantity of it but the fact that instead of controlling his impulses Koeppel continued to harass Jane, knowing that it was unwelcome and despite being told to leave her alone. He wouldn't leave her alone.

Dean Sarrubbo testified that Jane appeared upset at their meetings and that she was concerned about attending school during the fall term because she was scheduled to be in class with Koeppel. Given Koeppel's persistent harassment as well as the understandable (and intended) anxiety it caused Jane, Valencia reasonably concluded that his conduct invaded her rights. See id. at 512–13, 89 S.Ct. at 740; Hill v. Colorado, 530 U.S. 703, 718, 120 S.Ct. 2480, 2490, 147 L.Ed.2d 597 (2000) ("None of our decisions has minimized the enduring importance of a right to be free from persistent importunity, following and dogging after an offer to communicate has been declined."). Because Koeppel's conduct interfered with Jane's rights, Valencia was free to regulate it under Tinker without impinging on Koeppel's First Amendment rights. We need ot decide whether Koeppel's conduct also caused a "material and substantial interfere[nce]" with the school's programs or mission. Tinker, 393 U.S. at 511, 89 S.Ct. at 739.

Koeppel's misconduct occurred while he was enrolled at Valencia, although it was during the break between summer and fall classes. He and Jane were scheduled to be in the same class that fall. Still, he protests that the school was powerless to do anything about his misbehavior because he did it all while he was off campus. But Tinker teaches that "conduct by the student, in class or out of it" that results in the "invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Id. at 513, 89 S.Ct. at 740 (emphasis added). We agree with the Fifth Circuit that "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction ... making any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools." Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 391, 395–96 (5th Cir. 2015) (en banc) (quotation marks and alterations omitted); cf. Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) ("[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment ... [and] might also reach campus."). There is no absolute bar against schools disciplining a student for off-campus conduct that violates the rights of another student.

We need not decide how far Tinker's "in class or out of it" language extends. See Bell, 799 F.3d at 396 ("[I]n holding Tinker applies to off-campus speech in this instance ... we decline[ ] to adopt any rigid standard."). It is enough to hold, as we do, that Tinker does not foreclose a school from regulating all off-campus conduct. And under the facts of this case, Valencia could constitutionally regulate Koeppel's conduct, expressive though it was, which invaded the rights of another student.

B. Koeppel's Claim That Valencia's Policies Are Unconstitutionally Overbroad And Vague

Koeppel also attacks the provisions in Valencia's Code of Conduct about physical abuse, sexual harassment, stalking, and disorderly or lewd conduct. He claims that they are unconstitutionally overbroad and vague on their face and that they are vague as applied to him. The Code of Conduct lists 27 categories of prohibited conduct and provides that a violation of any of them can support any sanction, including suspension. The independent nature of each provision serves to make them severable. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985) (stating "the elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand") (quotation marks omitted).

As a result, Koeppel's facial challenge cannot succeed unless all four of the provisions he was found to have violated are overbroad or vague. His attorney conceded that at oral argument, and we agree. See Crowe v. Coleman, 113 F.3d 1536, 1542 (11th Cir. 1997) ("That concessions and admissions of counsel at oral argument in appellate courts can count against them is doubtlessly true."). So long as one of those four provisions can withstand the facial attack, it is not necessary to decide if the other three can as well. See Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 604 (11th Cir. 1985) (recognizing a "long-standing policy of refusing to decide constitutional issues unless strictly necessary").

We can begin and end our analysis with Valencia's stalking provision.[9] That provision, at the time this case arose, defined "stalking" as: "Stalking behavior in which an individual willfully, maliciously, and repeatedly engages in a knowing course of conduct directed at a specific person which reasonably and seriously alarms, torments, or terrorizes the person, and which serves no legitimate purpose." Koeppel argues that this provision is overbroad and vague on its face because the words "alarms, torments, or terrorizes" are entirely subjective and set the threshold of harm too low. We address overbreadth first.

1. The Overbreadth Claim

A plaintiff mounting a facial attack must usually prove "that no set of circumstances exists under which the [statute] would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). Overbreadth is an exception to that rule. Id. It is an exception because of the concern that "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech." Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 60, 96 S.Ct. 2440, 2447, 49 L.Ed.2d 310 (1976).

In a facial overbreadth challenge the plaintiff must show that the statute "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate

sweep." Fla. Ass'n of Prof'l Lobbyists, Inc. v. Fla. Office of Legislative Servs., 525 F.3d 1073, 1079 (11th Cir. 2008) (emphasis added) (quotation marks omitted). "Substantial overbreadth" is not a precisely defined term. Still, we know it requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). And the party claiming overbreadth "bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122, 123 S.Ct. 2191, 2198, 156 L.Ed.2d 148 (2003) (quotation marks and alterations omitted). That is not easy to do.

And Koeppel has not done it. The stalking provision, when read as a whole, covers conduct that Tinker allows schools to regulate. It does not prohibit all conduct that "alarms, torments, or terrorizes" someone else. Only that which is also "willful[ ], malicious[ ], and repeated[ ]"; and "directed at a specific person"; and that "serves no legitimate purpose." Although the stalking provision refers to the victim's reaction, it requires that the reaction be both "reasonabl[e] and serious[ ]," which goes beyond a purely subjective or only minimal threshold of harm. Prohibiting stalking conduct, however expressive it is, that meets all of those requirements does not punish a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep. See Tinker, 393 U.S. at 509, 89 S.Ct. at 738. It cannot be said "from the text of [the policy] and from actual fact, that substantial overbreadth exists." Hicks, 539 U.S. at 122, 123 S.Ct. at 2198 (quotation marks omitted). For that reason, the stalking provision is not unconstitutionally overbroad. We turn next to whether it is unconstitutionally vague.

2. The Vagueness Claim

Koeppel contends that the stalking provision is unconstitutionally vague on its face. "[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim ...." Holder v. Humanitarian Law Project, 561 U.S. 1, 20, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010); accord Expressions Hair Design v. Schneiderman, —— U.S. ——, 137 S.Ct. 1144, 1151–52, 197 L.Ed.2d 442 (2017). Koeppel's conduct was "clearly proscribed" under the stalking provision. He admits that he sent Jane a series of inappropriate messages and pictures hoping to "hurt[ ] her feelings" and that he continued doing so after she asked him to stop, Deputy Rush recommended that he stop, and Dean Sarrubbo ordered him to stop. That admission shows that his conduct was willful, malicious, and repeated; directed toward Jane; and served "no legitimate purpose," which is conduct that is clearly proscribed by the policy. Any objectively reasonable

person would have known that Jane was "reasonably and seriously alarm[ed], torment[ed], or terrorize[d]" by Koeppel's conduct because she repeatedly implored Koeppel to stop contacting her and reported Koeppel's conduct to the police and the school. Yet he continued.

Because Koeppel's conduct was "clearly proscribed" by the stalking provision, his facial vagueness challenge fails. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). For the same reason, to the extent he pursues an as applied challenge, it fails too.

The stalking provision is not facially overbroad, nor is it facially vague or vague as applied to his conduct. We need not and do not address the constitutionality of any of the other provisions that were in place when Koeppel was disciplined.[10]

C. Koeppel's Due Process Claims

[10] Koeppel also argues that the Code of Conduct's "jurisdictional" provision is vague because it is "arbitrary and capricious, allowing the school to pick and choose what off-campus conduct it punishes." That provision states: "College jurisdiction regarding discipline is generally limited to conduct of any student or registered student organization that occurs on College premises. However, the College reserves the right to impose discipline based on any student conduct, regardless of location, that may adversely affect the College community." Koeppel argues that the provision is unconstitutionally vague on its face and as applied to his conduct. His argument focuses on two clauses: (1) that Valencia "reserves the right," and (2) that conduct must "adversely affect the College community."

To begin with, the "jurisdictional provision" is not jurisdictional. It does not grant the college authority to discipline students for misconduct, nor does it affect the college's inherent authority to do so. Instead, the provision describes the conduct over which the college may exercise its disciplinary authority.

And neither clause allows for arbitrary enforcement. The two clauses put students on notice that the college may discipline them because of their off campus misconduct (further defined in the 27 grounds for discipline) that adversely affects the college community. And the college community obviously includes other students. Neither clause authorizes or invites application of the Code of Conduct in an arbitrary fashion to off campus or on campus conduct. The fact that Valencia reserved for itself the right to decide when to exercise its authority to discipline students for off campus misconduct that violates the Code is no more unconstitutional than any other type of prosecutorial discretion.

Koeppel contends that the district court erred by granting summary judgment on his claim that the process Valencia applied to him and the discipline he received violated his procedural and substantive due process rights.

1. The Procedural Due Process Claim

In the school disciplinary setting, procedural due process requires that colleges give students notice and a hearing before suspending or expelling them. See Nash v. Auburn Univ., 812 F.2d 655, 660–61 (11th Cir. 1987) (discussing the type of hearing and notice required when a public college suspended two students for academic dishonesty); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961) ("[D]ue process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."). "The adequacy of the notice and the nature of the hearing" required depend on the facts of the case and the "practical requirements of the circumstances." Nash, 812 F.2d at 660.

Koeppel attacks the adequacy of his disciplinary hearing, arguing that he was denied due process because the committee assumed that Jane was telling the truth in her unsworn complaint, denied him the opportunity to cross examine her, and applied the wrong standard of proof. Valencia responds that Koeppel cannot allege a procedural due process violation because he has not pursued available state remedies. Whatever doubts we may have about the adequacy of Valencia's procedures, we agree that because Koeppel failed to take advantage of available state remedies, he cannot show that he was denied procedural due process.

In our McKinney decision we held that "a procedural due process violation is not complete unless and until the State fails to provide due process." McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (quotations marks omitted). "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." Id.; see also Zinermon v. Burch, 494 U.S. 113, 125–26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (explaining that "the existence of state remedies is relevant" in a § 1983 action "brought for a violation of procedural due process" because in those cases the "constitutional violation ... is not complete unless and until the State fails to provide due process"). And in Watts we relied on McKinney to hold that a graduate student who was dropped from a required course after being removed from a practicum position could not raise a procedural due process claim because "several Florida Administrative Code sections and state court decisions indicat[ed] that [the student] could seek relief for his procedural deprivations in state court." Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1294 (11th Cir. 2007).

Koeppel argues that Watts does not preclude his federal procedural due process claim because that decision relied on remedies which were available under the Florida Administrative

Procedure Act. That Act no longer provides appellate review in the state courts of a decision by a Florida university because state universities are no longer treated as administrative agencies and now derive their authority directly from the Florida Constitution. See Fla. Const., art. IX, § 7(c), (d) (stating that each state university will be operated by a board of trustees under powers granted by the board of governors and that the state board of governors shall "operate, regulate, control and be fully responsible for the management of the whole university system"); Decker v. Univ. of W. Fla., 85 So.3d 571, 573 (Fla. 1st DCA 2012) ("[W]hen an officer or agency is exercising power derived from the constitution, the resulting decision is not one that is made by an agency as defined in the Administrative Procedure Act.").

Koeppel is correct about the authority of Florida universities now flowing directly from the Florida Constitution. But he is incorrect about the change meaning that the State of Florida no longer provides any avenue for relief from due process deprivations by its universities. Because Koeppel could have sought review as a matter of right through a state certiorari proceeding, see Decker, 85 So.3d at 574 (concluding that appellate review of a university's disciplinary decision was "a matter of right" and that "certiorari [wa]s the proper remedy"), the State provides an adequate remedy for Koeppel's alleged procedural deprivation . . . .

Because Florida provides an adequate remedy, the district court did not err by granting summary judgment in favor of Valencia on Koeppel's procedural due process claim.

2. The Substantive Due Process Claim

Koeppel contends that he was deprived of substantive due process because he had a constitutionally protected right to continued enrollment at Valencia, and that right was violated when the school acted in an arbitrary and capricious manner during his disciplinary proceedings. But students at a public university do not have a fundamental right to continued enrollment. See Plyler v. Doe, 457 U.S. 202, 221, 102 S.Ct. 2382, 2396, 72 L.Ed.2d 786 (1982) ("Public education is not a 'right' granted to individuals by the Constitution."); see also C.B. ex rel. Breeding v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996) ("The right to attend a public school is a state-created, rather than a fundamental, right for the purposes of substantive due process."); McKinney, 20 F.3d at 1556 ("[A]reas in which substantive rights are created only by state law ... are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution.") (quotation marks omitted).[12] The district court did not err by granting summary judgment to Valencia on

[12] Ewing and Horowitz are not to the contrary because in those cases the Supreme Court "assumed, without deciding, that federal courts can review an academic decision of a public

Koeppel's substantive due process claim.

*** * * ***

IV. CONCLUSION

The district court did not err by granting summary judgment in favor of Valencia on all of Koeppel's claims.

AFFIRMED.

Notes and Questions

1. How did the court respond to the student's arguments that his speech was protected by the First Amendment, namely that it was private and non-threatening? For discussion of *Tinker v. Des Moines Independent Community School District*, which as central to the court's reasoning in this case, see Text, pp. 657-659.

2. For what reasons did the court conclude that it was acceptable to subject the student to the college's disciplinary authority for off-campus behavior that took place during the summer break?

3. In this case, the court found that the student's expressive conduct was permissibly subject to institutional authority. Consider Footnote 10, in which the court considered the institution's assertion of the right to regulate off-campus student conduct with an "adverse affect" on the college community. What limits should courts impose on the authority of public colleges and universities to subject students' off-campus conduct to an institution's disciplinary authority?

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educational institution under a substantive due process standard." Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 222–23, 106 S.Ct. 507, 511–12, 88 L.Ed.2d 523 (1985); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 91–92, 98 S.Ct. 948, 956, 55 L.Ed.2d 124 (1978).

4. On what grounds did the court conclude that the student was precluded from an advancing a procedural due process claim? What action should the student have taken before filing a lawsuit in federal court for purposes a procedural due process claim?

SEC. 9.4. Student Protests and Freedom of Speech

Healy v. James
408 U.S. 169 (1972)

Mr. Justice POWELL delivered the opinion of the Court.

This case, arising out of a denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), presents this Court with questions requiring the application of well-established First Amendment principles. While the factual background of this particular case raises these constitutional issues in a manner not heretofore passed on by the Court, and only infrequently presented to lower federal courts, our decision today is governed by existing precedent.

As the case involves delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process. We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete, the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance.

I.

We mention briefly at the outset the setting in 1969-1970. A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period.[1] Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered. Fortunately, with the passage of time, a calmer atmosphere and greater maturity now pervade our campuses. Yet, it was in this climate of earlier unrest that this case arose.

[1] See Report of the President's Commission on Campus Unrest (1970); Report of the American Bar Association Commission on Campus Government and Student Dissent (1970).

Petitioners are students attending Central Connecticut State College (CCSC), a state-supported institution of higher learning. In September 1969 they undertook to organize what they then referred to as a 'local chapter' of SDS. Pursuant to procedures established by the College, petitioners filed a request for official recognition as a campus organization with the Student Affairs Committee, a committee composed of four students, three faculty members, and the Dean of Student Affairs. The request specified three purposes for the proposed organization's existence. It would provide 'a forum of discussion and self-education for students developing an analysis of American society'; it would serve as 'an agency for integrating thought with action so as to bring about constructive changes'; and it would endeavor to provide 'a coordinating body for relating the problems of leftist students' with other interested groups on campus and in the community. The Committee, while satisfied that the statement of purposes was clear and unobjectionable on its face, exhibited concern over the relationship between the proposed local group and the National SDS organization. In response to inquiries, representatives of the proposed organization stated that they would not affiliate with any national organization and that their group would remain 'completely independent.'

In response to other questions asked by Committee members concerning SDS' reputation for campus disruption, the applicants made the following statements, which proved significant during the later stages of these proceedings:

'Q. How would you respond to issues of violence as other S.D.S. chapters have?

'A. Our action would have to be dependent upon each issue.

'Q. Would you use any means possible?

'A. No I can't say that; would not know until we know what the issues are.

'Q. Could you envision the S.D.S. interrupting a class?

'A. Impossible for me to say.'

With this information before it, the Committee requested an additional filing by the applicants, including a formal statement regarding affiliations. The amended application filed in response stated flatly that 'CCSC Students for a Democratic Society are not under the dictates of any National organization.' At a second hearing before the Student Affairs Committee, the question of relationship with the National organization was raised again. One of the organizers explained that the National SDS was divided into several 'factional groups,' that the national-local relationship was a loose one, and that the local organization accepted only 'certain ideas' but not all of the National organization's aims and philosophies.

By a vote of six to two the Committee ultimately approved the application and recommended to the President of the College, Dr. James, that the organization be accorded official recognition. In approving the application, the majority indicated that its decision was premised on the belief that varying viewpoints should be represented on campus and that since

the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which 'left wing' students might identify. The majority also noted and relied on the organization's claim of independence. Finally, it admonished the organization that immediate suspension would be considered if the group's activities proved incompatible with the school's policies against interference with the privacy of other students or destruction of property. The two dissenting members based their reservation primarily on the lack of clarity regarding the organization's independence. Several days later, the President rejected the Committee's recommendation, and issued a statement indicating that petitioners' organization was not to be accorded the benefits of official campus recognition. His accompanying remarks, which are set out in full in the margin,[4] indicate several reasons for his action. Va.Code Ann. § 2.1-804 (emphasis omitted). He found that the organization's philosophy was antithetical to the school's policies,[5] and that the group's

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[4] The President stated:

"Though I have full appreciation for the action of the Student Affairs Committee and the reasons stated in their minutes for the majority vote recommending approval of a local chapter of Students for a Democratic Society, it is my judgment that the statement of purpose to form a local chapter of Students for a Democratic Society carries full and unmistakable adherence to at least some of the major tenets of the national organization, loose and divided though that organization may be. The published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to the approved policy (by faculty, students, and administration) of Central Connecticut State College which states: 'Students do not have the right to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others.'

The further statement on the request for recognition that 'CCSC Students for a Democratic Society are not under the dictates of any National organization' in no way clarifies why if a group intends to follow the established policy of the college, they wish to become a local chapter of an organization which openly repudiates such a policy.

Freedom of speech, academic freedom on the campus, the freedom of establishing an open forum for the exchange of ideas, the freedoms outlined in the Statement on Rights, Freedoms, and Responsibilities of Students that 'college students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition'-these are all precious freedoms that we cherish and are freedoms on which we stand. To approve any organization or individual who joins with an organization which openly repudiates those principles is contrary to those freedoms and to the approved 'Statement on the Rights, Freedoms, and Responsibilities of Students' at Central." App. 15-16.

[5] In 1969, CCSC adopted, as have many other colleges and universities, a Statement on Rights, Freedoms and Responsibilities of Students. This statement, commonly referred to as the 'Student Bill of Rights,' is printed as an Appendix to the Second Circuit's majority opinion in this case, 445 F.2d, at 1135-1139, see n. 2, supra. Part V of that statement establishes the standards for approval of campus organizations and imposes several basic limitations on their campus activities:

independence was doubtful. He concluded that approval should not be granted to any group that 'openly repudiates' the College's dedication to academic freedom.

Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and – most importantly – nonrecognition barred them from using campus facilities for holding meetings. This latter disability was brought home to petitioners shortly after the President's announcement. Petitioners circulated a notice calling a meeting to discuss what further action should be taken in light of the group's official rejection. The members met at the coffee shop in the Student Center ('Devils' Den') but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities.[6]

Their efforts to gain recognition having proved ultimately unsuccessful, and having been made to feel the burden of nonrecognition, petitioners resorted to the courts. They filed a suit in the United States District Court for the District of Connecticut, seeking declaratory and

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'A. Care shall be taken in the establishment and organization of campus groups so that the basic rights, freedoms and responsibilities of students will be preserved.

'B. Student organizations shall submit a clear statement of purpose, criteria for membership, rules of procedures and a list of officers as a condition of institutional recognition. They shall not be required to submit a membership list as a condition of institutional recognition.

'C. Membership in campus organizations shall be limited to matriculated students (day or evening) at the college. Membership shall not be restricted by race, religion or nationality. The members shall have sole power to determine organization policy consistent with the regulations of the college.

'D. Each organization is free to choose its own adviser. Advisers to organizations shall advise but not control the organizations and their policies.

'E. College students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition. Students do not have the right to deprive others of the opportunity to speak or be heard, to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others.'

[6] During the meeting petitioners were approached by two of the College's deans, who served petitioners with a memorandum from the President stating:

> "Notice has been received by this office of a meeting of the C.C.S.C.-S.D.S. on Thursday-November 6 at 7:00 p.m. at the Devils' Den.
>
> Such meeting may not take place in the Devils' Den of the Student Center nor in or on any other property of the college since the C.C.S.C.-S.D.S. is not a duly recognized college organization.
>
> You are hereby notified by this action to cease and desist from meeting on college property."

injunctive relief against the President of the College, other administrators, and the State Board of Trustees. Petitioners' primary complaint centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition. The cause was submitted initially on stipulated facts, and, after a short hearing, the judge ruled that petitioners had been denied procedural due process because the President had based his decision on conclusions regarding the applicant's affiliation, which were outside the record before him. The court concluded that if the President wished to act on the basis of material outside the application he must at least provide petitioners a hearing and opportunity to introduce evidence as to their affiliations. 311 F. Supp. 1275, at 1279, 1281. While retaining jurisdiction over the case, the District Court ordered respondents to hold a hearing in order to clarify the several ambiguities surrounding the President's decision. One of the matters to be explored was whether the local organization, true to its repeated affirmations, was in fact independent of the National SDS. *Id*., at 1282. And if the hearing demonstrated that the two were not separable, the respondents were instructed that they might then review the 'aims and philosophy' of the National organization. *Ibid*.

Pursuant to the court's order, the President designated Dean Judd, the Dean of Student Affairs, to serve as hearing officer, and a hearing was scheduled. The hearing, which spanned two dates and lasted approximately two hours, added little in terms of objective substantive evidence to the record in this case. Petitioners introduced a statement offering to change the organization's name from 'CCSC local chapter of SDS' to 'Students for a Democratic Society of Central Connecticut State College.' They further reaffirmed that they would 'have no connection whatsoever to the structure of an existing national organization. Petitioners also introduced the testimony of their faculty adviser to the effect that some local SDS organizations elsewhere were unaffiliated with any national organization. The hearing officer, in addition to introducing the minutes from the two pertinent Student Affairs Committee meetings, also introduced, sua sponte, portions of a transcript of hearings before the United States House of Representatives Internal Security Committee investigating the activities of SDS. Excerpts were offered both to prove that violent and disruptive activities had been attributed to SDS elsewhere and to demonstrate that there existed a national organization that recognized and cooperated with regional and local college campus affiliates.

Petitioners did not challenge the asserted existence of a National SDS, nor did they question that it did have a system of affiliations of some sort. Their contention was simply that their organization would not associate with that network. Throughout the hearing the parties were acting at cross purposes. What seemed relevant to one appeared completely immaterial to the other. This failure of the hearing to advance the litigation was, at bottom, the consequence of

a more basic failure to join issue on the considerations that should control the President's ultimate decision, a problem to which we will return in the ensuing section.

Upon reviewing the hearing transcript and exhibits, the President reaffirmed his prior decision to deny petitioners recognition as a campus organization. The reasons stated, closely paralleling his initial reasons, were that the group would be a 'disruptive influence' at CCSC and that recognition would be 'contrary to the orderly process of change' on the campus.

After the President's second statement issued, the case then returned to the District Court, where it was ordered dismissed. The court concluded, first, that the formal requisites of procedural due process had been complied with, second, that petitioners had failed to meet their burden of showing that they could function free from the National organization, and, third, that the College's refusal to place its stamp of approval on an organization whose conduct it found 'likely to cause violent acts of disruption' did not violate petitioners' associational rights. 319 F. Supp. 113, at 116.

Petitioners appealed to the Court of Appeals for the Second Circuit where, by a two-to-one vote, the District Court's judgment was affirmed. The majority purported not to reach the substantive First Amendment issues on the theory that petitioners had failed to avail themselves of the due process accorded them and had failed to meet their burden of complying with the prevailing standards for recognition. 445 F.2d 1122, at 1131-1132. Judge Smith dissented, disagreeing with the majority's refusal to address the merits and finding that petitioners had been deprived of basic First Amendment rights. Id., at 1136. This Court granted certiorari 404 U.S. 983 and, for the reasons that follow, we conclude that the judgments of the courts below must be reversed and the case remanded for reconsideration.

II.

At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in Tinker, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case. *Ibid*. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id*., at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on

college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 249-250 (1957) (plurality opinion of Mr. Chief Justice Warren), 262 (Frankfurter, J., concurring in result).

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, e.g., *NAACP v. Button*, 371 U.S. 415, 430 1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.[8] Such impediments cannot be viewed as insubstantial.

Respondents and the courts below appear to have taken the view that denial of official recognition in this case abridged no constitutional rights. The District Court concluded that 'President James' discretionary action in denying this application cannot be legitimately magnified and distorted into a constitutionally cognizable interference with the personal ideas or beliefs of any segment of the college students; neither does his action deter in any material way

[8] It is unclear on this record whether recognition also carries with it a right to seek funds from the school budget. Petitioners' counsel at oral argument indicated that official recognition entitled the group to 'make application for use of student funds.' Tr. of Oral Arg. 4. The first District Court opinion, however, states flatly that '(r)ecognition does not thereby entitle an organization to college financial support.' 311 F. Supp. 1275, 1277. Since it appears that, at the least, recognition only entitles a group to apply for funds, and since the record is silent as to the criteria used in allocating such funds, we do not consider possible funding as an associational aspect of nonrecognition in this case.

the individual advocacy of their personal beliefs; nor can his action be reasonably construed to be an invasion of, or having a chilling effect on academic freedom.' 319 F. Supp., at 116.

In that court's view all that was denied petitioners was the 'administrative seal of official college respectability. *Ibid*. A majority of the Court of Appeals agreed that petitioners had been denied only the 'college's stamp of approval.' 445 F.2d at 1131. Respondents take that same position here, arguing that petitioners still may meet as a group off campus, that they still may distribute written material off campus, and that they still may meet together informally on campus – as individuals, but not as CCSC-SDS.

We do not agree with the characterization by the courts below of the consequences of nonrecognition. We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S., at 461, that the administration 'has taken no direct action . . . to restrict the rights of (petitioners) to associate freely. . . .' But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). See also *Sweezy v. New Hampshire by Wyman*, 354 U.S., at 263 (Frankfurter, J., concurring in result).

The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the College. While petitioners have not challenged the procedural requirement that they file an application in conformity with the rules of the College,[11] they do question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National SDS. For reasons to be stated later in this opinion, we do not consider the issue of affiliation to be a controlling one. But, apart from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of

[11] The standards for official recognition require applicants to provide a clear statement of purposes, criteria for membership, rules of procedure, and a list of officers. Applicants must limit membership to 'matriculated students' and may not discriminate on the basis of race, religion or nationality. The standards further state that groups may 'examine and discuss all questions of interest,' and they may conduct demonstrations and utilize their right of petition, but they are prohibited from interfering with the rights of other students. See n. 5, supra. Petitioners have not challenged these standards and their validity is not here in question.

rejection. See, e.g., *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 162-163 (1971); *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958). It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-716 (1931); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

III.

These fundamental errors – discounting the existence of a cognizable First Amendment interest and misplacing the burden of proof – require that the judgments below be reversed. But we are unable to conclude that no basis exists upon which nonrecognition might be appropriate. Indeed, based on a reasonable reading of the ambiguous facts of this case, there appears to be at least one potentially acceptable ground for a denial of recognition. Because of this ambiguous state of the record, we conclude that the case should be remanded and, in an effort to provide guidance to the lower courts upon reconsideration, it is appropriate to discuss the several bases of President James' decision. Four possible justifications for nonrecognition, all closely related, might be derived from the record and his statements. Three of those grounds are inadequate to substantiate his decision: a fourth, however, has merit.

A.

From the outset the controversy in this case has centered in large measure around the relationship, if any, between petitioners' group and the National SDS. The Student Affairs Committee meetings, as reflected in its minutes, focused considerable attention on this issue; the court-ordered hearing also was directed primarily to this question. Despite assurances from petitioners and their counsel that the local group was in fact independent of the National organization, it is evident that President James was significantly influenced by his apprehension that there was a connection. Aware of the fact that some SDS chapters had been associated with disruptive and violent campus activity, he apparently considered that affiliation itself was sufficient justification for denying recognition.[12]

[12] See n. 4, supra, for the complete text of the President's statement.

Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S., at 605-610; *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Scales v. United States*, 367 U.S. 203 (1961). In these cases it has been established that 'guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights. *United States v. Robel*, supra, 389 U.S., at 265. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.

Students for a Democratic Society, as conceded by the College and the lower courts, is loosely organized, having various factions and promoting a number of diverse social and political views only some of which call for unlawful action.[14] Not only did petitioners proclaim their complete independence from this organization,[15] but they also indicated that they shared only some of the beliefs its leaders have expressed. On this record, it is clear that the relationship was not an adequate ground for the denial of recognition.

B.

Having concluded that petitioners were affiliated with, or at least retained an affinity for, National SDS, President James attributed what he believed to be the philosophy of that organization to the local group. He characterized the petitioning group as adhering to 'some of the major tenets of the national organization,' including a philosophy of violence and disruption.[17] Understandably, he found that philosophy abhorrent. In an article signed by President James in an alumni periodical, and made a part of the record below, he announced his unwillingness to 'sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded.' He further emphasized that the petitioners' 'philosophies' were 'counter to the official policy of the college.'

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[14] See Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 2d Sess., pt. 1, p. 916 (1972), in which the former Director of the Federal Bureau of Investigation, J. Edgar Hoover, stated that while violent factions have spun off from SDS, its present leadership is 'critical of bombing and violence.'

[15] Petitioners asserted their independence both orally and in a written submission before the Student Affairs Committee. They restated their non-affiliation in a formal statement filed prior to the court-ordered hearing. The only indication to the contrary is their unwillingness to eschew use of the SDS name altogether. But see n. 3, supra.

[17] See n. 4, supra.

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. As Mr. Justice Black put it most simply and clearly:

> I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.' *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 137 (dissenting opinion) (1961).

C.

As the litigation progressed in the District Court, a third rationale for President James' decision – beyond the questions of affiliation and philosophy – began to emerge. His second statement, issued after the court-ordered hearing, indicates that he based rejection on a conclusion that this particular group would be a 'disruptive influence at CCSC.' This language was underscored in the second District Court opinion. In fact, the court concluded that the President had determined that CCSC-SDS' 'prospective campus activities were likely to cause a disruptive influence at CCSC.' 319 F. Supp., at 116.

If this reason, directed at the organization's activities rather than its philosophy, were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of nonrecognition. The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (unanimous per curiam opinion). In the context of the 'special characteristics of the school environment,'[18] the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitable are actions that 'materially and substantially disrupt the work and discipline of the school.' *Tinker v. Des Moines Independent Community School District*, 393 U.S., at 513. Associational activities need

[18] *Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, 506 (1969).

not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

The 'Student Bill of Rights' at CCSC, upon which great emphasis was placed by the President, draws precisely this distinction between advocacy and action. It purports to impose no limitations on the right of college student organizations 'to examine and discuss all questions of interest to them.' (Emphasis supplied.) But it also states that students have no right (1) 'to deprive others of the opportunity to speak or be heard,' (2) 'to invade the privacy of others,' (3) 'to damage the property of others,' (4) 'to disrupt the regular and essential operation of the college,' or (5) 'to interfere with the rights of others.[19] The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command the President's decision should be affirmed.[20]

The record, however, offers no substantial basis for that conclusion. The only support for the view expressed by the President, other than the reputed affiliation with National SDS, is to be found in the ambivalent responses offered by the group's representatives at the Student Affairs Committee hearing, during which they stated that they did not know whether they might respond to 'issues of violence' in the same manner that other SDS chapters had on other campuses. Nor would they state unequivocally that they could never 'envision . . . interrupting a class.' Whatever force these statements might be thought to have is largely dissipated by the following exchange between petitioners' counsel and the Dean of Student Affairs during the court-ordered hearing:

> 'Counsel: '. . . I just read the document that you're offering (minutes from Student Affairs Committee meeting) and I can't see that there's anything in it that intimates that these students contemplate any illegal or disruptive practice. 'Dean: 'No. There's no question raised to that, counselor. . . .' App. 73-74.

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[19] See n. 5, supra.

[20] It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights-as non-recognition does-the State must demonstrate that the action taken is reasonably related to protection of the State's interest and that 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). On this record, absent a showing of any likelihood of disruption or unwillingness to recognize reasonable rules governing campus conduct, it is not necessary for us to decide whether denial of recognition is an appropriately related and narrow response.

Dean Judd's remark reaffirms, in accord with the full record, that there was no substantial evidence that these particular individuals acting together would constitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of 'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.' *Tinker v. Des Moines Independent Community School District*, 393 U.S., at 508.

D.

These same references in the record to the group's equivocation regarding how it might respond to 'issues of violence' and whether it could ever 'envision . . . interrupting a class,' suggest a fourth possible reason why recognition might have been denied to these petitioners. These remarks might well have been read as announcing petitioners' unwillingness to be bound by reasonable school rules governing conduct. The College's Statement of Rights, Freedoms, and Responsibilities of Students contains, as we have seen, an explicit statement with respect to campus disruption. The regulation, carefully differentiating between advocacy and action, is a reasonable one, and petitioners have not questioned it directly.[21] Yet their statements raise considerable question whether they intend to abide by the prohibitions contained therein.[22]

Moreover, this question was not among those referred by the District Court to the administrative hearing, and it was there addressed only tangentially. The group members who had made statements before the Student Affairs Committee did not testify, and their position was not clarified. Their counsel, whose tactics were characterized as 'disruptive' by the Court of Appeals, elected to make argumentative statements rather than elicit relevant testimony. *Id.*, at 1126. Indeed, the District Court's failure to identify the question of willingness to abide by the College's rules and regulations as a significant subject of inquiry, coupled with the equivocation on the part of the group's representatives, lends support to our view that a remand is necessary.

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[21] See n. 5, supra.

[22] The Court of Appeals found that petitioners 'failed candidly to respond to inquiries whether they would resort to violence and disruption on the CCSC campus, including interruption of classes.' 445 F.2d, at 1131. While petitioners' statements may be read as intimating a rejection of reasonable regulations in advance, there is in fact substantial ambiguity on this point. The questions asked by members of the Student Affairs Committee do not appear to have been propounded with any clear distinction in mind between that which the petitioners might advocate and the conduct in which they might engage. Nor did the Student Affairs Committee attempt to obtain a clarification of the petitioners' ambiguous answers by asking specifically whether the group was willing to abide by the Student Bill of Rights governing all campus organizations.

As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules. Mr. Justice Blackmun, at the time he was a circuit judge on the Eighth Circuit, stated:

> We . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.' *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (CA8 1969). Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Petitioners have not challenged in this litigation the procedural or substantive aspects of the College's requirements governing applications for official recognition. Although the record is unclear on this point, CCSC may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations. Upon remand it should first be determined whether the College recognition procedures contemplate any such requirement. If so, it should then be ascertained whether petitioners intend to comply. Since we do not have the terms of a specific prior affirmation rule before us, we are not called on to decide whether any particular formulation would or would not prove constitutionally acceptable. Assuming the existence of a valid rule, however, we do conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees.[24]

[24] In addition to the College administration's broad rulemaking power to assure that the traditional academic atmosphere is safeguarded, it may also impose sanctions on those who violate the rules. We find, for instance, that the Student Affairs Committee's admonition to petitioners in this case suggests one

IV.

We think the above discussion establishes the appropriate framework for consideration of petitioners' request for campus recognition. Because respondents failed to accord due recognition to First Amendment principles, the judgments below approving respondents' denial of recognition must be reversed. Since we cannot conclude from this record that petitioners were willing to abide by reasonable campus rules and regulations, we order the case remanded for reconsideration. We note, in so holding, that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.

Reversed and remanded.

Mr. Chief Justice BURGER, concurring.

I am in agreement with what is said in the Court's opinion and I join in it. I do so because I read the basis of the remand as recognizing that student organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations. This is a reasonable condition insofar as it calls for the disavowal of resort to force, disruption, and interference with the rights of others.

The District Judge was troubled by the lack of a comprehensive procedural scheme that would inform students of the steps to be taken to secure recognized standing, and by the lack of articulated criteria to be used in evaluating eligibility for recognition. It was for this reason, as I read the record, that he remanded the matter to the college for a factual inquiry and for a more orderly processing in a de novo hearing within the college administrative structure. It is within that structure and within the academic community that problems such as these should be resolved. The courts, state or federal, should be a last resort. Part of the educational experience

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permissible practice-recognition, once accorded, may be withdrawn or suspended if petitioners fail to respect campus law. See, e.g., *University of Southern Mississippi Chapter of Mississippi Civil Liberties Union v. University of Southern Mississippi*, 452 F.2d 564 (CA5 1971); *American Civil Liberties Union v. Radford College*, 315 F. Supp. 893 (W.D.Va.1970).

of every college student should be an experience in responsible self-government and this must be a joint enterprise of students and faculty. It should not be imposed unilaterally from above, nor can the terms of the relationship be dictated by students. Here, in spite of the wisdom of the District Court in sending the case back to the college, the issue identified by the Court's opinion today was not adequately addressed in the hearing.

The relatively placid life of the college campus of the past has not prepared either administrators or students for their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted vigorously, but civilly, to the end that those who seek to be heard accord the same right to all others. The 'Statement on Rights, Freedoms, and Responsibilities of Students,' sometimes called the 'Student Bill of Rights,' in effect on this campus, and not questioned by petitioners, reflected a rational adjustment of the competing interests. But it is impossible to know from the record in this case whether the student group was willing to acknowledge an obligation to abide by that 'Bill of Rights.'

Against this background, the action of the Court in remanding on this issue is appropriate.

[The concurring opinion of Justice Douglas is deleted.]

Mr. Justice REHNQUIST, concurring in the result.

While I do not subscribe to some of the language in the Court's opinion, I concur in the result that it reaches. As I understand the Court's holding, the case is sent back for reconsideration because respondents may not have made it sufficiently clear to petitioners that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college.

I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), to the effect that First Amendment rights must always be applied 'in light of the special characteristics of the . . . [school] environment,' and from *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (CA8, 1969), to the effect that a college 'may expect that its students adhere to generally accepted standards of conduct,' emphasize this fact.

* * * *

Prior cases dealing with First Amendment rights are not fungible goods, and I think the doctrine of these cases suggests two important distinctions. The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each. Because some of the language used by the Court tends to obscure these distinctions, which I believe to be important, I concur only in the result.

Notes and Questions

1. *Healy v. James* is a classic student rights case. It provides a foundation for later student freedom of expression and freedom of association cases in the U.S. Supreme Court, the lower federal courts, and the state courts. *Healy* is discussed in the Text in Section 9.4.1, Section 9.4.4, and Section 10.1.1. Issues concerning the recognition of student organizations are discussed more generally in the Text Sections 10.1.1 through 10.1.5.

2. Could *Healy* be considered to be an academic freedom case? In what sense? What is the relationship between freedom of association (the right recognized in *Healy*) and academic freedom? See the Text Section 7.1.4.

3. The U.S. Supreme Court remanded the *Healy* case to the federal district court for further consideration in light of the Court's opinion in *Healy*. If you were counsel to the college president (James), what strategy would you advise for the remand? What would you need to do, and what information would you need to have, in order to effectuate the strategy? If you were a policy advisor to the president, what strategy would you advise? What would you need to do, and what information would you need to have, in order to effectuate the strategy?

4. Could the dispute in this case have been resolved satisfactorily within the college, without resort to the courts? What could have been done differently, by whom, and when, to increase the likelihood of a satisfactory internal resolution? Could the college's

“Student Bill of Rights,” Part V, set out in footnote 5 to the U.S. Supreme Court’s opinion, have played a larger or different role in an internal resolution?

SEC. 9.4. Student Protests and Freedom of Speech

Shamloo v. Mississippi State Board of Trustees of Institutions of Higher Learning et al.
620 F.2d 516 (5th Cir. 1980)

THORNBERRY, Circuit Judge:

This court is called upon to assess the constitutionality of two university regulations that govern demonstrations held on the campus of Jackson State University (Jackson State). Sadegh Shamloo contends that the regulations violate his first amendment rights, that the regulations were discriminatorily and selectively enforced, and that the university disciplinary proceedings enforcing the regulations were unconstitutional for failing to provide due process of law.

The United States District Court for the Southern District of Mississippi disagreed and refused to grant a preliminary injunction. Because we find that the regulations are unconstitutionally vague, we must reverse the decision of the district court.

On December 12, 1979, Shamloo and Majid Mokhayeri filed their complaint as a class action on behalf of themselves and all Iranian students at Jackson State who were subjected to disciplinary proceedings for their participation in a demonstration on the campus of Jackson State. The complaint sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 . . . .

On December 28, 1979, appellants filed a motion for preliminary injunction seeking to stay enforcement of the student disciplinary actions and to reinstate the Iranians to their previous status as students. The district court conducted a hearing on this motion on January 8, 1980 and January 9, 1980. At the conclusion of the hearing, the district court refused to grant a preliminary injunction holding that (1) the Jackson State regulations are not unconstitutional, (2) the regulations were not selectively enforced, and (3) the student disciplinary hearings did not constitute a denial of due process. This appeal follows.

I. Facts

Appellants Shamloo, Mokhayeri, and thirty other Iranians, nationals who are in the United States pursuant to student visas, were enrolled students at Jackson State for the fall semester in 1979. These students participated in two student demonstrations on the campus of Jackson State to indicate their support of the new government in Iran under the Ayatollah Khomeini. These demonstrations were allegedly unauthorized because the students did not comply with Jackson State's regulations governing demonstrations.

The regulations, contained in the student handbook, "The Tiger," provide as follows:

> Any student parade, serenade, demonstration, rally, and/or other meeting or gathering for any purpose, conducted on the campus of the institution must be scheduled with the President or designated agent at least three (3) days in advance of the event. Names of the responsible leaders of the group must be submitted to the institution at the time of scheduling. Organizations which meet at regular times and places may, at the beginning of each semester, schedule such meetings with the designated official.
>
> Students assembling for any meetings not authorized in accordance with the aforesaid paragraphs are subject to disciplinary action, which may result in dismissal from the institution. Students present at each unauthorized meeting are considered to be participants.
>
> All events sponsored by student organizations, groups, or individual students must be registered with the Director of Student Activities, who, in cooperation with the Vice President for Student Affairs, approves activities of a wholesome nature. In some instances, the individual or group making the request will be counseled as to the inappropriateness of date, time, or place of the event. And thus, alternate schedules may be suggested, or the prevailing circumstances may warrant disapproval of the activity.

Jackson State University, The Tiger: Student Handbook, pp. 66-67, 48 (1978) (emphasis added).

To schedule a demonstration with the "President or designated agent," a student must submit an "Application For Use Of University Facilities" (See Appendix A [to this opinion]) and obtain the approval of five individuals. The testimony reveals that Shamloo was made aware of these regulations on October 5, 1979 in a meeting specifically called to explain to the Iranian students the Jackson State regulations and the "Use of Facilities" form with respect to their request for obtaining an off-campus speaker. Therefore, it is clear that Shamloo was aware of the requirement that he must give three days' advance written notice of a student demonstration.

The first demonstration occurred on November 19, 1979. It was apparently held in response to the presence of officials of the Immigration and Naturalization Service on the Jackson State campus to review the status of the Iranian students at Jackson State. A group of Iranian students gathered in an area on the campus known as the "Plaza." The students did not comply with the Jackson State regulations by acquiring written permission so this was an unauthorized demonstration. Shamloo did speak with Dr. Johnson, Vice-President for Student Affairs, before the demonstration concerning the possibility of holding a meeting to discuss the

state of affairs in Iran and the status of the Shah. But the testimony reveals that Dr. Johnson never gave Shamloo oral permission to hold a demonstration on the Plaza. Even if he had, the oral permission would not satisfy the Jackson State regulations requiring written permission. No disciplinary action was brought against the students for their participation in this demonstration.

The second demonstration occurred on November 29, 1979. At approximately 9:00 A.M., a group of Iranian students gathered on the Plaza. The student demonstration consisted of chanting, marching, and carrying signs. At approximately 9:15, Dr. Estus Smith, Vice-President of Academic Affairs, heard the chanting from his office in the Administrative Tower. Dr. Smith asked the students to disperse because this was the week before "dead week" when students were meeting with their professors for the last time before final examinations and because the demonstration was disrupting classes. When Dr. Smith left the Plaza, the chanting resumed. At approximately 9:30 A.M., Captain Stringer, Director of Campus Security, was contacted by radio with regards to the demonstration. Upon determining that the students did not have written permission to demonstrate, Captain Stringer ordered the group to disperse.

The district court concluded that the demonstration had a disruptive effect with respect to the other students. Shamloo testified that, in his opinion, the demonstration was not disruptive. Dr. Johnson, Vice-President for Student Affairs, testified that the demonstration was "quite noisy," while Dr. Smith testified that it was "disrupting classes." Dr. Smith also testified as to the location of the Plaza with respect to other buildings on campus. The Academic Skills Center, dorms, a library, the School of Business, several faculty offices, and the Department of Political Science are located within 200 feet of the Plaza.

Again, Shamloo did not comply with the Jackson State regulations because he did not acquire written permission. Shamloo testified that he left messages with the secretaries of Dr. Johnson and Captain Stringer informing them of the planned demonstration. Dr. Johnson and Captain Stringer denied having received the messages. Also, this does not satisfy the requirement of obtaining written permission. Therefore, this demonstration was also unauthorized.

Pursuant to the mandate found in the regulations, Jackson State brought disciplinary action before the Student Affairs Committee of Jackson State against 32 Iranian students who participated in the demonstration. Though there was conflicting testimony as to the participation of non-Iranians in the demonstration, the district court concluded that only Iranians participated in the demonstration. Each student was given notice of a hearing and thereafter a closed hearing was held. Each student was advised of the charges and they were permitted to have counsel to act in an advisory capacity. The proceedings were taped and each student was entitled to listen to and transcribe the tape. At the conclusion of the hearing, notice of the decision of the panel was sent to each of the students. Two students were suspended for two semesters, eighteen

students were suspended for one semester, eleven students were placed on disciplinary probation for their tenure at Jackson State, and the charges were dismissed against one student. Appeals were taken to Dr. Peoples, President of Jackson State, and he affirmed the decisions of the discipline committee.

II. First Amendment

It is clear after an examination of the testimony that the Iranian students were subjected to disciplinary action for failing to comply with the Jackson State regulations. Appellants initially contend that these regulations deny them their constitutional rights under the First Amendment. They claim that the regulations are unconstitutionally vague and overbroad and that they constitute an unconstitutional prior restraint. The proper method of analyzing these claims is suggested by this court's decision in *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992 (5th Cir. 1975). We must first determine whether the regulations were violated. We then must consider whether Jackson State's action in suspending appellants violated their First Amendment rights by determining whether their action was "protected." Then, we may examine the constitutionality of the regulations.

The Jackson State regulations provide that any student demonstration for any purpose conducted on the campus must be scheduled with the President or his designated agents at least three days in advance. The names of the leaders of the demonstration must be submitted to Jackson State. All events must be registered with the Director of Student Activities. This is accomplished by submitting an "Application For Use Of University Facilities." Students assembling for any unauthorized meeting are subject to disciplinary action, which may result in their dismissal from Jackson State. The testimony shows that Shamloo was aware of these regulations and their requirements.

The testimony reveals that neither Shamloo nor any of the other Iranian students complied with these regulations. The activity on November 29, 1979, can certainly be classified as an on-campus demonstration. It was not scheduled with the President of Jackson State or one of his agents at least three days in advance. The only evidence that Shamloo attempted to "schedule" the demonstration was his testimony that he called the offices of Dr. Johnson and Captain Stringer and informed their secretaries of the demonstration planned for the next day. Dr. Johnson and Captain Stringer testified that they never received such notification. Shamloo never contacted the Director of Student Activities and never "registered" with him by filing an "Application For Use Of University Facilities." There is conflicting testimony concerning whether Shamloo even received oral permission. Shamloo spoke with Dr. Johnson about

scheduling a meeting to discuss the state of affairs in Iran but he apparently never received permission to conduct a demonstration on the Plaza.

Although we have found evidence supporting the disciplinary committee's determination that the Iranian students violated the Jackson State regulations, we must next consider whether the suspension and probation of appellants violated their First Amendment rights by punishing them for protected activity. This issue must be addressed in light of the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and this court's decisions in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), and *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

The Supreme Court stated in *Tinker* that students are entitled to their First Amendment rights, even in light of the special characteristics of the school environment. Colleges and universities are not immune from the requirements of the First Amendment. *Healy v. James*, 408 U.S. 169 (1972). A demonstration is a method of expression often entitled to First Amendment protection, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and university students are usually immunized from suspension or other disciplinary action in retaliation for the exercise of their First Amendment rights. *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973). Although "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech," *id*. at 671, the Court in *Tinker* recognized the need for authorizing school officials to prescribe and control conduct in the schools in a manner consistent with constitutional safeguards. The right of a student to participate in a demonstration is not unbridled since First Amendment rights are not unlimited constitutional guarantees that may be exercised at any time, at any place, and in any manner. *Jenkins*, 506 F.2d at 1002.

The test to be applied when confronted with the conflict between a student exercising his First Amendment rights and the regulations adopted by a university were first enunciated by this court in *Burnside*. The Supreme Court later adopted the *Burnside* test in *Tinker* when it stated that a student may exercise his First Amendment rights:

> . . . if he does so without "materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars*, supra, 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason whether it stems from time, place, or type of behavior materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized

by the constitutional guarantee of freedom of speech. *Cf. Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

Tinker, supra, 393 U.S. at 513.

* * * *

The record here contains conflicting and unconvincing evidence concerning whether the demonstration involved material and substantial interference with the requirement of appropriate discipline in the operation of an educational institution. Unlike in Jenkins and Blackwell, there was no testimony by the students or teachers complaining that the demonstration was disrupting and distracting. Shamloo testified that he did not think any of the classes were disrupted. Dr. Johnson testified that the demonstration was quite noisy. Dr. Smith testified that he could hear the chanting from his office and that, in his opinion, classes were being disrupted. The only justification for his conclusion is that there are several buildings within a close proximity of the Plaza that students may have been using for purposes of study or for classes. There is no evidence that he received complaints from the occupants of these buildings.

The district court concluded that "the demonstration had a disruptive effect with respect to other students' rights." But this is not enough to conclude that the demonstration was not protected by the First Amendment. The court must also conclude (1) that the disruption was a material disruption of classwork or (2) that it involved substantial disorder or invasion of the rights of others. It must constitute a material and substantial interference with discipline. The district court did not make such a conclusion and we certainly cannot, especially in light of the conflicting evidence found in the record. We cannot say that the demonstration did not constitute activity protected under the First Amendment . . . . Therefore, we must decide this case on the basis of the constitutionality of the regulations.

Appellants challenge their suspension and probation on the grounds that the Jackson State regulations are vague and overbroad and that they constitute an impermissible prior restraint. While the idea of a regulation being unconstitutionally vague and overbroad has previously been applied to regulations of an educational institution, it is important to realize that school disciplinary regulations need not be drawn with the same precision of a criminal code. *Jenkins*, supra, 506 F.2d at 1004. But the regulations must be reasonable as limitations on the time, place, and manner of the protected speech and its dissemination. *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972). Disciplinary action may not be based on the disapproved content of the protected speech. *Papish*, supra, 410 U.S. at 670.

The reasonableness of a similar university regulation was previously addressed by this court in *Bayless v. Martine*, 430 F.2d 872, 873 (5th Cir. 1970). In *Bayless*, ten students sought injunctive relief from their suspension for violating a university regulation. The regulation in *Bayless* created a Student Expression Area that could be reserved 48 hours in advance for any nonviolent purpose.[1] All demonstrations similar to the one held by the Iranian students were regulated to the extent that they could only be held at the Student Expression Area "between the hours of 12:00 noon to 1:00 p.m., and from 5:00 to 7:00 p.m." but there was no limitation on the content of the speech. This court noted that the requirement of 48 hours advance notice was a reasonable method to avoid the problem of simultaneous and competing demonstrations and it also provided advance warning of the possible need for police protection. This court upheld the validity of the regulation as a valid exercise of the right to adopt and enforce reasonable nondiscriminatory regulations as to the time, place, and manner of a demonstration.

There is one critical distinction between the regulation examined in *Bayless* and the Jackson State regulation. The former made no reference to the content of the speech that would be allowed in the Student Expression Area. As long as there was no interference with the flow of traffic, no interruption of the orderly conduct of university affairs, and no obscene material, the students were not limited in what they could say. Apparently, the same cannot be said with respect to the Jackson State regulations, which provide that only "activities of a wholesome nature" will be approved. And if a demonstration is not approved, the students participating may be subjected to disciplinary action including the possibility of dismissal.

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[1] The regulation examined in *Bayless* provides as follows:

> STUDENT EXPRESSION AREA
>
> Students and University personnel may use the Student Expression Area located on the grass terraces in front of Old Main between the hours of 12:00 noon to 1:00 p.m., and from 5:00 to 7:00 p.m. Reservations for the Student Expression Area are made through the Dean of Students Office and must be made at least 48 hours in advance.
>
> Rules to be observed by users of the area include:
>
> 1. No interference with the free flow of traffic.
>
> 2. No interruption of the orderly conduct of University affairs.
>
> 3. No obscene materials.
>
> 4. Person making the reservation is responsible for seeing that the area is left clean and in a good state of repair.
>
> When a registered student organization plans to invite a non-University person to address a meeting, his name must be submitted to the Dean of Students Office at least 48 hours before the event.
>
> *Bayless*, supra, 430 F.2d at 875.

Limiting approval of activities only to those of a "wholesome" nature is a regulation of content as opposed to a regulation of time, place, and manner. Dr. Johnson testified that he would disapprove a student activity if, in his opinion, the activity was unwholesome. The presence of this language converts what might have otherwise been a reasonable regulation of time, place, and manner into a restriction on the content of speech. Therefore, the regulation appears to be unreasonable on its face.

The restriction on activities other than those of a "wholesome" nature raises the additional issue that the Jackson State regulation may be void for vagueness. A law is unconstitutionally vague if people of common intelligence must guess at its meaning and differ as to its application. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The degree of specificity required in regulations affecting First Amendment rights is even greater. *NAACP v. Button*, 371 U.S. 415 (1963); *Smith v. California*, 361 U.S. 147 (1959); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). An individual is entitled to fair notice or a warning of what constitutes prohibited activity by specifically enumerating the elements of the offense. *Smith v. Goguen*, 415 U.S. 566 (1974). The regulation must not be designed so that different officials could attach different meaning to the words in an arbitrary and discriminatory manner. *Id*. But, of course, we cannot expect "mathematical certainty" from our language. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979). The approach adopted by this court with respect to university regulations is to examine whether the college students would have any "difficulty in understanding what conduct the regulations allow and what conduct they prohibit." *Jenkins*, supra, 506 F.2d at 1004.

The requirement that an activity be "wholesome" before it is subject to approval is unconstitutionally vague. The testimony revealed that the regulations are enforced or not enforced depending on the purpose of the gathering or demonstration. Dr. Johnson admitted that whether or not something was wholesome was subject to interpretation and that he, as the Vice-President of Student Affairs, and Dr. Jackson, Director of Student Activities, could come to different conclusions as to its meaning. He also stated that "wholesome" has a different meaning "in the legal word" as opposed to its meaning in the "educational word" and that two people might disagree very widely on what is and is not wholesome. The regulation's reference to wholesome activities is not specific enough to give fair notice and warning. A college student would have great difficulty determining whether or not his activities constitute prohibited unwholesome conduct. The regulation is void for vagueness. Because we have already found that the regulations governing demonstrations that were the basis for the disciplinary action brought against the Iranian students were not reasonable regulations of time, place, or manner but restrictions on the content of speech and because we have found the regulations void for

vagueness, we need not address the other First Amendment issues raised by appellant. We conclude that appellants were disciplined for violating an unconstitutional regulation.

* * * *

IV. Preliminary Injunction

This court clearly established the requirements for granting a preliminary injunction in *Canal Authority of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974) as follows:

> . . . (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Id. at 473. The grant or denial of a preliminary injunction rests in the discretion of the district court. *Johnson v. Radford*, 449 F.2d 115 (5th Cir. 1971). We must determine whether the district court abused its discretion as bounded by the four prerequisites of *Canal Authority*. *Farshy v. Kagan*, 585 F.2d 749 (5th Cir. 1978).

We find that the district court abused its discretion in failing to grant the preliminary injunction . . . .

The order entered by the district court denying the motion for preliminary injunction is hereby vacated, the judgment is reversed, and the cause is remanded with directions to the district court to grant a preliminary injunction, consistent with this opinion, enjoining Jackson State from enforcement of its disciplinary proceedings which resulted in probation for or the suspension of 31 Iranian students.

APPENDIX A

JACKSON STATE UNIVERSITY
Jackson, Mississippi
APPLICATION FOR USE OF UNIVERSITY FACILITIES
(Please Type)

Date Filed_____

Organization making application_____

Facility desired_____

Nature of activity_____
_____

Date(s) of activity_____ Hour to begin_____ Close_____

Name of person(s) in direct charge of activity_____

Name of chaperons, if required _____

Services required in connection with activity_____

Signature of person making application:
_____
(Use ballpoint pen – Press Hard)

(IN CASE OF STUDENT ORGANIZATION, THE SPONSOR MUST SIGN)

Signature of supervisor of facility to be used:

_____
(Use ballpoint pen – Press Hard)

Approved:

_____ _____

Director of Student Activities Director of Plant Operations
(Use ballpoint pen – Press Hard)

Approved:_____ Charge, if any:$_____
Comptroller
(Use ballpoint pen – Press Hard)

Approved:_____
Vice-President for Administration
(Use ballpoint pen – Press Hard)

NOTE: This application is to be filled out at least three days prior to the event. It is understood that any damages or loss to the building or equipment are to be paid in full by the organization making this application.

Please fill out in quadruplicate.

Notes and Questions

1. What standard does the court use to determine whether the protest is so disruptive as to lose its protection under the First Amendment? What kind of testimony is necessary to apply this standard to particular cases? Who bears the burden of proof on whether the standard is met? What are some examples of protest activity that would be unprotected?

2. The court in *Shamloo* discusses a similar regulation that was upheld in *Bayless v. Martin* (see footnote 1 in the *Shamloo* opinion). What is the relevant difference(s), according to the court, between this regulation and the one struck down in *Shamloo*? Why is this difference(s) important to freedom of speech concerns? Do you agree that the regulation in *Bayless* is consistent with the First Amendment?

3. Why is a "vague" regulation of speech constitutionally offensive? What dangers does such a regulation create for freedom of speech?

4. Jackson State's regulation (set out in the court's opinion) provided that demonstrations must be approved by university administrators and that such permission must be sought at least three days in advance of the planned demonstration. Is such a requirement consistent with the free speech clause of the First Amendment? How would a court analyze a challenge to such an approval requirement and waiting period? How might you improve upon the Jackson State regulation and the application form (see Appendix A to court's opinion) used to implement it. See the Text Section 9.4.4.

5. In addition to the lines of analysis in the *Shamloo* court's opinion, analysis of speech regulations at public institutions often requires consideration of the "public forum doctrine" (a doctrine that the court in *Shamloo* did not rely on). The public forum doctrine is discussed in the Text Section 9.4.2; and the conceptual distinctions that undergird the doctrine are depicted in the Illustration below. How might the public forum doctrine have been relevant to the analysis of the regulation at issue in *Shamloo*?

6. The "free speech zone" or "student speech zone" is a technique for regulating protests and demonstrations that became increasingly popular in the 1980s and 1990s. *Bayless v. Martine*, discussed in *Shamloo* (see note 2 above), provides an early example of this regulatory technique. To analyze the validity of the ways in which public institutions use such zones, the public forum doctrine (see note 5 above) must often be considered. For discussion and examples, see the Text Section 9.4.3, pp.670-671.

7. For a large-scale practice problem on student protests with review guidelines, see Problem-Solving Exercise C in Part II of this volume of materials.

8. For an illustration of the Public Forum doctrine, see p. 705 of the Text.

Sec. 9.4.1 Student Free Speech in General

Mahanoy Area Sch. Dist. v. B.L.

594 U.S. 180 (2021)

OPINION BY: BREYER

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with the reasoning of the Third Circuit panel's majority, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

I

A

B. L. (who, together with her parents, is a respondent in this case) was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team.

That weekend, B. L. and a friend visited the Cocoa Hut, a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B. L. had about 250 "friends") to view the images for a 24 hour period.

The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." App. 20. The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji.

B. L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B. L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit in Federal District Court.

B

The District Court found in B. L.'s favor. It first granted a temporary restraining order and a preliminary injunction ordering the school to reinstate B. L. to the cheerleading team. In granting B. L.'s subsequent motion for summary judgment, the District Court found that B. L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). Consequently, the District Court declared that B. L.'s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court's conclusion. In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not

constitutionally prohibit a peaceful student political demonstration consisting of "'pure speech'" on school property during the school day. In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students." But the Court also said that: "[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."

Many courts have taken this statement as setting a standard—a standard that allows schools considerable freedom on campus to discipline students for conduct that the First Amendment might otherwise protect. But here, the panel majority held that this additional freedom did "not apply to off-campus speech," which it defined as "speech that is outside school-owned, -operated, or –supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Because B. L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B. L. for engaging in a form of pure speech.

A concurring member of the panel agreed with the majority's result but wrote that the school had not sufficiently justified disciplining B. L. because, whether the *Tinker* standard did or did not apply, B. L.'s speech was not substantially disruptive.

C

The school district filed a petition for certiorari in this Court, asking us to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." But we have also made clear that courts must apply

the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 266 (1988). One such characteristic, which we have stressed, is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents.

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, (2) speech, uttered during a class trip, that promotes "illegal drug use,"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper.

Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B. L. herself and the *amici* supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts

or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.'s proposed rule.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker's* highly general statement about the nature of a school's special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

III

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words. And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term. To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. See cf. *Snyder* v. *Phelps*, 562 U. S. 443, 461 ("The inappropriate . . . character of a statement is irrelevant to the question whether it deals with a matter of public concern").

Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained) diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. See App. 35 (indicating that coaches removed B. L. from the cheer team because "there was profanity in [her] Snap and it was directed towards cheerleading. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time.

B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of

days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. But when one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker*'s demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. One of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school." There is little else, however, that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have previously said, simple "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression."

It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary.

* * *

Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, we nonetheless agree that the school violated B. L.'s *First Amendment* rights. The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

DISSENT BY: THOMAS

B. L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The message included a picture of B. L. raising her middle finger and captioned "F*** school" and "f*** cheer." This message was juxtaposed with another, which explained that B. L. was frustrated that she failed to make the varsity cheerleading squad. The cheerleading coach responded by disciplining B. L.

The Court overrides that decision—without even mentioning the 150 years of history supporting the coach. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis*—that is, as substitutes of parents—to discipline speech and conduct. Off campus, the authority of schools is somewhat less. At that level of generality, I agree. But the majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?

Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. Because the majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable, I respectfully dissent.

* * * * *

Perhaps there are good constitutional reasons to depart from the historical rule, and perhaps this Court and lower courts will identify and explain these reasons in the future. But because the Court does not do so today, and because it reaches the wrong result under the appropriate historical test, I respectfully dissent.

Notes and Questions

1. The majority opinion seems to draw a bright line between "school time" when the school is *in loco parentis* and "parent time" when the parent is responsible for the child. Is this line really bright? Can you think of examples where there might be times where neither the school nor the parent is responsible for the student's speech?

2. What are the implications of *Mahanoy* for student discipline in K-12 public schools?

3. Public colleges and universities have struggled with issues related to abusive student speech on social media. How does *Mahanoy* affect a college student's free speech protections—or does it?

4. What implications does this case have for student protests, on or near campus?

SEC. 9.5. *Speech Codes and the Problem of Hate Speech*

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University
993 F.2d 386 (4th Cir. 1993)

SPROUSE, Senior Circuit Judge:

George Mason University [a state university in Virginia] appeals from a summary judgment granted by the district court to the IOTA XI Chapter of Sigma Chi Fraternity in its action for declaratory judgment and an injunction seeking to nullify sanctions imposed on it by the University because it conducted an "ugly woman contest" with racist and sexist overtones. We affirm.

I.

Sigma Chi has for two years held an annual "Derby Days" event, planned and conducted both as entertainment and as a source of funds for donations to charity. The "ugly woman contest," held on April 4, 1991, was one of the "Derby Days" events. The Fraternity staged the contest in the cafeteria of the student union. As part of the contest, eighteen Fraternity members were assigned to one of six sorority teams cooperating in the events. The involved Fraternity members appeared in the contest dressed as caricatures of different types of women, including one member dressed as an offensive caricature of a black woman. He was painted black and wore stringy, black hair decorated with curlers, and his outfit was stuffed with pillows to exaggerate a woman's breasts and buttocks. He spoke in slang to parody African-Americans.

There is no direct evidence in the record concerning the subjective intent of the Fraternity members who conducted the contest. The Fraternity, which later apologized to the University officials for the presentation, conceded during the litigation that the contest was sophomoric and offensive.

Following the contest, a number of students protested to the University that the skit had been objectionably sexist and racist. Two hundred forty-seven students, many of them members of the foreign or minority student body, executed a petition, which stated: "We are condemning the racist and sexist implications of this event in which male members dressed as women. One man in particular wore a black face, portraying a negative stereotype of black women."

On April 10, 1991, the Dean for Student Services, Kenneth Bumgarner, discussed the situation with representatives of the objecting students. That same day, Dean Bumgarner met

with student representatives of Sigma Chi, including the planners of and participants in the "ugly woman contest." He then held a meeting with members of the student government and other student leaders. In this meeting, it was agreed that Sigma Chi's behavior had created a hostile learning environment for women and blacks, incompatible with the University's mission.

The Dean met again with Fraternity representatives on April 18, and the following day advised its officers of the sanctions imposed. They included suspension from all activities for the rest of the 1991 spring semester and a two-year prohibition on all social activities except pre-approved pledging events and pre-approved philanthropic events with an educational purpose directly related to gender discrimination and cultural diversity. The University's sanctions also required Sigma Chi to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women. A few weeks later, the University made minor modifications to the sanctions, allowing Sigma Chi to engage in selected social activities with the University's advance approval.

On June 5, 1991, Sigma Chi brought this action under 42 U.S.C. § 1983 against the University and Dean Bumgarner. It requested declaratory judgment and injunctive relief to nullify the sanctions as violative of the First and Fourteenth Amendments. Sigma Chi moved for summary judgment on its First Amendment claims on June 28, 1991, filing with its motions numerous affidavits explaining the nature of the "ugly woman contest." Also submitted were large glossy photographs of the participants as they appeared in the skits, including photographs of the Fraternity member depicting the offensive caricature of the black woman.

In addition to the affidavit of Dean Bumgarner explaining his meetings with student leaders, the University submitted the affidavits of other officials, including that of University President George W. Johnson and Vice-President Earl G. Ingram. President Johnson, by his affidavit, presented the "mission statement" of the University:

> (3) George Mason University is committed to promoting a culturally and racially diverse student body. . . . Education here is not limited to the classroom.
>
> (4) We are committed to teaching the values of equal opportunity and equal treatment, respect for diversity, and individual dignity.
>
> (5) Our mission also includes achieving the goals set forth in our affirmative action plan, a plan incorporating affirmative steps designed to attract and retain minorities to this campus. . . .

Vice President Earl G. Ingram's affidavit represented:

(6) The University's affirmative action plan is a part of an overall state plan designed, in part, to desegregate the predominately "white" and "black" public institutions of higher education in Virginia. . . . The behavior of the members of Sigma Chi that led to this lawsuit was completely antithetical to the University's mission, as expressed through its affirmative action statement and other pertinent University policies, to create a non-threatening, culturally diverse learning environment for students of all races and backgrounds, and of both sexes.

(7) While the University has progressed in attracting and retaining minority students, it cannot expect to maintain the position it has achieved, and make further progress on affirmative action and minority issues that it wishes to make, if behavior like that of Sigma Chi is perpetuated on this campus.

The district court granted summary judgment to Sigma Chi on its First Amendment claim.

* * * *

III.

We initially face the task of deciding whether Sigma Chi's "ugly woman contest" is sufficiently expressive to entitle it to First Amendment protection. From the mature advantage of looking back, it is obvious that the performance, apart from its charitable fund-raising features, was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the Fraternity recognized as much. The answer to the question of whether the First Amendment protects the Fraternity's crude attempt at entertainment, however, is all the more difficult because of its obvious sophomoric nature.

A.

First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected.

* * * *

Thus, we must determine if the skit performed by Sigma Chi comes within the constitutionally protected rubric of entertainment. Unquestionably, some forms of entertainment are so inherently expressive as to fall within the First Amendment's ambit regardless of their quality.

* * * *

[I]t appears that the low quality of entertainment does not necessarily weigh in the First Amendment inquiry. It would seem, therefore, that the Fraternity's skit, even as low-grade entertainment, was inherently expressive and thus entitled to First Amendment protection. . . .

B.

The University nevertheless contends that discovery will demonstrate that the contest does not merit characterization as a skit but only as mindless fraternity fun, devoid of any artistic expression. It argues further that entitlement to First Amendment protection exists only if the production was intended to convey a message likely to be understood by a particular audience. See *Texas v. Johnson*, 491 U.S. 397, 404, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989). . . .

As indicated, we feel that the First Amendment protects the Fraternity's skit because it is inherently expressive entertainment. Even if this were not true, however, the skit, in our view, qualifies as expressive conduct under the test articulated in *Texas v. Johnson*. . . . [T]he intent to convey a message can be inferred from the conduct and the circumstances surrounding it. Thus viewed, the University's argument is self-defeating.

* * * *

Importantly, the affidavits [of university officials] establish that the punishment was meted out to the Fraternity because its boorish message had interfered with the described University mission. It is manifest from these circumstances that the University officials thought the Fraternity intended to convey a message. The Fraternity members' apology and post-conduct contriteness suggest that they held the same view. To be sure, no evidence suggests that the Fraternity advocated segregation or inferior social status for women. What is evident is that the Fraternity's purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University's concerns, in the Fraternity's view, should be treated humorously.

* * * *

IV.

If this were not a sufficient response to the University's argument, the principles relating to content and viewpoint discrimination recently emphasized in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), provide a definitive answer. Although the Court in *St. Paul* reviewed the constitutional effect of a city "hate speech" ordinance, and we review the constitutionality of sanctions imposed for violating University policy, *St. Paul*'s rationale applies here with equal force. Noting that St. Paul's city ordinance prohibited displays of symbols that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," but did not prohibit displays of symbols which would advance ideas of racial or religious equality, Justice Scalia stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 2541, 2547.

As evidenced by their affidavits, University officials sanctioned Sigma Chi for the message conveyed by the "ugly woman contest" because it ran counter to the views the University sought to communicate to its students and the community. The mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well. "The First Amendment generally prevents government from proscribing...expressive conduct because of disapproval of the ideas expressed." *Id*. at 2542 (citing *Johnson*, 491 U.S. at 406).

The University, however, urges us to weigh Sigma Chi's conduct against the substantial interests inherent in educational endeavors. See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express. We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that "the manner of [its action] cannot consist of selective limitations upon speech." *St. Paul*, 112 S. Ct. at 2548. . . . The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint.

The decision of the district court is affirmed.

AFFIRMED

MURNAGHAN, Circuit Judge, concurring in judgment:

* * * *

The present case can be decided easily within the contours of First Amendment law simply by holding that George Mason University's action violated the Fraternity members' rights by punishing them post hoc and in conflict with its tacit approval of their performance. Instead, the majority ranges far to discuss what it has concluded the law would be absent such permission.

* * * *

George Mason's treatment of the Fraternity is not itself constitutionally flawed, because the University was concerned about the message of the students' performance, but because of the permission to give the performance that the University granted. The University, following the Fraternity's performance of the skit, meted out punishment to the Fraternity, without any prior indication that such behavior was not allowed at school-sanctioned events, and despite indicating that the Fraternity's skit had University approval.

Actually, forbidding the skit or requiring substantial amendment was not beyond its power. The University does have greater authority to regulate expressive conduct within its confines as a result of the unique nature of the educational forum. *Tinker v. Des Moines School District*, 393 U.S. 503, 513, 89 S. Ct. 733 (1969).

* * * *

In the present case, the University, by officially recognizing Greek-letter social organizations and participating in the planning of their events, inevitably has participated in the activities of those groups. Therefore, it must retain the ability to refuse to sanction certain behavior that infringes on the rights of other students. The University need not allow activity distinctly injurious to its objectives.

Certainly, the most fundamental concern of a university is to provide the optimum conditions for learning. The majority concedes that "the University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education." Therefore, the University must have some leeway to

regulate conduct that counters that interest, and thereby infringes upon the right of other students to learn. See *Tinker*, 393 U.S. at 513; cf. *R.A.V.*, U.S. at , 112 S. Ct. at 2565 (Stevens, J. concurring) ("A selective proscription of unprotected expression designed to protect 'certain persons or groups' would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression.").

By concluding that a university must be allowed to regulate expressive conduct that runs directly counter to its mission, I do not mean to imply that a university has the unrestricted power to silence entirely certain perspectives. I wholeheartedly believe that the free exchange of ideas and debate are fundamental to a place of learning. Yet, they comprise only part of a university's mission and must be balanced against a university's other interests, especially those interests that rise to the level of constitutional significance. Moreover, if the University, in advance, had refused to allow the Fraternity to perform its intended skit, the marketplace of ideas would hardly have been endangered. The Fraternity, if it wished, could have presented its ideas and perspectives on the value of women and Blacks in an open debate, allowing other students to challenge its perspective.

Notes and Questions

1. How did the court in the *George Mason* case determine that the fraternity's action was "speech" within the meaning of the First Amendment – rather than conduct that could not be considered speech and therefore was not protected by the First Amendment?

2. The court considered the university's sanctions against the fraternity to be a "viewpoint"-based restriction on speech, or "viewpoint" discrimination. Is this a fair characterization of the university's action? Why or why not? Also, why are viewpoint restrictions especially suspect and disfavored under the First Amendment; what is the fault or evil that resides in such restrictions?

3. Consider the main point being made by the concurring judge. What role does the university's mission play in this judge's reasoning? Do you agree that a public college or university should have more leeway to regulate offensive speech of students on its campus than a state or local government would have to regulate offensive speech of

citizens within its borders? See generally Byrne, "Racial Insults and Free Speech Within the University," 79 *Georgetown L.J.* 399 (1991).

4. Suppose the dean and university had learned in advance of the fraternity's plans and had refused to allow the fraternity to hold the ugly woman contest. Would this be a different case? One that the university would be more likely to win? See generally the Text Sections 9.4.4, 10.1.1, 10.2.2.

5. Would mediation have been a feasible and useful process for the university to employ here rather than sanctions? How might the university have structured a mediation process? What effect might such a process have had that would be different from the effect of sanctions?

6. For more on hate speech, see the Text Section 9.5. The *George Mason* case is discussed in this section. For a large-scale problem concerning hate speech, see Problem-Solving Exercise E in Part II of this volume of materials.

SECS. 9.4. and *9.5. Student Protests and Freedom of Speech* and *Speech Codes and the Problem of Hate Speech*

Problem 17*

State University has a residential campus, with about 80% of the university's 20,000 students living on campus or in the neighborhoods surrounding the campus. The campus includes various open areas, including outdoor recreation areas; a main quadrangle (a large, grassy area with trees and sidewalks); plazas in front of various buildings, including the main library and the student union; and numerous walkways. In the past, students often used lampposts, trees, and the doors and outside walls of buildings in these open areas to post notices of student activities. To alleviate the litter and clutter that resulted from such postings, the university's administrators installed information "kiosks" on the plazas in front of the library and the student union, and on the plazas of various other buildings. Students are directed to post their informational posters and other notices on these kiosks rather than on trees, lampposts, walls, or other outdoor places.

The information kiosks are box shaped, approximately 7 feet high, 4 feet wide, and 4 feet in depth, covered by a simple roof with an overhang that protects notices from the elements. The upper portion of the outer surfaces is covered with a synthetic cork material that holds both tacks and staples, thus providing a 4 ft. by 4 ft. "posting" area on each of the kiosk's four sides.

The Director of Student Activities manages the informational kiosks. The director uses a "self-service" system for posting on the kiosks. Any student or student organization may place a poster or other notice on a kiosk on a first-come, first-served basis; and whoever posts a notice is also responsible for removing it. There are only two rules that the director enforces: (1) each notice must display the date on which it was posted, and the student posting the notice must remove it not later than two weeks after the posting; and (2) no notice may be posted on top of another student's posting, nor may any student remove someone else's posting to make room for their own posting.

Customarily, the kiosks have been used primarily to post notices of student organizations' meetings and events. In the past couple of years, however, students have increasingly used the kiosks for notices that make controversial political statements. There have been posted notices, for example, that glorify the use of marijuana, condemn homosexuality, and criticize various religious groups. Many such notices have been written in crude language, sometimes including racial or sexual slurs, or have included offensive drawings that may depict racial or religious stereotypes or sexual innuendos.

There also have been large increases in notices that stridently criticize particular university administrators, usually by name. There have been notices, for example, that criticize

the Dean of Admissions for using preferences for athletes in admission policies, the Vice-President for Student Life for recognizing a student Christian organization that refuses to admit "practicing homosexuals," and that charge several named faculty members with coercing students to have sex with them. Most of these notices, as well as the notices making political statements, have been posted anonymously

In addition, during the past couple of years, many of the posters and other notices have increased in size and garishness (presumably to attract attention) and have often been posted so that most of the notice protrudes outside the 4 ft. by 4 ft. posting area of the kiosk. The overall effect has been to give the kiosks an unkempt or tacky look that university administrators think would be displeasing to campus visitors.

The Director of Student Activities, and the Director's boss, the Vice-President for Student Life, are concerned about all the changes in the types of posters and notices being placed on the information kiosks. They have asked for advice from the university counsel's office on whether, under the First Amendment, they may promulgate additional rules to alleviate the new problems that have arisen regarding kiosk postings.

If you are the Director of Student Activities, what additional, perhaps more specific, questions would you want to ask counsel? What proposals would you make for additional rules or procedures regarding the kiosks or related matters? What information would you want to collect to elucidate the problem for counsel or to help you think through and support your proposals?

If you are Counsel advising the Director and the Vice-President for Student Life, what initial advice would you give them? What additional information would you want to obtain from them? What proposals would you have for additional types of constitutionally sound rules or procedures for the kiosks or related matters?

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* This problem was inspired by a similar but shorter problem in Daniel Farber, William Eskridge, and Philip Frickey, *Constitutional Law: Themes for the Constitution's Third Century* (3d ed., Thomson/West, 2003), pp. 630-31.

J.

CHAPTER X: RIGHTS AND RESPONSIBILITIES OF STUDENT ORGANIZATIONS AND THEIR MEMBERS

SECS. 10.1.2. and *10.1.3. Student Organizations The Right Not to Join* and *Mandatory Student Activities Fees*

Board of Regents of the University of Wisconsin System v. Southworth
120 S. Ct. 1346 (2000)

Justice Kennedy delivered the opinion of the Court.

For the second time in recent years we consider constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university. Respondents are a group of students at the University of Wisconsin. They brought a First Amendment challenge to a mandatory student activity fee imposed by petitioner Board of Regents of the University of Wisconsin and used in part by the University to support student organizations engaging in political or ideological speech. Respondents object to the speech and expression of some of the student organizations. Relying upon our precedents that protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. The University contends that its mandatory student activity fee and the speech that it supports are appropriate to further its educational mission.

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, we remand for further proceedings.

I.

The University of Wisconsin is a public corporation of the State of Wisconsin. See Wis. Stat. § 36.07(1) (1993-1994). State law defines the University's mission in broad terms: "to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by

developing in students heightened intellectual, cultural and humane sensitivities...and a sense of purpose." § 36.01(2). Some 30,000 undergraduate students and 10,000 graduate and professional students attend the University's Madison campus, ranking it among the Nation's largest institutions of higher learning. . . .

The responsibility for governing the University of Wisconsin System is vested by law with the board of regents. § 36.09(1). The same law empowers the students to share in aspects of the University's governance. One of those functions is to administer the student activities fee program. By statute the "[s]tudents in consultation with the chancellor and subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities." § 36.09(5). The students do so, in large measure, through their student government, called the Associated Students of Madison (ASM), and various ASM subcommittees. The program the University maintains to support the extracurricular activities undertaken by many of its student organizations is the subject of the present controversy.

It seems that since its founding the University has required full-time students enrolled at its Madison campus to pay a nonrefundable activity fee. For the 1995-1996 academic year, when this suit was commenced, the activity fee amounted to $331.50 per year. The fee is segregated from the University's tuition charge. Once collected, the activity fees are deposited by the University into the accounts of the State of Wisconsin. The fees are drawn upon by the University to support various campus services and extracurricular student activities. In the University's view, the activity fees "enhance the educational experience" of its students by "promot[ing] extracurricular activities," "stimulating advocacy and debate on diverse points of view," enabling "participa[tion] in political activity," "promot[ing] student participa[tion] in campus administrative activity," and providing "opportunities to develop social skills," all consistent with the University's mission. *Id.*, at 14-155.

The board of regents classifies the segregated fee into allocable and nonallocable portions. The nonallocable portion approximates 80% of the total fee and covers expenses such as student health services, intramural sports, debt service, and the upkeep and operations of the student union facilities. Respondents did not challenge the purposes to which the University commits the nonallocable portion of the segregated fee. The allocable portion of the fee supports extracurricular endeavors pursued by the University's registered student organizations or RSO's. To qualify for RSO status students must organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus. During the 1995-1996 school year, 623 groups had RSO status on the Madison campus. To name but a few, RSO's included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties

Union Campus Chapter. As one would expect, the expressive activities undertaken by RSO's are diverse in range and content, from displaying posters and circulating newsletters throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying.

RSO's may obtain a portion of the allocable fees in one of three ways. Most do so by seeking funding from the Student Government Activity Fund (SGAF), administered by the ASM. SGAF moneys may be issued to support an RSO's operations and events, as well as travel expenses "central to the purpose of the organization." As an alternative, an RSO can apply for funding from the General Student Services Fund (GSSF), administered through the ASM's finance committee. During the 1995-1996 academic year, 15 RSO's received GSSF funding. These RSO's included a campus tutoring center, the student radio station, a student environmental group, a gay and bisexual student center, a community legal office, an AIDS support network, a campus women's center, and the Wisconsin Student Public Interest Research Group (WISPIRG). *Id.*, at 16-17. The University acknowledges that, in addition to providing campus services (*e.g.*, tutoring and counseling), the GSSF-funded RSO's engage in political and ideological expression.

The GSSF, as well as the SGAF, consists of moneys originating in the allocable portion of the mandatory fee. The parties have stipulated that, with respect to SGAF and GSSF funding, "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," and that the University does not use the fee program for "advocating a particular point of view."

A student referendum provides a third means for an RSO to obtain funding. While the record is sparse on this feature of the University's program, the parties inform us that the student body can vote either to approve or to disapprove an assessment for a particular RSO. One referendum resulted in an allocation of $45,000 to WISPIRG during the 1995-1996 academic year. At oral argument, counsel for the University acknowledged that a referendum could also operate to defund an RSO or to veto a funding decision of the ASM. In October 1996, for example, the student body voted to terminate funding to a national student organization to which the University belonged. Both parties confirmed at oral argument that their stipulation regarding the program's viewpoint neutrality does not extend to the referendum process. With respect to GSSF and SGAF funding, the ASM or its finance committee makes initial funding decisions. The ASM does so in an open session, and interested students may attend meetings when RSO funding is discussed. It also appears that the ASM must approve the results of a student referendum. Approval appears *pro forma*, however, as counsel for the University advised us that the student government "voluntarily views th[e] referendum as binding." Once the ASM approves an RSO's funding application, it forwards its decision to the chancellor and to the

board of regents for their review and approval. App. 18, 19. Approximately 30% of the University's RSO's received funding during the 1995-1996 academic year. . . .

The University's Student Organization Handbook has guidelines for regulating the conduct and activities of RSO's. In addition to obligating RSO's to adhere to the fee program's rules and regulations, the guidelines establish procedures authorizing any student to complain to the University that an RSO is in noncompliance. An extensive investigative process is in place to evaluate and remedy violations. The University's policy includes a range of sanctions for noncompliance, including probation, suspension, or termination of RSO status.

In March 1996, respondents, each of whom attended or still attend the University's Madison campus, filed suit in the United States District Court for the Western District of Wisconsin against members of the board of regents. Respondents alleged, *inter alia*, that imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment. They contended the University must grant them the choice not to fund those RSO's that engage in political and ideological expression offensive to their personal beliefs. Respondents requested both injunctive and declaratory relief. On cross-motions for summary judgment, the District Court ruled in their favor, declaring the University's segregated fee program invalid under *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990). The District Court decided the fee program compelled students "to support political and ideological activity with which they disagree" in violation of respondents' First Amendment rights to freedom of speech and association. . . . The court did not reach respondents' free exercise claim. The District Court's order enjoined the board of regents from using segregated fees to fund any RSO engaging in political or ideological speech.

The United States Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and vacated in part. *Southworth* v. *Grebe*, 151 F. 3d 717 (1998). As the District Court had done, the Court of Appeals found our compelled speech precedents controlling. After examining the University's fee program under the three-part test outlined in *Lehnert* v. *Ferris Faculty Assn.*, 500 U.S. 507 (1991), it concluded that the program was not germane to the University's mission, did not further a vital policy of the University, and imposed too much of a burden on respondents' free speech rights. "[L]ike the objecting union members in *Abood*," the Court of Appeals reasoned, the students here have a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with their own personal beliefs. 151 F. 3d, at 731. It added that protecting the objecting students' free speech rights was "of heightened concern" following our decision in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), because "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in

political and ideological activities – that is the only way to protect the individual's rights." 151 F. 3d., at 730, n. 11. The Court of Appeals extended the District Court's order and enjoined the board of regents from requiring objecting students to pay that portion of the fee used to fund RSO's engaged in political or ideological expression. *Id.,* at 735.

Three members of the Court of Appeals dissented from the denial of the University's motion for rehearing en banc. In their view, the panel opinion overlooked the "crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of other viewpoints, as in *Abood* and *Keller*, and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here." *Southworth* v. *Grebe,* 157 F. 3d 1124, 1129 (CA7 1998) (D. Wood, J., dissenting).

Other courts addressing First Amendment challenges to similar student fee programs have reached conflicting results. Compare *Rounds* v. *Oregon State Bd. of Higher Ed.*, 166 F. 3d 1032, 1038-1040 (CA9 1999), *Hays County Guardian* v. *Supple*, 969 F. 2d 111, 123 (CA5 1992), *cert. denied*, 506 U.S. 1087 (1993), *Kania* v. *Fordham*, 702 F. 2d 475, 480 (CA4 1983), *Good* v. *Associated Students of Univ. of Wash.*, 86 Wash. 2d 94, 105, 542 P. 2d 762, 769 (1975) (en banc), with *Smith* v. *Regents of Univ. of Cal*., 4 Cal. 4th 843, 862-863, 844 P. 2d 500, 513-514 *cert. denied*, 510 U.S. 863 (1993). These conflicts, together with the importance of the issue presented, led us to grant certiorari. . . . We reverse the judgment of the Court of Appeals.

II.

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. See, *e.g.*, *Rust* v. *Sullivan,* 500 U.A. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548-549 (1983). The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the

principle that the government can speak for itself. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.

The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities that they are required to support. Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech. See, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students. The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

We must begin by recognizing that the complaining students are being required to pay fees that are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then, provide the beginning point for our analysis. *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990). While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university. In *Abood*, some nonunion public school teachers challenged an agreement requiring them, as a condition of their employment, to pay a service fee equal in amount to union dues. The objecting teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association guaranteed by the First and Fourteenth Amendments. The Court agreed and held that any objecting teacher could "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." The principles outlined in *Abood* provided the foundation for our later decision in *Keller*. There we held that lawyers admitted to practice in California could be required to join a state bar association and to fund activities "germane" to the association's mission of "regulating the legal profession and improving the quality of legal services." The lawyers could not, however, be required to fund the bar association's own political expression.

The proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases. Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential. If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* and *Keller* become implicated. It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her. Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.

In *Abood* and *Keller* the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself. Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts after a long history of government regulation and judicial involvement, we have encountered difficulties in deciding what is germane and what is not. The difficulty manifested itself in our decision in *Lehnert* v. *Ferris Faculty Assn.*, 500 U.S. 507 (1991), where different members of the Court reached varying conclusions regarding what expressive activity was or was not germane to the mission of the association. If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.

The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Just as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech that some students find objectionable and offensive to their personal beliefs. If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes that he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of

optional or refund system it would be free to do so. We decline to impose a system of that sort as a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk.

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." *Id.*, at 841. While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger:* whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger:* Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

The parties have stipulated that the program the University has developed to stimulate extracurricular student expression respects the principle of viewpoint neutrality. If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment.

We make no distinction between campus activities and the off-campus expressive activities of objectionable RSO's. Those activities, respondents tell us, often bear no relationship to the University's reason for imposing the segregated fee in the first instance, to foster vibrant campus debate among students. If the University shares those concerns, it is free to enact

viewpoint neutral rules restricting off-campus travel or other expenditures by RSO's, for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected. We find no principled way, however, to impose upon the University, as a constitutional matter, a requirement to adopt geographic or spatial restrictions as a condition for RSOs' entitlement to reimbursement. Universities possess significant interests in encouraging students to take advantage of the social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country. Universities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse. If the rule of viewpoint neutrality is respected, our holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities.

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or – of particular importance – its faculty, are subject to the First Amendment analysis that controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. See *Rust* v. *Sullivan*); *Regan* v. *Taxation With Representation of Wash*, (1983). The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.

When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position. In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered. Cf. *Rosenberger*, *supra*, at 833 (discussing the discretion universities possess in deciding matters relating to their educational mission).

III.

It remains to discuss the referendum aspect of the University's program. While the record is not well developed on the point, it appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated

with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here. A remand is necessary and appropriate to resolve this point; and the case in all events must be reexamined in light of the principles we have discussed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. In this Court the parties shall bear their own costs. It is so ordered.

Notes and Questions

1. Although the U.S. Court of Appeals for the Seventh Circuit, in *Southworth*, had found that the expressive activity in question was not germane to the mission of the university under the teachings of *Lehnert v. Ferris Faculty Assn.*, the U.S. Supreme Court disagreed. How, according to the Court, does one define expressive activity that is germane to the mission of a public university?

2. The Supreme Court acknowledged that requiring students to pay fees that support speech with which they disagree affected those students' free speech rights. Did the Court require the university to provide a remedy for students who object to subsidizing activities or speech with which they disagree? What protection does the Court provide for such students?

3. Although the parties in the Supreme Court case did not raise the issue of the legality of the referendum used by the University, the Court addressed it anyway. What standard will be used to judge the legality of such a referendum? Is the Court hinting that the referendum may need to be modified or eliminated?

4. A decade after the settlement of *Cohen*, the interpretation and enforcement of Title IX in collegiate athletics remains controversial. The U.S. Department of Education issued an "Additional Clarification of Intercollegiate Athletics Policy" in March 2005, which offered a web-based survey for institutions to use to determine the level of interest of students in participating in collegiate athletics. The NCAA and proponents of gender equity in college sports criticized the new OCR policy, and it was withdrawn in 2010 by the Obama Administration ("Dear Colleague" letter, April 20, 2010, available at

www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf). The 2010 Dear Colleague letter reaffirmed the applicability of the 1979 Policy Interpretation and the 1996 clarification, and elaborated on how an institution might determine the extent of the "interests and abilities" of the "underrepresented sex" using multiple approaches.

5. After the U.S. Supreme Court's opinion in *Southworth* and the Seventh Circuit's opinion on remand (see note 4 above), what are the essential features of a mandatory student fees program that is consistent with the First Amendment speech and press clauses? If you were a vice-president for student affairs or a legal counsel for a public institution, what type of program would you recommend, with what characteristics? For suggestions see the Text Section 10.1.3.

SECS. 10.1.3. and *10.1.5. Student Organizations* and *Religious Activities*

Rosenberger v. Rector and Visitors of the University of Virginia
115 S. Ct. 2510 (1995)

Justice KENNEDY delivered the opinion of the Court. The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

I.

* * * *

Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a "Contracted Independent Organization" (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are fulltime students, and that complies with certain procedural requirements. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO. CIO's enjoy access to University facilities, including meeting rooms and computer terminals. A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO's "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."

All CIO's may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student

activities that "are related to the educational purpose of the University." App. to Pet. for Cert. 61a. The SAF is based on the University's "recogni[tion] that the availability of a wide range of opportunities" for its students "tends to enhance the University environment." App. 26. The Guidelines require that it be administered "in a manner consistent with the educational purpose of the University as well as with state and federal law." App. to Pet. for Cert. 61a. The SAF receives its money from a mandatory fee of $14 per semester assessed to each full-time student. The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs.

Some, but not all, CIO's may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." One of these is "student news, information, opinion, entertainment, or academic communications media groups." The Guidelines also specify, however, that the costs of certain activities of CIO's that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those that involve payment of honoraria or similar fees, or social entertainment or related expenses. The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which...espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."

The Guidelines prescribe these criteria for determining the amounts of third-party disbursements that will be allowed on behalf of each eligible student organization: the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities. If an organization seeks SAF support, it must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups. During the 1990-1991 academic year, 343 student groups qualified as CIO's. One hundred thirty-five of them applied for support from the SAF, and 118 received funding. Fifteen of the groups were funded as "student news, information, opinion, entertainment, or academic communications media groups."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which

fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." App. 67. WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." App. 45. The editors committed the paper to a two- fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "[r]eligious [o]rganization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." App. to Pet. for Cert. 66a. At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF to pay its printer $5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP's request on the ground that Wide Awake was a "religious activity" within the meaning of the Guidelines, i.e., that the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." It made its determination after examining the first issue.

WAP appealed the denial to the full Student Council, contending that WAP met all the applicable Guidelines and that denial of SAF support on the basis of the magazine's religious perspective violated the Constitution. The appeal was denied without further comment, and WAP appealed to the next level, the Student Activities Committee. In a letter signed by the Dean of Students, the committee sustained the denial of funding.

Having no further recourse within the University structure, WAP, Wide Awake, and three of its editors and members filed suit in the United States District Court for the Western District of Virginia, challenging the SAF's action as violative 42 U.S.C. Sec. 1983. They alleged that

refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. . . .

The suit sought damages for the costs of printing the paper, injunctive and declaratory relief, and attorney's fees.

On cross-motions for summary judgment, the District Court ruled for the University, holding that denial of SAF support was not an impermissible content or viewpoint discrimination against petitioners' speech, and that the University's Establishment Clause concern over its "religious activities" was a sufficient justification for denying payment to third-party contractors. . . .

The United States Court of Appeals for the Fourth Circuit, in disagreement with the District Court, held that the Guidelines did discriminate on the basis of content. It ruled that, while the State need not underwrite speech, there was a presumptive violation of the Speech Clause when viewpoint discrimination was invoked to deny third-party payment otherwise available to CIO's. The Court of Appeals affirmed the judgment of the District Court nonetheless, concluding that the discrimination by the University was justified by the "compelling interest in maintaining strict separation of church and state." *Id*., at 281. . . .

II.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994). These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd*., 502 U.S. 105 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 46 (1983).

* * * *

The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. See, e.g., *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Ed. Assn., supra*, at 49. . . . Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. See *Perry Ed. Assn., supra*, at 46.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.

* * * *

The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., *R.A.V., supra*, at 391. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel* [*v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)], viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

* * * *

The University urges that this case involves the provision of funds rather than access to facilities. . . . Citing our decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), and *Widmar v. Vincent*, 454 U.S. 263 (1981), the University argues that content-based funding decisions are both inevitable and lawful. . . .

To this end the University relies on our assurance in *Widmar v. Vincent*, *supra*. There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U.S., at 276. The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan, supra*, we upheld the government's prohibition on abortion- related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S., at 194. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id*., at 196-200. It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

* * * *

The distinction between the University's own favored message and the private speech of students is evident in the case before us.

The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.

* * * *

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. See generally R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students' risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality," in its ordinary and commonsense meaning, has a vast potential reach. The term "promotes" as used here would comprehend any writing advocating a philosophic position that

rests upon a belief in a deity or ultimate reality. See Webster's *Third New International Dictionary* 1815 (1961) (defining "promote" as "to contribute to the growth, enlargement, or prosperity of: further, encourage"). And the term "manifests" would bring within the scope of the prohibition any writing that is explicable as resting upon a premise that presupposes the existence of a deity or ultimate reality. See *id*., at 1375 (defining "manifest" as "to show plainly: make palpably evident or certain by showing or displaying"). Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does, those student journalistic efforts that primarily manifest or promote a belief that there is no deity and no ultimate reality, then undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

III.

* * * *

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.

* * * *

More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See *Lamb's Chapel*, 508 U.S., at 393-394; *Mergens*, 496 U.S., at 248; *Widmar, supra*, at 274-275.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." Pet. for Cert. 66a. The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission. The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. We must treat it, then, as an exaction upon the students. But the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. See *United States v. Butler*, 297 U.S. 1, 61, 56 S.Ct. 312, 317, 80 L.Ed. 477 (1936) ("A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government"). The SAF cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion. Much like the arrangement in *Widmar*, the money goes to a special fund from which any group of students with CIO status can draw for purposes consistent with the University's educational mission. And to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church.

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens, supra*, at 250, 110 S.Ct., at 2372 (opinion of O'CONNOR, J.). In this case, "the government has not fostered or encouraged" any mistaken impression that the student newspapers speak for the University. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766. The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State.

* * * *

We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. See *Widmar*, 454 U.S., at 269; *Mergens*, 496 U.S., at 252. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses are paid from a student activities fund to which students are required to contribute. *Widmar, supra*, at 265. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a

printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar, supra*; *Mergens, supra*. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIO's by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. As a result, and as in *Widmar*, the University can charge the SAF, and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations.

It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." Post, at 2550. That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official

censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

* * * *

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed. It is so ordered.

CONCURRING OPINION

Justice O'CONNOR, concurring.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994) (O'CONNOR, J., concurring in part and concurring in judgment). This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all. See *Lamb's Chapel v. Center Moriches Union Free School Dist*., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). . . . Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

As Justice SOUTER demonstrates [in his dissent], however, there exists another axiom in the history and precedent of the Establishment Clause. "Public funds may not be used to endorse the religious message." *Bowen v. Kendrick*, 487 U.S. 589, 642, (1988) (Blackmun, J., dissenting); see also *id*., at 622 (O'CONNOR, J., concurring). Our cases have permitted some government funding of secular functions performed by sectarian organizations. These decisions, however, provide no precedent for the use of public funds to finance religious activities.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints.

It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging – sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.

* * * *

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the Contracted Independent Organizations (CIO) – i.e., student groups – provides:

> "The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. . . .
>
> "The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities. . . ." App. 27.

And the agreement requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer:

> "Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." *Id.*, at 28.

Any reader of Wide Awake would be on notice of the publication's independence from the University.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication to "promote a better understanding of Islam to the University Community," App. 92. Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens to dominate the forum.

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. . . .

* * * *

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. . . . When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases – focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program – such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out – convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

I.

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. . . . The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax. . . .

The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A.

The Court's difficulties will be all the more clear after a closer look at Wide Awake than the majority opinion affords. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." App. 45. The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11."

Each issue of Wide Awake contained in the record makes good on the editor's promise and echoes the Apostle's call to accept Salvation. . . .

* * * *

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communicatio[n] ..." (in the language of the University's funding criterion, App. to Pet. for Cert. 61a), but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and ... to consider what a personal relationship with Jesus Christ means" (in the language of Wide Awake's founder, App. 45). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.

* * * *

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section. . . . The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

C.

Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate its permissibility. For one reason or another, the Court's chosen element appears to be the fact that under the University's Guidelines, funds are sent to the printer chosen by Wide Awake, rather than to Wide Awake itself.

2.

It is...probable, however, that the Court's reference to the printer goes to a different attempt to justify the payment. On this purported justification, the payment to the printer is significant only as the last step in an argument resting on the assumption that a public university may give a religious group the use of any of its equipment or facilities so long as secular groups are likewise eligible. The Court starts with the cases of *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), and *Lamb's Chapel v. Center Moriches Union Free School Dist*., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), in which religious groups were held to be entitled to access for speaking in government buildings open generally for that purpose. The Court reasons that the availability of a forum has economic value (the government built and maintained the building, while the speakers saved the rent for a hall); and that economically there is no difference between the University's provision of the value of the room and the value, say, of the University's printing equipment; and that therefore the University must be able to provide the use of the latter. Since it may do that, the argument goes, it would be unduly formalistic to draw the line at paying for an outside printer, who simply

does what the magazine's publishers could have done with the University's own printing equipment.

The argument is as unsound as it is simple. . . .

* * * *

D.

Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.

II.

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

The Court acknowledges the necessity for a university to make judgments based on the content of what may be said or taught when it decides, in the absence of unlimited amounts of money or other resources, how to honor its educational responsibilities. *Widmar, supra*, at 276. Nor does the Court generally question that in allocating public funds a state university enjoys spacious discretion. Accordingly, the Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints, citing, *inter alia*, *Perry, supra*, at 46.

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. See *Cornelius, supra*, at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is not eligible for funding, App. to Pet. for Cert. 62a, is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality," *id*., at 66a. It is clear that this is the basis on which Wide Awake Productions was denied funding. Letter from Student Council to Ronald W. Rosenberger, App. 54 ("In reviewing the request by Wide Awake Productions, the Appropriations Committee determined your organization's request could not be funded as it is a religious activity"). The discussion of Wide Awake's content, *supra*, at 2534-2536, shows beyond any question that it "primarily promotes or manifests a particular belief(s) in or about a deity ...," in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists. . . . The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that "primarily promotes or manifests" any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

* * * *

[Th]e Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a

related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God, does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums.

Notes and Questions

1. Note that there are two major questions or issues addressed in *Rosenberger*: whether the university's actions violated the First Amendment's speech and press clauses, and whether the university's actions were necessary to protect against a violation of the First Amendment's establishment clause. How are these two issues interrelated? Specifically, how would a negative answer to the first question have affected the relevance or analysis of the second question? Suppose the Court had answered both questions in the affirmative; what result?

2. In Part II of his majority opinion, Justice Kennedy distinguished between "subject matter" discrimination, that is, a restriction of expression based upon its subject matter; and "viewpoint" discrimination, that is, a restriction on expression based upon the speaker's particular point of view. In Part II of his dissent, Justice Breyer drew the same distinction. Under the First Amendment speech and press clauses, what is the significance of this distinction? How do Kennedy and Breyer differ in their application of the distinction to this case?

3. The majority opinion also distinguishes between "government speech" and "private speech" or, more particularly, between a public university acting as a speaker and a private individual acting as a speaker whose speech is being subsidized or regulated by a public university. What is the significance of this distinction in First Amendment law?

   Rosenberger is the second case in a trilogy of U.S. Supreme Court cases exploring the distinction between government as speaker and government as regulator or subsidizer of

private speech. *Rust v. Sullivan*, 500 U.S. 173 (1991) precedes *Rosenberger* in the trilogy, and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), follows it. For another, subsequent, case that explores this distinction in a context that (like *Rosenberger's* context) implicates both the free speech clause and the establishment clause, see *Santa Fe Indep. School District v. Doe*, 120 S. Ct. 2266 (2000).

4. The majority in *Rosenberger* notes, but does not address, the question of "whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." Justice O'Connor notes the same question in her concurrence. Subsequent to *Rosenberger*, the Court did address this issue in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). *Southworth* is set out in Section 10.1 of this volume of materials.

5. Suppose, in *Rosenberger*, the student group had been classified as a "religious organization" under the university's SAF policy and had been denied funds solely because it is a "religious organization." Would or should there have been any difference in the Court's reasoning or result?

6. Note that the majority opinion includes a discussion and affirmation of academic freedom that focuses, unlike most other cases, on *student* rather than *faculty or institutional* freedoms. For discussion of student academic freedom, see the Text Section 7.1.4.

The *Rosenberger* case is discussed in the Text Sections 10.1.5 and 10.3.2.

Sec. 10.1.4. Principle of Nondiscrimination

Christian Legal Society v. Martinez
130 U.S. 2971 (2010)

JUDGES**:** Ginsburg, J., delivered the opinion of the Court, in which Stevens, Kennedy, Breyer, and Sotomayor, JJ., joined. Stevens, J., and Kennedy, J., filed concurring opinions. Alito, J., filed a dissenting opinion, in which Roberts, C. J., Scalia, and Thomas, JJ., joined.

Justice Ginsburg delivered the opinion of the Court. In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510(1995); *Widmar* v. *Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981); *Healy* v. *James*, 408 U.S. 169 (1972). This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group – and the attendant use of school funds and facilities – on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of petitioner, Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program

In accord with the District Court and the Court of Appeals, we reject CLS's First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS – in common with all other student organizations – to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

I

Founded in 1878, Hastings was the first law school in the University of California public-school system. Like many institutions of higher education, Hastings encourages students to form extracurricular associations that "contribute to the Hastings community and experience." App. 349. These groups offer students "opportunities to pursue academic and social interests outside of the classroom [to] further their education" and to help them "develo[p] leadership skills." *Ibid.*

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. *Id.,* at 217. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. *Id.,* at 216-219. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. *Id.,* at 218-219. Finally, Hastings allows officially recognized groups to use its name and logo. *Id.,*at 216.

In exchange for these benefits, RSOs must abide by certain conditions. Only a "non-commercial organization whose membership is limited to Hastings students may become [an RSO]." App. to Pet. for Cert. 83a. A prospective RSO must submit its bylaws to Hastings for approval, *id.,* at 83a-84a; and if it intends to use the Law School's name or logo, it must sign a license agreement, App. 219. Critical here, all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students." *Ibid.*[1]

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

> "[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] policy on nondiscrimination is to comply fully with applicable law.

[1] These policies and regulations address a wide range of matters, for example, alcoholic beverages at campus events, bake sales, and blood drives. App.246

> "[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." *Id.,* at 220.

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." *Id.,* at 221.[2] Other law schools have adopted similar all-comers policies.... From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, "no student organization at Hastings . . . ever sought an exemption from the Policy." App. 221.

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization – which had been an RSO at Hastings for a decade – formed CLS by affiliating with the national Christian Legal Society (CLS-National). *Id.,* at 222-223, 225. CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. *Id.,* at 225. CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. *Id.,* at 225-226; App. to Pet. for Cert. 101a.[3] Among those tenets is the belief that sexual activity should not occur outside

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[2] Th[is] policy," Hastings clarifies, "does not foreclose neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Brief for Hastings 5. So long as all students have the *opportunity* to participate on equal terms, RSOs may require them, *inter alia*, to pay dues, maintain good attendance, refrain from gross misconduct, or pass a skill-based test, such as the writing competitions administered by law journals. See *ibid.* The dissent trumpets these neutral, generally applicable membership requirements, arguing that, in truth, Hastings has a "some-comers," not an all-comers, policy. (See opinion of Alito, J.). Hastings' open-access policy, however, requires only that student organizations open eligibility for membership and leadership regardless of a student's status or beliefs; dues, attendance, skill measurements, and comparable uniformly applied standards are fully compatible with the policy. The dissent makes much of Hastings' observation that groups have imposed "even conduct requirements." (See opinion of Alito, J.) But the very example Hastings cites leaves no doubt that the Law School was referring to boilerplate good-behavior standards, *e.g.,* "[m]embership may cease . . . if the member is found to be involved in gross misconduct," App. 173 (cited in Brief for Hastings 5).

[3] The Statement of Faith provides: "Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.

- The presence and power of the Holy Spirit in the work of regeneration

of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." App. 226. CLS also excludes students who hold religious convictions different from those in the Statement of Faith. *Id.,* at 227.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. *Id.,* at 227-228. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation. *Id.,* at 228.

CLS formally requested an exemption from the Nondiscrimination Policy, *id.,* at 281, but Hastings declined to grant one. "[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.,* at 294. If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." *Ibid.* CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. *Id.,* at 219, 233. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004-2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. *Id.,* at 229. It also hosted a beach barbeque, Thanksgiving dinner, campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet, and other informal social activities. *Ibid.*

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings' refusal to grant the organization RSO status violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief.

On cross-motions for summary judgment, the U. S. District Court for the Northern District of California ruled in favor of Hastings. The Law School's all-comers condition on access to a limited public forum, the court held, was both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech. App. to Pet. for Cert. 27a-38a.

Nor, in the District Court's view, did the Law School impermissibly impair CLS's right to expressive association. "Hastings is not directly ordering CLS to admit [any] studen[t]," the

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- The Bible as the inspired Word of God." App. 226.

court observed, *id.*, at 42a; "[r]ather, Hastings has merely placed conditions on" the use of its facilities and funds, *ibid*. "Hastings' denial of official recognition," the court added, "was not a substantial impediment to CLS's ability to meet and communicate as a group." *Id.*, at 49a.

The court also rejected CLS's Free Exercise Clause argument. "[T]he Nondiscrimination Policy does not target or single out religious beliefs," the court noted; rather, the policy "is neutral and of general applicability." *Id.*, at 63a. "CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation," the court explained, "but that does not convert the reason for Hastings' [Nondiscrimination Policy] to be one that is religiously-based." *Id.*, at 63a -64a.

On appeal, the Ninth Circuit affirmed in an opinion that stated, in full:

> "The parties stipulate that Hastings imposes an open membership rule on all student groups--all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir. 2008)." *Christian Legal Soc. Chapter of Univ. of Cal.* v. *Kane*, 319 Fed. Appx. 645, 645-646 (CA9 2009).

We granted certiorari, 558 U.S. ____, 130 S. Ct. 795, and now affirm the Ninth Circuit's judgment.

II

Before considering the merits of CLS's constitutional arguments, we must resolve a preliminary issue: CLS urges us to review the Nondiscrimination Policy as written--prohibiting discrimination on several enumerated bases, including religion and sexual orientation--and not as a requirement that all RSOs accept all comers. The written terms of the Nondiscrimination Policy, CLS contends, "targe[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior," and leave other associations free to limit membership and leadership to individuals committed to the group's ideology. Brief for Petitioner 19 (internal quotation marks omitted). For example, "[a] political . . . group can insist that its leaders support its purposes and beliefs," CLS alleges, but "a religious group cannot." *Id.*, at 20.

CLS's assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. In that filing, the parties specified:

> "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization,

> regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." App. 221 (Joint Stipulation P18) (emphasis added; citations omitted).[5]

Under the District Court's local rules, stipulated facts are deemed "undisputed." Civil Local Rule 56-2 (ND Cal. 2010). . . .

Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established." *H. Hackfeld & Co.* v. *United States*, 197 U.S. 442, 447, 25 S. Ct. 456, 49 L. Ed. 826 (1905).[7] This entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits. . . . As a leading legal reference summarizes:

> "[Factual stipulations are] binding and conclusive . . . , and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, . . . or to maintain a contention contrary to the agreed statement, . . . or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 C. J. S., Stipulations § 93 (2000) (footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis.*

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[5] In its briefs before the District Court and the Court of Appeals, CLS several times affirmed that Hastings imposes an all-comers rule on RSOs. See, *e.g.*, Plaintiff's Notice of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in No. C 04 4484 JSW (ND Cal.), p. 4 ("Hastings interprets the [Nondiscrimination Policy] such that student organizations must allow *any* student, regardless of their status or beliefs, to participate in the group's activities and meetings and to become voting members and leaders of the group.") . . . And at oral argument in this Court, counsel for CLS acknowledged that "the Court needs to reach the constitutionality *of the all-comers policy* as applied to CLS in this case." Tr. of Oral Arg. 59 (emphasis added). We repeat, in this regard, that Hastings' all-comers policy is hardly novel. Other law schools have adopted similar requirements. . . .

[7] Record evidence, moreover, corroborates the joint stipulation concerning Hastings' all-comers policy. The Law School's then-Chancellor and Dean testified, for example, that "in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." App. 343. Hastings' Director of Student Services confirmed that RSOs must "be open to all students" – "even to students who may disagree with [an RSO's] purposes." *Id.*, at 320 (internal quotation marks omitted). See also *id.*, at 349 ("Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization.").

System v. *Southworth*, 529 U.S. 217, 226, 120 S. Ct. 1346 (2000). Time and again, the dissent races away from the facts to which CLS stipulated. . . . But factual stipulations are "formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission . . . is conclusive in the case." 2 K. Broun, McCormick on Evidence § 254, p. 181 (6th ed. 2006) (footnote omitted). . . .

In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement, as described in the parties' accord. See 319 Fed. Appx., at 645-646; App. to Pet. for Cert. 32a; *id.*, at 36a. We reject CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written. This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.[10]

III

A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.[11] Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439 (1985) (internal quotation marks omitted), the Court has permitted

[10] The dissent, in contrast, devotes considerable attention to CLS's arguments about the Nondiscrimination Policy as written. . . . We decline to address these arguments, not because we agree with the dissent that the Nondiscrimination Policy is "plainly" unconstitutional, but because, as noted, , , , that constitutional question is not properly presented

[11] In conducting forum analysis, our decisions have sorted government property into three categories. First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009)). Second, governmental entities create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose"; speech restrictions in such a forum "are subject to the same strict scrutiny as restrictions in a traditional public forum." Third, governmental entities establish limited public forums by opening property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Ibid.* As noted in text, "[i]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral." *Ibid.*

restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, *e.g.*, *Rosenberger*, 515 U.S., at 829, 115 S. Ct. 2510. . . . [12]

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas" – interests that cannot be advanced "through . . . significantly less restrictive [means]." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244. See also, *e.g* (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S., at 623. 104 S. Ct. 3244. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights."

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. See Brief for Petitioner 35 (expressive association in this case is "the functional equivalent of speech itself"). It therefore makes little sense to treat CLS's speech and association claims as discrete. See *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U.S. 290, 300, 102 S. Ct. 434, (1981). Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. See *Roberts*, 468 U.S., at 622, 104 S. Ct. 3244 (Associational freedom is "implicit in the right to engage in activities protected by the First Amendment."). When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. Accord Brief for State Universities and State University Systems as *Amici Curiae* 37-38. That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role. See Brief for Petitioner 18.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums – the State may "reserv[e] [them] for certain groups." *Rosenberger*, 515

[12] Our decisions make clear, and the parties agree, that Hastings, through its RSO program, established a limited public forum.

U.S., at 829, 115 S. Ct. 2510. See also . . . ("[A] speaker may be excluded from" a limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created.").

An example sharpens the tip of this point: Schools, including Hastings, see App. to Pet. for Cert. 83a, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students – even if those groups wish to associate with nonstudents. See, *e.g.*, Volokh, Freedom of Expressive Association and Government Subsidies, 58 Stan. L. Rev. 1919, 1940 (2006). The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to "confin[e] a [speech] forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S., at 829, 115 S. Ct. 2510. See also ("Associational activities need not be tolerated where they infringe reasonable campus rules.").

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition.[13] The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. See, *e.g.*, *Dale*, 530 U.S., at 648, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (regulation "forc[ed] [the Boy Scouts] to accept members it [did] not desire" (internal quotation marks omitted)). . . .

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. See, *e.g.*, *Grove City College* v. *Bell*, 465 U.S. 555, 575-576, 104 S. Ct. 1211 (1984). . . . Application of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. . . .

In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

B

[13] The fact that a university "expends funds to encourage a diversity of views from private speakers," this Court has held, does not justify it in "discriminat[ing] based on the viewpoint of private persons whose speech it facilitates." *Rosenberger*, 515 U.S., at 834, 115 S. Ct. 2510, 132 L. Ed. 2d 700. Applying limited-public-forum analysis (which itself prohibits viewpoint discrimination) to CLS's expressive association claim, we emphasize, does not upset this principle.

As earlier pointed out, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). 408 U.S., at 170, 92 S. Ct. 2338 33 L. Ed. 2d 266. Characterizing SDS's mission as violent and disruptive, and finding the organization's philosophy repugnant, the college completely banned the SDS chapter from campus; in its effort to sever all channels of communication between students and the group, university officials went so far as to disband a meeting of SDS members in a campus coffee shop. The college, we noted, could require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law," including "reasonable standards respecting conduct." *Id.,* at 193, 92 S. Ct. 2338 . But a public educational institution exceeds constitutional bounds, we held, when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent." *Id.*, at 187-188, 92 S. Ct. 2338.

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. 454 U.S., at 264-265, 102 S. Ct. 269. "A university's mission is education," we observed, "and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.,* at 268, n. 5, 102 S. Ct. 269. But because the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to strict scrutiny. *Id.*, at 269-270, 102 S. Ct. 269. The school's interest "in maintaining strict separation of church and State," we held, was not "sufficiently compelling to justify . . . [viewpoint] discrimination against . . . religious speech." *Id.,* at 270, 276, 102 S. Ct. 269 (internal quotation marks omitted).

Most recently and comprehensively, in *Rosenberger*, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. 515 U.S., at 825-827, 115 S. Ct. 2510. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.,* at 831, 830, 115 S. Ct. 2510.

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. "Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." *Id.,* at 829, 115 S. Ct. 2510. The constitutional constraints on the boundaries the State may set bear repetition here: "The State

may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint." *Ibid.* (internal quotation marks omitted).

C

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances." *Cornelius*, 473 U.S., at 809, 105 S. Ct. 3439.

1

Our inquiry is shaped by the educational context in which it arises: First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S., at 268, n. 5, 102 S. Ct. 269 (internal quotation marks omitted). This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. . . . Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty* .v.*Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034 (1982). . . .

A college's commission – and its concomitant license to choose among pedagogical approaches – is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. . . . . We therefore "approach our task with special caution," *Healy*, 408 U.S., at 171,92 S. Ct. 2338, , mindful that Hastings' decisions about the character of its student-group program are due decent respect.[16]

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all

[16] The dissent mischaracterizes the nature of the respect we accord to Hastings. . . . . As noted ***supra***, this Court, exercising its independent judgment, must "interpre[t] and appl[y] . . . the right to free speech." But determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators. . . . .

students." Brief for Hastings 32; see Brief for American Civil Liberties Union et al. as *Amici Curiae* 11. Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students." Brief for Hastings 32. RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. See Tr. of Oral Arg. 18. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Brief for Petitioner 35-36 (emphasis deleted). Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence* v. *Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.*, at 583, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). . . .

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." App. 349. And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates – in fact, subsumes – state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public

monies and benefits conduct of which the people of California disapprove." Brief for Hastings 35; *id.*, at 33-34 (citing Cal. Educ. Code § 66270 (prohibiting discrimination on various bases)). State law, of course, may not *command* that public universities take action impermissible under the First Amendment. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

3

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Ed. Assn.*, 460 U.S., at 53, 103 S. Ct. 948. If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers. See *ibid.*; *Cornelius*, 473 U.S., at 809, 105 S. Ct. 3439; *Greer* v. *Spock*, 424 U.S. 828, 839, 96 S. Ct. 1211(1976); *Pell*, 417 U.S., at 827-828, 94 S. Ct. 2800.

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. App. 232-233. Although CLS could not take advantage of RSO-specific methods of communication, see *supra*, the advent of electronic media and social-net-working sites reduces the importance of those channels. See App. 114-115 (CLS maintained a Yahoo! message group to disseminate information to students.). . . .

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation. Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. App. 224, 229-230. "The variety and type of alternative modes of access present here," in short, "compare favorably with those in other [limited public] forum cases where we have upheld restrictions on access." *Perry Ed. Assn.*, 460 U.S., at 53-54, 103 S. Ct. 948. It is beyond dissenter's license, we note again, see *supra*, at ___, n. 17, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking.

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." Brief for Petitioner 49. "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." *Id.*, at 50. . . .; (Alito, J., dissenting). This catchphrase confuses CLS's preferred policy with constitutional limitation – the *advisability* of Hastings' policy does not control its *permissibility*. . . .. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S., at 808, 105 S. Ct. 3439.[22]

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO-hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join – let alone seek leadership positions in – groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. Several RSOs at Hastings limit their membership rolls and officer slates in just this way. See, *e.g.*, App. 192 (members must "[p]ay their dues on a timely basis" and "attend meetings regularly"); *id.*, at 173 (members must complete an application and pay dues; "[a]ny active member who misses a semester of regularly scheduled meetings shall be dropped from rolls"); App. to Pet. for Cert. 129a ("Only Hastings students who have held membership in this organization for a minimum of one semester shall be eligible to be an officer.").[23]

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[22] CLS's concern, shared by the dissent, . . . that an all-comers policy will squelch diversity has not been borne out by Hastings' experience. In the 2004-2005 academic year, approximately 60 student organizations, representing a variety of interests, registered with Hastings, from the Clara Foltz Feminist Association, to the Environmental Law Society, to the Hastings Chinese Law and Culture Society. App. 215, 237-238. Three of these 60 registered groups had a religious orientation: Hastings Association of Muslim Law Students, Hastings Jewish Law Students Association, and Hastings Koinonia. *Id.*, at 215-216

[23] As Hastings notes, other "checks [are also] in place" to prevent RSO-sabotage. Brief for Hastings 43, n. 16. "The [Law] School's student code of conduct applies to RSO activities and, *inter alia*, prohibits obstruction or disruption, disorderly conduct, and threats." *Ibid.* (internal quotation marks and brackets omitted).

Hastings, furthermore, could reasonably expect more from its law students than the disruptive behavior CLS hypothesizes – and to build this expectation into its educational approach. A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy. See Tr. of Oral Arg. 41 (counsel for Hastings); Brief for Hastings 38.

Finally, CLS asserts (and the dissent repeats, [130 S. Ct at 3015], that the Law School lacks any legitimate interest – let alone one reasonably related to the RSO forum's purposes – in urging "religious groups not to favor co-religionists for purposes of their religious activities." Brief for Petitioner 43; *id.*, at 50. CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.[24]

D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

[24] In arguing that the all-comers policy is not reasonable in light of the RSO forum's purposes, the dissent notes that Title VII, which prohibits employment discrimination on the basis of religion, among other categories, provides an exception for religious associations . . . . The question here, however, is not whether Hastings *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their faith. It is instead whether Hastings *must* grant that exemption. This Court's decision in ***Employment Div., Dept. of Human Resources of Ore.*** v. ***Smith***, 494 U.S. 872, 878-882, 110 S. Ct. 1595 (1990), unequivocally answers no to that latter question. . . .

1

Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions . . . , we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." Brief for Petitioner 51 .This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746 (1989). . . .

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy. *R. A. V.* v. *St. Paul*, 505 U.S. 377, 390, 112 S. Ct. 2538 (1992).
Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." *Ward*, 491 U.S., at 791, 109 S. Ct. 2746 (internal quotation marks and emphasis omitted). The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 488, 113 S. Ct. 2194 (1993). CLS's conduct – not its Christian perspective – is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its *own* viewpoint-based objections to . . . nondiscrimination

laws (which it is entitled to have and [to] voice) with viewpoint *discrimination*." Brief for Hastings 31.[26]

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims.[27]

IV

In its reply brief, CLS contends that "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext." Reply Brief 23. Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance.[28] On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved.

For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Stevens, concurring.

The Court correctly confines its discussion to the narrow issue presented by the record.... and correctly upholds the all-comers policy. I join its opinion without reservation. Because the dissent has volunteered an argument that the school's general Nondiscrimination Policy would

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[26] Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish--including a discriminatory one. . . .

[27] CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Brief for Petitioner 40-41. Our decision in *Smith*, 494 U.S. 872, 110 S. Ct. 1595, forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. *Id.*, at 878-882, 110 S. Ct. 1595. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause

[28] Finding the Ninth Circuit's analysis cursory, the dissent repeatedly urges us to resolve the pretext question. . . .In doing so, the dissent forgets that "we are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S. Ct. 2113 (2005). When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves. That is especially true when we agree to review an issue on the understanding that "[t]he material facts . . . are undisputed," as CLS's petition for certiorari emphasized was the case here. Pet. for Cert. 2.

be "plainly" unconstitutional if applied to this case, [130 S. Ct. at 3009] opinion of Alito, J., a brief response is appropriate. In my view, both policies are plainly legitimate.

* * * *

In the dissent's view, by refusing to grant CLS an exemption from the Nondiscrimination Policy, Hastings violated CLS's rights, for by proscribing unlawful discrimination on the basis of religion, the policy discriminates unlawfully on the basis of religion. There are numerous reasons why this counterintuitive theory is unsound. Although the First Amendment may protect CLS's discriminatory practices off campus, it does not require a public university to validate or support them.

As written, the Nondiscrimination Policy is content and viewpoint neutral. It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all. The policy is "directed at the organization's activities rather than its philosophy," *Healy* v. *James*, 408 U.S. 169, 188, 92 S. Ct. 23386 (1972). Those who hold religious beliefs are not "singled out," (Alito, J., dissenting); those who engage in discriminatory *conduct* based on someone else's religious status and belief are singled out. Regardless of whether they are the product of secular or spiritual feeling, hateful or benign motives, all acts of religious discrimination are equally covered. The discriminator's beliefs are simply irrelevant. There is, moreover, no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views. The policy's religion clause was plainly meant to promote, not to undermine, religious freedom.

To be sure, the policy may end up having greater consequence for religious groups – whether and to what extent it will is far from clear *ex ante* – inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths. But there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations. And it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination. The dissent has thus given no reason to be skeptical of the basic design, function, or rationale of the Nondiscrimination Policy.

What the policy does reflect is a judgment that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors. This approach may or may not be the wisest choice in the context of a Registered Student Organization (RSO) program. But it is at least a reasonable

choice. Academic administrators routinely employ antidiscrimination rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination, including sexual orientation discrimination. Applied to the RSO context, these values can, in turn, advance numerous pedagogical objectives. See [130 S. Ct. at 2999-3000 (Kennedy, J., concurring).

* * * *

The RSO forum is . . . not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral – indeed it could not remain neutral – in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make. When any given group refuses to comply with the rules, the RSO sponsor need not admit that group at the cost of undermining the program and the values reflected therein. . . .

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct," App. 226. The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women – or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.

Justice Kennedy concurring.

To be effective, a limited forum often will exclude some speakers based on their affiliation (*e.g.*, student versus nonstudent) or based on the content of their speech, interests, and expertise (*e.g.*, art professor not chosen as speaker for conference on public transit). When the government does exclude from a limited forum, however, other content-based judgments may be impermissible. For instance, an otherwise qualified and relevant speaker may not be excluded because of hostility to his or her views or beliefs. See *Healy* v. *James*, 408 U.S. 169, 187-188, 92 S. Ct. 2338 (1972).

In *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510 (1995), the essential purpose of the limited forum was to facilitate the expression of differing views in the context of student publications. The forum was limited because it was confined:

first, to student-run groups; and second, to publications. The forum was created in the long tradition of using newspapers and other publications to express differing views and also in the honored tradition of a university setting that stimulates the free exchange of ideas. See *id.*, at 835, 115 S. Ct. 2510 ("[I]n the University setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"). These considerations supported the Court's conclusion that, under the First Amendment, a limited forum for student-run publications did not permit the exclusion of a paper for the reason that it was devoted to expressing religious views.

Rosenberger is distinguishable from the instant case in various respects. Not least is that here the school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have a different outcome. Here, the policy applies equally to all groups and views. And, given the stipulation of the parties, there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint.

* * * *

In addition to a circumstance, already noted, in which it could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, petitioner also would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views. But that has not been shown to be so likely or self-evident as a matter of group dynamics in this setting that the Court can declare the school policy void without more facts; and if there were a showing that in a particular case the purpose or effect of the policy was to stifle speech or make it ineffective, that, too, would present a case different from the one before us.

These observations are offered to support the analysis set forth in the opinion of the Court, which I join.

Justice Alito, with whom The Chief Justice; Justice Scalia, and Justice Thomas join, dissenting.

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States* v. *Schwimmer*, 279 U.S. 644, 654-655, 49 S. Ct. 448(1929) (Holmes, J., dissenting). Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

The Hastings College of the Law, a state institution, permits student organizations to register with the law school and severely burdens speech by unregistered groups. Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS). CLS claims that Hastings refused to register the group because the law school administration disapproves of the group's viewpoint and thus violated the group's free speech rights.

Rejecting this argument, the Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit *any* student who wishes to join. Deferring broadly to the law school's judgment about the permissible limits of student debate, the Court concludes that this "accept-all-comers" policy . . . , is both viewpoint-neutral and consistent with Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups.

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups – groups to which, as Hastings candidly puts it, these institutions "do not wish to . . . lend their name[s]." Brief for Respondent Hastings College of Law 11; see also *id.*, at 35.

* * * *

[[The dissenters then engaged in a lengthy criticism of the majority opinion and of the Stevens and Kennedy concurring opinions. (See 130 S. Ct. at 3000-3020 for the full text of the dissent.) The dissenters compile numerous instances in which they say that the majority set aside or ignored important facts – especially facts about the existence, status, and substance of the Hastings "all comers" policy – and put aside or misapplied pertinent Supreme Court precedents. In addition, the dissenters challenge the majority's reliance on the parties' stipulations of facts as a basis for declining to delve into other facts that the dissenters deem important. The dissenters also argue that the majority has minimized the importance of the Hastings Nondiscrimination Policy to CLS's claims, and has focused instead only on the all-comers policy for RSO's.]

[The majority opinion, as set out above, includes brief references to the dissenters' arguments along with brief responses to them.]

Notes and Questions

1. *Christian Legal Society v. Martinez* is discussed in the Text Section 10.1.4.

2. Much of the Court's analysis is based on the "public forum" doctrine. The public forum doctrine is discussed in the Text Section 9.4.2. According to the Court, the Hastings RSO program qualifies as a public forum. What type of forum is it? What legal standards (or standards of judicial review) apply to a college regulation that limits access to this type of forum?

3. It appears that "deference," that is, a court's inclination to defer to the policy judgments of a higher educational institution (see generally the Text Section 2.2.2), is important to the majority's reasoning and Justice Stevens' reasoning in his concurring opinion. What role does the concept of deference play in this case? In what way is the concept of deference connected to the majority's public forum analysis? Do you agree that the "all comers" requirement is good policy?

4. Consider whether, subsequent to *Martinez,* there are still grounds upon which students may challenge an all-comers policy that a public institution imposes on recognized student organizations. What types of First Amendment challenges may still be viable, and in what circumstances? If you were the director of student life at a public university with an all-comers policy, what steps would you suggest for minimizing the possibility of a successful challenge to your all-comers policy? If you were legal counsel for the division of student life, what advice would you give for avoiding any successful challenge to the all-comers policy?

5. Suppose that the Christian Legal Society at Hastings had not applied for RSO status and was not an RSO. The group seeks to use a campus meeting room (which other students use) for monthly meetings. May Hastings deny CLS use of the room because the group does not accept "all comers?"

Sec. 10.1.4

Student Organizations

The Principle of Nondiscrimination

Intervarsity Christian Fellowship/USA v. Univ. of Iowa

5 F. 4th 855 (8th Cir. 2021)

OPINION BY: KOBES, Circuit Judge.

Employees of the University of Iowa targeted religious student organizations for discriminatory enforcement of its Human Rights Policy. After the district court ordered it to stop selectively enforcing the policy against one religious group, the University deregistered another—InterVarsity Graduate Christian Fellowship. InterVarsity filed suit. On cross-motions for summary judgment, the district court held that University employees violated InterVarsity's First Amendment rights and denied qualified immunity. We affirm.

I.

A. University Policies for Student Organizations

The University of Iowa, like other state institutions of higher learning, allows students to form organizations. Those organizations, called Registered Student Organizations (RSOs), are "voluntary special interest group[s] organized for educational, social, recreational, and service purposes and [are] comprised of [their] members." RSOs get a variety of benefits, including money, participation in University publications, use of the University's trademark, and access to campus facilities. Once there are enough students interested in forming an RSO, they submit a proposed constitution. University officials review the constitution before approving the group.

RSOs must comply with campus rules, including the University's Policy on Human Rights. They must also include similar language to the Human Rights Policy in their constitutions. The Policy provides:

[I]n no aspect of [the University's] programs shall there be differences in the treatment of persons because of race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the U.S. military, sexual orientation, gender

identity, associational preferences, or any other classification that deprives the person of consideration as an individual, and that equal opportunity and access to facilities shall be available to all.

RSOs must also abide by the RSO Policy in selecting members and leaders. The RSO Policy says that membership and engagement "must be open to all students without regard to race, creed, color, religion, national origin, age, sex [unless the organization is exempt under Title IX] . . . sexual orientation, gender identity . . . or any other classification that deprives the person of consideration as an individual." But, noting the importance of students' ability to "organize and associate with like-minded students," the RSO policy also allows:

[A]ll registered student organizations [are] able to exercise free choice of members on the basis of their merits as individuals without restriction in accordance with the [Human Rights Policy]. . . . [T]herefore any individual who subscribes to the goals and beliefs of a student organization may participate in and become a member of the organization.

This is not an "all-comers policy," which would require RSOs to accept any student as a member or leader of the group.

The University permits RSOs to base membership and leadership on specific traits protected under the Human Rights Policy. For example, sports clubs and Greek organizations may hinge membership and leadership on sex, and the a cappella group, the "Hawkapellas," is limited to women. Some groups prefer or require membership in a racial group. Other groups require their members to be United States military veterans or subscribe to a certain ideological viewpoint or mission.

The University has also permitted religious groups to require members or leaders to affirm certain beliefs. In 2003, it allowed the Christian Legal Society to require its members to sign "a statement of faith" affirming Christian beliefs. It also approved the constitutions of other religious groups like the Imam Mahdi Organization, which requires leaders "to refrain from major sins" and requires both leaders and voting members to "[b]e Muslim, Shiea." The University never thought these groups violated the Human Rights Policy.

B. Business Leaders in Christ

Things changed in 2017, when a student filed a complaint against Business Leaders in Christ (BLinC). He was denied a leadership role after refusing to affirm the group's belief that same-sex relationships were against the Bible, and he claimed the decision was because he is gay. The University agreed that BLinC violated the Human Rights Policy. It deregistered BLinC because requiring leaders to affirm BLinC's beliefs would "effectively disqualify individuals from leadership positions on the basis of sexual orientation and gender identity."

BLinC filed suit, asserting violations of free speech, free association, and free exercise of religion under the First Amendment. BLinC argued that the University selectively applied its Human Rights Policy and sought a preliminary injunction to restore its status as an RSO while the litigation was pending. That was granted. The district court noted in the preliminary injunction order that BLinC had "a fair chance of succeeding on the merits of its claims under the Free Speech Clause" and found that the University selectively applied its Human Rights Policy.

In response to the preliminary injunction, the University, through its Center for Student Involvement and Leadership, began a "Student Org Clean Up Proposal" and reviewed all RSO constitutions to bring them into compliance with the Human Rights Policy. In charge of this review were Melissa Shivers, the Vice President for Student Life; William Nelson, Associate Dean of Student Organizations; and Andrew Kutcher, Coordinator for Student Development. Reviewers were told to "look at religious student groups first" for language that required leaders to affirm certain religious beliefs.

Around the same time the reviewers turned their focus to religious groups, the University amended the Human Rights Policy to expressly exempt sororities and fraternities from the policy prohibiting sex discrimination. But the University did deregister 38 student groups—most for failure to submit updated documents—and several were deregistered for requiring their leaders to affirm statements of faith. InterVarsity was one of them.

C. InterVarsity

InterVarsity has been active at the University for over twenty-five years. The group is affiliated with InterVarsity Christian Fellowship/USA, "a national ministry" to "establish university-based witnessing communities of students and faculty who follow Jesus as Savior and Lord, and who are growing in love for God, God's Word, and God's people of every ethnicity and culture." InterVarsity.

Membership and participation in the University's chapter of InterVarsity is open to all students, but those who seek leadership roles are required to affirm a statement of faith, which includes "the basic biblical truths of Christianity."

Over twenty-five years, Iowa had no problem with InterVarsity. But in June 2018, Andrew Kutcher charged that InterVarsity's constitution violated the Human Rights Policy. InterVarsity's leader, Katrina Schrock, responded that the constitution did not prevent anyone from joining if they did not subscribe to the group's faith, but that only its leaders were required to affirm their statement of faith. Kutcher countered that "[h]aving a restriction on leadership related to religious beliefs is contradictory to [the Human Rights Policy]."

Schrock asked Kutcher if the University would accept amended language that "requested [leaders] to subscribe" or that they "are strongly encouraged to subscribe" to the statement of faith. Kutcher consulted with the University's general counsel, who told him that the proposed amended language was not allowed.

InterVarsity did not bend, and so the University deregistered the group a few weeks later. Afterwards, InterVarsity struggled with recruiting members, organizing activities, and spent money and other resources in fighting its deregistration. After the preliminary injunction in BLinC's case was extended, the University ultimately reinstated InterVarsity and the other religious groups it deregistered. But after having lost a significant number of members and out of fear of "retaliation from the University," InterVarsity brought this action for First Amendment violations.

D. Litigation

InterVarsity sued the University of Iowa; Bruce Harreld, the President of the University; Thomas Baker, the Student Misconduct and Title IX Investigator; Melissa Shivers; William Nelson; and Andrew Kutcher under 42 U.S.C. § 1983 in both their official and individual capacities for violations of its rights to free speech, free association, and free exercise under the First Amendment. It also asserted violations of its right to select its own leadership under the Religion Clauses of the First Amendment and state law claims. InterVarsity sought damages and a permanent injunction prohibiting the University from denying RSO status. Everyone cross-moved for summary judgment, and the individual defendants sought qualified immunity.

The district court first found that the University and the individual defendants violated InterVarsity's First Amendment rights and granted summary judgment on its free speech, free association, and free exercise claims. It also granted summary judgment to the University and individual defendants on InterVarsity's Religion Clauses claim.

As for qualified immunity, the court denied the individual defendants qualified immunity on the free speech and association claims, finding that the law was clearly established that the University could not discriminate based on viewpoint. The court noted that while the defendants in *BLinC I* got qualified immunity, the court's preliminary injunction order "squarely applied" First Amendment law on the "selective application of the Human Rights Policy to a religious group's leadership requirements." Noting that the "finding of likelihood of success on the merits is not the same as a final determination that a constitutional violation has occurred," the district court held that its preliminary injunction order in BLinC's case put the question beyond debate and clearly established the University's actions as unconstitutional.

Turning to InterVarsity's free exercise claim, the court found a free exercise violation and denied qualified immunity as moot because "each constitutional violation was founded on the same underlying conduct" and InterVarsity's damages did not vary depending on the violation.

The individual defendants appealed. They suggest that even if their actions violated InterVarsity's rights to free speech, they are entitled to qualified immunity because the law was not clearly established. InterVarsity did not cross-appeal.

II.

We review a district court's denial of summary judgment on the basis of qualified immunity *de novo.* "In doing so, we grant the nonmoving party 'the benefit of all relevant inferences.'"

"Qualified immunity shields public officials from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Turning Point USA at Ark. St. Univ. v. Rhodes*, 973 F.3d 868, 875 (8th Cir. 2020). We determine "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct."

A. Constitutional Violation

InterVarsity's free speech and free expressive association claims merge into one because "[*w*]*ho* speaks on [InterVarsity's] behalf . . . colors *what* concept is conveyed." So, we look to precedent dealing with limited public forums and the right to free speech and association.

"A university establishes limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects." There is no dispute that the University of Iowa created a limited public forum by granting RSOs official recognition and access to a variety of benefits. And when a university does, it may restrict access to that limited public forum so long as the "access barrier [is] reasonable and viewpoint neutral." "If a state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint.'"

The district court found that the University's Human Rights Policy was reasonable and viewpoint neutral, but not as applied to InterVarsity. We agree. A reasonable "nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." "The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction."

That is what the University and individual defendants did to InterVarsity. For decades, the University permitted RSOs to base their membership and leadership on religious affirmations or other traits that are protected by the Human Rights Policy. They did this for religious groups (e.g., the Christian Legal Society and Imam Mahdi Organization) and secular groups (e.g., sororities and fraternities, ideological groups, and groups that prefer their members or leaders to identify as a racial minority). In fact, the University still permits this; but it didn't for InterVarsity.

The district court found that the defendants likely violated BLinC's constitutional rights and ordered the University to apply the Human Rights Policy equally to all RSOs. But instead of doing that, the University started a compliance review that prioritized religious organizations. That review led to InterVarsity's deregistration, along with other religious groups. The University's fervor dissipated, however, once they finished with religious RSOs. Sororities and fraternities got exemptions from the Human Rights Policy. Other groups were permitted to base membership on sex, race, veteran status, and even some religious beliefs.

Take LoveWorks, for example. It was formed by the student who was denied a leadership role in BLinC. LoveWorks requires its members and leaders to sign a "gay-affirming statement of Christian faith.'" Despite that requirement—which violates the Human Rights Policy just as much as InterVarsity's—the University did nothing.

We are hard-pressed to find a clearer example of viewpoint discrimination. The University's choice to selectively apply the Human Rights Policy against InterVarsity suggests a preference for certain viewpoints—like those of LoveWorks—over InterVarsity's. The University focused its "clean up" on specific religious groups and then selectively applied the Human Rights Policy against them. Other groups were simply glossed over or ignored.

Because the University and individual defendants violated InterVarsity's First Amendment rights, the question is whether their actions satisfy strict scrutiny. The University "can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." Here, the district court found that the University did not have a compelling government interest in singling out InterVarsity for deregistration because it could

not point to "any actual harm to [the University's] interests caused by InterVarsity's religious leadership requirements." The court further found that the University's decision to deregister InterVarsity was not narrowly tailored because it "did not meaningfully consider less-restrictive alternatives to deregistration."

On appeal, the University and individual defendants do not try to argue their actions survive strict scrutiny. That is wise. Of course, the University has a compelling interest in preventing discrimination. But it served that compelling interest by picking and choosing what kind of discrimination was okay. Basically, some RSOs at the University of Iowa may discriminate in selecting their leaders and members, but others, mostly religious, may not. If the University honestly wanted a campus free of discrimination, it could have adopted an "all-comers" policy like the one in *Martinez.*

The University could also have made an explicit exemption for religious beliefs like it did for sororities and fraternities. But it "offers no compelling reason why it has a particular interest in denying an exception to [InterVarsity] while making them available to others." "Instead, the University took an extreme step—complete deregistration of InterVarsity—to discriminately prevent theoretical harms that may never materialize."

The University and individual defendants' selective application of the Human Rights Policy against InterVarsity was viewpoint discrimination in violation of the First Amendment. It cannot survive strict scrutiny.

B. Clearly Established

We now consider whether it was clearly established that the University violated InterVarsity's First Amendment rights. We do not "define clearly established law at a high level of generality." Instead, "we look for a controlling case or a robust consensus of cases of persuasive authority." We do not need "a prior case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."

The University and individual defendants say that the law is not clearly established when there is a direct conflict between civil rights laws and First Amendment protections in the University

setting. InterVarsity, on the other hand, argues that its right to be free from viewpoint discrimination when speaking in a university's limited public forum was clearly established at the time of the violation.

In denying the individual defendants qualified immunity below, the district court treated its preliminary injunction in the BLinC case as precedent. The court explained that the order applied the appropriate First Amendment cases and put the individual defendants on notice that their actions were unconstitutional. It remarked, "[t]he Court would never have expected the University to respond to that order by homing in on religious groups' compliance with the policy while at the same time carving out explicit exemptions for other groups. But here we are."

While we share the district court's frustration with the University's conduct, we do not consider the BLinC preliminary injunction as precedent that clearly established the individual defendants' conduct was unconstitutional. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." "Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity." While the Eighth Circuit "subscribes to a broad view of what constitutes clearly established law," and we often look to "state courts, other circuits and district courts," for what is clearly established, we will not rely on a district court's preliminary injunction as clearly established law in this case.

But when the district court denied the individual defendants qualified immunity, it did not have the benefit of our decision in *BLinC II*. We found that the law was clearly established that universities may not engage in viewpoint discrimination against RSOs based on a nondiscrimination policy. In reaching that conclusion, we relied on Supreme Court precedent, our own case law, and other circuit decisions. The Supreme Court has clearly stated that universities may not single out groups because of their viewpoint.[1] Our own precedent clearly establishes that this is a violation of the First Amendment. Out-of-circuit decisions also define

[1] The court cited *Healy v. James* as Supreme Court precedent that justified finding that the law in this case was "clearly established. *Healy v. James*, 408 U.S. 169, 187-88 (1972).

the selective application of a nondiscrimination policy against religious groups as a violation of the First Amendment.

Relying on those precedents, we held that the University's choice to deregister BLinC while permitting other student organizations to base membership and leadership on specific traits or affirmations of beliefs was viewpoint discrimination and a violation of the First Amendment that was clearly established. The University and individual defendants in that case took action against BLinC well before InterVarsity was ever on their radar. If the law was clearly established when the University discriminated against BLinC, it was clearly established when they did the same thing to InterVarsity.

We acknowledge that the intersection of the First Amendment and anti-discrimination principles can present challenging questions. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." And, if applied properly, it protects "all but the plainly incompetent or those who knowingly violate the law."

But as Justice Thomas asked in *Hoggard v. Rhodes*, "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting. What the University did here was clearly unconstitutional. It targeted religious groups for differential treatment under the Human Rights Policy—while carving out exemptions and ignoring other violative groups with missions they presumably supported. The University and individual defendants turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven.

III.

The judgment of the district court is affirmed.

Notes and Questions

1. Note that the appellate court agreed with the trial court that the university administrators who were sued individually did not enjoy qualified immunity, which makes them individually liable for a portion of the damages payable to the plaintiff. Since the University of Iowa is public, state law or institutional policy may determine whether or not these individual defendants are indemnified by the state or by the University, which may require them to use their own funds to pay the damages.

2. What are the implications of this opinion for the enforcement of nondiscrimination policies on campus, as applied to student organizations? Should the university adopt an "all comers" policy, as was discussed in *Martinez* and found compliant with the Constitution?

3. In addition to the *Meriwether* case, included in section 1.6.4, this case suggests a tension between a public institution's nondiscrimination policy as applied to faculty, staff, and student organizations and the religious beliefs of those individuals and organizations. How can a public institution reconcile these protections without violating the First Amendment's speech and Free Exercise Clauses?

4. For background on the tension between nondiscrimination policies and free exercise of religion, see Melanie Crouch, "Comment: The Public University's Right to Prohibit Discrimination." 53 *Houston Law Review* 1369 (2016).

SEC. 10.1. Student Organizations

Problem 18[*]

Midstate University is a large state university. In the last few years, several student organizations have been established at the university that focus, in whole or in part, on religious values, religious worship, and religious evangelism. The New Light Fellowship, a student group affiliated with an outside religious organization, has been active on campus for two years. It is recognized by the Student Government Association, and thus receives funding from mandatory student fees and is allowed to hold meetings in the Student Union. Meetings are devoted to prayer and to discussions of religious philosophy and ethics.

One of the credos of the New Light Fellowship is the separation of the races. The group will not allow students of color to attend its meetings or to become members. Members believe that this practice is religiously based and derives from a literal interpretation of the Bible.

The Association of Black Students (ABS), another student organization recognized by the student government, is aware of the practices of New Light Fellowship. ABS has protested to university officials about the existence of such a group on campus, its funding from mandatory student fees, and its use of campus facilities. The ABS members argue that such university support for the New Light Fellowship violates the Establishment Clause and the equal protection clause of the U.S. Constitution and also violates their free speech rights.

The ABS has filed a lawsuit in federal district court, seeking to enjoin the university from providing recognition, funding, and student union space to the Fellowship. The Fellowship argues that any such action, by the university or by the court, would violate its free exercise of religion and its freedom of association rights.

Advise the university president on the likelihood of ABS's success in this lawsuit. Also consider whether the university should redraft its policies for recognition of student organizations and for allocating student fees to student organizations.

Would the analysis be any different if the New Light Fellowship discriminated on the basis of sexual orientation rather than race?

[*] With thanks to James Brooks, who drafted the original problem from which this problem is adapted.

SEC. 10.3.5. The Student Press

Papish v. Board of Curators of the University of Missouri
410 U.S. 667 (1973)

PER CURIAM

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech"[1] in violation of a bylaw of the Board of Curators. The newspaper, the *Free Press Underground*, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the State of Liberty and the Goddess of Justice. The caption under the cartoon read: "...With Liberty and Justice for All." Secondly, the issue contained an article entitled "M-----f----- Acquitted," which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M-----f-----."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the "General Standards of Student Conduct," which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech."[2] Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in which she made a passing grade.[3]

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[1] This charge was contained in a letter from the University's Dean of Students, which is reprinted in the Court of Appeals' opinion. 464 F.2d 136, 139 (CA8 1972).

[2] In pertinent part, the bylaw states: "Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. . . . Indecent conduct or speech...are examples of conduct which would contravene this standard. . . ." 464 F.2d, at 138.

[3] Miss Papish, a 32-year-old graduate student, was admitted to the graduate school of the University in September 1963. Five and one-half years later, when the episode under consideration occurred, she was still pursuing her graduate degree. She was on "academic probation" because of "prolonged submarginal academic progress," and since November 1, 1967, she also had been on disciplinary probation for disseminating Students for a Democratic Society literature found at a university hearing to have contained "pornographic, indecent and obscene words." This dissemination had occurred at a time when the

After exhausting her administrative review alternatives within the University, petitioner brought an action for declaratory and injunctive relief pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, 331 F. Supp. 1321, and the Court of Appeals affirmed, one judge dissenting. 464 F.2d 136. . . .

The District Court's opinion rests, in part, on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." *Id*., at 145. The court concluded that "the Constitution does not compel the University...[to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." *Ibid*.

This case was decided several days before we handed down *Healy v. James*, 408 U.S. 169 (1972), in which, while recognizing a state university's undoubted prerogative to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id*., at 180. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). We think Healy makes it clear that the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. E.g., *Kois v. Wisconsin*, 408 U.S. 229 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). There is language in the opinions below that suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, e.g., *Healy v. James*, 408 U.S., at 192-193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution.[4]

University was host to high school seniors and their parents. 464 F.2d, at 139 nn. 3 and 4. But disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.

[4] It is true, as MR. JUSTICE REHNQUIST's dissent indicates, that the District Court emphasized that the newspaper was distributed near the University's memorial tower and concluded that petitioner was

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Reversed and remanded.

MR. CHIEF JUSTICE BURGER, dissenting.

I join the dissent of JUSTICE REHNQUIST, which follows and add a few observations.

* * * *

Unlike...traditional First Amendment cases [involving criminal prosecutions], we deal here with rules that govern conduct on the campus of a state university. In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

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engaged in "pandering." The opinion makes clear, however, that the reference to "pandering" was addressed to the content of the newspaper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated. 331 F. Supp., at 1325, 1328, 1329, 1330, 1332. As the Court of Appeals opinion states, "the facts are not in dispute." 464 F.2d, at 138. The charge against petitioner was quite unrelated to either the place or manner of distribution. The Dean's charge stated that the "forms of speech" contained in the newspaper were "improper on the University campus." *Id.*, at 139. Moreover, the majority below quoted without disapproval petitioner's verified affidavit stating that "no disruption of the University's functions occurred in connection with the distribution." *Id.*, at 139-140. Likewise, both the dissenting opinion in the Court of Appeals and the District Court opinion refer to this same uncontroverted fact. *Id.*, at 145; 331 F. Supp., at 1328. Thus, in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.

Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications that are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

* * * *

I.

Petitioner Papish has for many years been a graduate student at the University of Missouri. Judge Stephenson, writing for the Court of Appeals in this case, summarized her record in these words:

> "Miss Papish's academic record reveals that she was in no rush to complete the requirements for her graduate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September in 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled 'Research Journalism' and in a three-hour course entitled 'Ceramics 4.' In the semester immediately preceding her dismissal, she was enrolled only in 'Ceramics 3.'" 464 F.2d, at 138 n. 2.

Whatever may have been her lack of ability or motivation in the academic area, petitioner had been active on other fronts. In the words of the Court of Appeals:

> "3. On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for

her probation was her violation of the general standard of student conduct. . . . This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia*, with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at the ensuing hearing, that one of these publications, the *New Left Notes*, contained 'pornographic, indecent and obscene words, "f---," "bull s---," and "sh--s."' The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained "a pornographic and indecent picture depicting two rats apparently fornicating on its cover. . . ."

"4. Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree." *Id*., at 138-139, nn. 3, 4.

It was in the light of this background that respondents finally expelled petitioner for the incident described in the Court's opinion. The Court fails to note, however, two findings made by the District Court with respect to the circumstances under which petitioner hawked her newspaper near the memorial tower of the University:

"The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the University, students, including many persons under 18 years of age and high school students." 331 F. Supp. 1321, 1325 n. 4.

> "The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities." *Id.*, at 1325.

II.

I continue to adhere to the dissenting views expressed in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), that the public use of the word "M-----f-----" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). . . .

* * * *

A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force.

III.

The Court cautions that "disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators. . . .

Notes and Questions

1. When may colleges and universities legally regulate the distribution by students of material that some students, faculty, or community members would find offensive? See generally the Text Sections 10.3.3, 10.3.5, and 10.3.6. Do private institutions have more latitude in such regulation than public institutions? See generally the Text Section 10.3.6.

2. What legal and policy guidelines should institutions follow in developing regulations regarding offensive or indecent student expression? See the Text sections cited in note 1 above; and see generally Section 9.5.3 of the Text.

3. Chief Justice Burger and Justice Rehnquist cited various reasons for disapproving the majority opinion. Do you agree with them? What implications do their views have for institutional academic freedom? For the academic freedom of students and faculty members?

4. For a case involving indecent or offensive speech by a faculty member, see *Martin v. Parrish*, set out in Section 6.2.2 above. How do you reconcile the result in *Papish* with the result in *Martin v. Parrish*; can you justify the greater protection for the student in the former than for the faculty member in the latter?

SEC. 10.3. The Student Press

Hosty v. Carter
412 F.3d 731 (7th Cir. 2005) (*en banc)*

EASTERBROOK, Circuit Judge.

Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator,* the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey de Laforcade, the paper's faculty adviser.

I.

After articles bearing Margaret Hosty's by-line attacked the integrity of Roger K. Oden, Dean of the College of Arts and Sciences, the University's administration began to take intense interest in the paper. (Here, and in Part II of this opinion as well, we relate matters in the light most favorable to the plaintiffs.) Both Oden and Stuart Fagan (the University's President) issued statements accusing the *Innovator* of irresponsible and defamatory journalism. When the *Innovator* declined to accept the administration's view of its duties – in particular, the paper refused to retract factual statements that the administration deemed false, or even to print the administration's responses – Patricia Carter, Dean of Student Affairs and Services, called the *Innovator's* printer and told it not to print any issues that she had not reviewed and approved in advance. The printer was not willing to take the risk that it would not be paid (the paper relies on student activity funds), and the editorial staff was unwilling to submit to prior review. Publication ceased in November 2000. The paper has since resumed publication under new management; Porche, Hosty, and Steven Barba, another of the paper's reporters, have continued the debate in court, suing the University, all of its trustees, most of its administrators, and several of its staff members for damages under 42 U.S.C. § 1983

Defendants moved for summary judgment, and the district court granted the motion with respect to all except Dean Carter. 2001 WL 1465621, 2001 U.S. Dist. LEXIS 18873 (N.D.Ill. Nov. 13, 2001); see also 174 F. Supp.2d 782 (N.D.Ill.2001). Some defendants prevailed because, in the district judge's view, they had not done anything wrong (or, indeed, anything at all, and § 1983 does not create vicarious liability); others received qualified immunity. As for Carter, however, the judge thought that the evidence could support a conclusion that threatening

to withdraw the *Innovator's* financial support violated the first amendment to the Constitution (applied to the University, as a unit of state government in Illinois, through the fourteenth). Although *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), holds that faculty may supervise and determine the content of a student newspaper, the district court thought that decision limited to papers published by high school students as part of course work and inapplicable to student newspapers edited by college students as extracurricular activities – and the judge added that these distinctions are so clearly established that no reasonable person in Carter's position could have thought herself entitled to pull the plug on the *Innovator*. Carter took an interlocutory appeal to pursue her claim of qualified immunity. See *Behrens v. Pelletier*, 516 U.S. 299 (1996). A panel of this court affirmed, 325 F.3d 945 (2003), and we granted Carter's petition for rehearing en banc.

When entertaining an interlocutory appeal by a public official who seeks the shelter of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Only if the answer is affirmative does the court inquire whether the official enjoys qualified immunity. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. We address the issues in the order *Saucier* specifies: the existence of a constitutional claim in Part II and immunity in Part III.

II.

A.

Hazelwood provides our starting point. A high school's principal blocked the student newspaper (which was financed by public funds as part of a journalism class) from publishing articles that the principal thought inappropriate for some of the school's younger students and a potential invasion of others' privacy. When evaluating the students' argument that the principal had violated their right to freedom of speech, the Court first asked whether the paper was a public forum. 484 U.S. at 267-70. After giving a negative answer based on the school's established policy of supervising the writing and reviewing the content of each issue, the Court observed that the school's subvention of the paper's costs distinguished the situation from one in which students were speaking independently, as in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). When a school regulates speech for which it also pays, the Court held, the appropriate question is whether the "actions are reasonably related

to legitimate pedagogical concerns." 484 U.S. at 273. "Legitimate" concerns, the Court stated, include setting "high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world – and [the school] may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* at 271-72. Shortly after this passage the Court dropped a footnote: "A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273-74 n. 7 (citations omitted).

Picking up on this footnote, plaintiffs argue, and the district court held, that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot ever insist that student newspapers be submitted for review and approval. Yet this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age. Only when courts need assess the reasonableness of the asserted pedagogical justification in nonpublic-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood's* text. To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters – not only the desire to ensure "high standards for the student speech that is disseminated under [the school's] auspices" (the Court particularly mentioned "speech that is … ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences", 484 U.S. at 271) but also the goal of dissociating the school from "any position other than neutrality on matters of political controversy", *id.* at 272 – there is no sharp difference between high school and college papers.

The Supreme Court itself has established that age does not control the public-forum question. See generally "Symposium: Do Children Have the Same First Amendment Rights As Adults?," 79 *Chi.-Kent L.Rev.* 3-313 (2004) (including many articles collecting and discussing these decisions). So much is clear not only from decisions such as *Tinker,* which held that public

school students have a right of non-disruptive personal expression on school premises, but also from the decisions concerning the use of school funds and premises for religious expression. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995); *Good News Club v. Milford Central School,* 533 U.S. 98 (2001). These decisions hold that no public school, of any level – primary, secondary, or post-secondary – may discriminate against religious speech in a public forum (including classrooms made available to extracurricular activities), or withhold funding that would be available to student groups espousing sectarian views. *Good News Club,* which dealt with student clubs in an elementary school, deemed dispositive (533 U.S. at 110), a decision about the first amendment rights of college students. Having opened its premises to student clubs, and thus created a limited-purpose public forum, even an elementary school could not supervise or censor the views expressed at a meeting of the Good News Club.

If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school (the holding of *Good News Club*) then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level – or later, as *Rust v. Sullivan,* 500 U.S. 173 (1991), shows by holding that the federal government may insist that physicians use grant funds only for the kind of speech required by the granting authority. Cf. *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998). We hold, therefore, that *Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools. See also *Axson-Flynn v. Johnson,* 356 F.3d 1277 (10th Cir.2004) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when the speech is connected to the curriculum); *Bishop v. Aronov,* 926 F.2d 1066 (11th Cir.1991) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when readers might infer the school's approval).

B.

Hazelwood's first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a non-public forum or publish the paper itself (a closed forum where content may be supervised)? Plaintiffs contend, and the district court agreed, that the Court found a public forum missing in *Hazelwood* only because the paper was prepared as part of the journalism curriculum. By contrast, the *Innovator* was an extracurricular activity, and thus beyond all control, the district court concluded. Yet if the Constitution establishes a bright line between curricular activities and all other speech, then decisions such as *Rust* and *Finley* are inexplicable, for they hold that speakers who have completed their education still must abide by the conditions

attached to public subsidies of speech and other expressive activities. See also Robert C. Post, "Subsidized Speech," 106 *Yale L.J.* 151 (1996).

Suppose the University had given the *Innovator* $10,000 to publish a semester's worth of newspapers, and Porche then had decided that the students would get more benefit from a booklet describing campus life and cultural activities in the surrounding neighborhoods. Both paper and booklet are forms of speech, but the fact that the publication was not part of the University's curriculum and did not carry academic credit would not have allowed Porche to divert the money from one kind of speech to the other. Or suppose that the publication in question were one under the University's direct management – say, its alumni magazine. If the University offered course credit to journalism students who prepared a publishable puff piece, the right to control would be evident. The University, after all, is the alumni magazine's publisher; the contents are *its* speech; units of state and local government are entitled to speak for themselves. See *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550, 559-567 (2005); *University of Wisconsin v. Southworth,* 529 U.S. 217, 229 (2000); *Keller v. State Bar,* 496 U.S. 1, 12-13 (1990). That institutions can speak only through agents does not allow the agents to assume control and insist that submissions graded D-minus appear under the University's masthead. *Livestock Marketing Ass'n* has dispelled all doubt on that score

Now take away the course credit and assume that the alumni magazine hires students as stringers and pays by the word for any articles accepted and printed. The University would remain the operator of this non-public forum and could pick and choose from among the submissions, printing only those that best expressed the University's own viewpoint. Thus although, as in *Hazelwood,* being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition. Extracurricular activities may be outside any public forum, as our alumni-magazine example demonstrates, without also falling outside all university governance. Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts. See *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990); *University of Michigan v. Ewing,* 474 U.S. 214 (1985); *Southworth,* 529 U.S. at 237-39 (Souter, J., concurring).

C.

What, then, was the status of the *Innovator?* Did the University establish a public forum? Or did it hedge the funding with controls that left the University itself as the newspaper's publisher? If the paper operated in a public forum, the University could not vet its contents. See *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). But if underwritten student

publications at Governors State University are a non-public forum, then it becomes important whether Dean Carter had legitimate pedagogical reasons for her action. We do not think it possible on this record to determine what kind of forum the University established or evaluate Dean Carter's justifications. But the question posed by *Saucier* is not who wins in the end, but whether the evidence makes out a constitutional claim when taken in the light most favorable to the plaintiff. These facts would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum and thus was beyond the control of the University's administration.

The *Innovator* did not participate in a traditional public forum. Freedom of speech does not imply that someone else must pay. The University does not hand out money to everyone who asks. But by establishing a subsidized student newspaper, the University may have created a venue that goes by the name "designated public forum" or "limited-purpose public forum." See *United States v. American Library Association,* 539 U.S. 194 (2003); *United States v. Kokinda,* 497 U.S. 720 (1990); *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). Participants in such a forum, declared open to speech *ex ante,* may not be censored *ex post* when the sponsor decides that particular speech is unwelcome. The classrooms used for meetings in *Good News Club* were designated public forums, and because the school allowed any student group to use the space the Court held that it could not forbid religious speech. In the same way, a school may declare the pages of the student newspaper open for expression and thus disable itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered. Dean Carter did not purport to alter the terms on which the *Innovator* operated; that authority belonged to the Student Communications Media Board. And the rules laid down by the Board, though ambiguous, could be thought (when considered as favorably to plaintiffs as the record allows) to create a designated public forum.

Defendants concede that the Board is the publisher of the *Innovator* and other subsidized print and broadcast media. The Board has seven members, all chosen by the Student Senate: four students, two faculty members, and one "civil service or support unit employee of the university." The Board determines how many publications it will underwrite (subject to the availability of funds, which as in *Southworth* and *Rosenberger* come from student activities fees), and the general character of each. It appoints "for the period of one year, the head of each student media staff." The Board's policy is that each funded publication "will determine content and format … without censorship or advance approval." If this is all there is to it, then the *Innovator* is in the same position as the student speakers in *Southworth* and *Rosenberger*; a designated public forum has been established, and the faculty cannot censor speech within it. When viewing matters in the light most favorable to the students, we stop here, because other matters are cloudy.

Two things have the potential to cast matters in a different light if a trial were to occur. One is that the Board's charter provides that it is "responsible to the Director of Student Life." Perhaps the Director of Student Life (who appears to be one of Dean Carter's subordinates) has established criteria for subsidized student publications. None is in the record, however, so this possibility does not matter. The other is that each funded publication has a faculty adviser. The parties disagree not only about who the adviser was at the critical time (plaintiffs say that de Laforcade remained their adviser even after he left the University's faculty; Carter insists that a different person filled that position) but also about whether the adviser just offers advice (plaintiffs' view) or exercises some control (Carter's view). Because the district court acted on a motion for summary judgment, it assumed (as do we) that plaintiffs' perspective is the correct one. On that understanding, the Board established the *Innovator* in a designated public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.

III.

Qualified immunity nonetheless protects Dean Carter from personal liability unless it should have been "clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. One might well say as a "broad general proposition" something like "public officials may not censor speech in a designated public forum," but whether Dean Carter was bound to know that the *Innovator* operated in such a forum is a different question altogether.

The district court held that any reasonable college administrator should have known that (a) the approach of *Hazelwood* does not apply to colleges; and (b) only speech that is part of the curriculum is subject to supervision. We have held that neither of these propositions is correct – that *Hazelwood's* framework is generally applicable and depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities.

But even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule. The question had been reserved in *Hazelwood*, and the Supreme Court does not identify for future decision questions that already have "clearly established" answers. Post-*Hazelwood* decisions likewise had not "clearly established" that college administrators must keep hands off all student newspapers. As we mentioned in Part II.A, the tenth and eleventh circuits have used

Hazelwood as the framework for evaluating the acts of colleges as well as high schools. One circuit has said otherwise. See *Student Government Ass'n v. University of Massachusetts,* 868 F.2d 473, 480 n. 6 (1st Cir.1989) (asserting, in sole reliance on *Hazelwood's* footnote 7, that the Supreme Court itself "holds" that *Hazelwood's* approach does not apply to post-secondary education). The approach of others is hard to classify. See *Kincaid v. Gibson,* 236 F.3d 342, 346 n. 5 (6th Cir.2001) (en banc) (stating, in reliance on the parties' agreement, that *Hazelwood* has "little application" to collegiate publications but not explaining what this means, or how a constitutional framework can apply "just a little"). This circuit had not spoken on the subject until our panel's opinion, which post-dated Dean Carter's actions.

Many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply, as we remarked in *Baxter v. Vigo County School Corp.,* 26 F.3d 728 (7th Cir.1994), when holding school administrators entitled to qualified immunity for banning certain message-bearing T-shirts that the elementary-school pupils claimed were protected under *Tinker.* See also, e.g., *Brown v. Li,* 308 F.3d 939 (9th Cir.2002), in which the members of the appellate panel articulated three distinct and incompatible views about whether *Hazelwood* applies to collegiate settings and how the first amendment affects relations between college faculty and students' expression.

Neither plaintiffs, who have elected to appear *pro se,* nor the *amici curiae* who have ably supported their position in this court, contend that Dean Carter owes damages from her own purse if *Hazelwood* establishes the appropriate legal framework. For reasons that should by now be evident, the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation – and it is the function of qualified immunity to ensure that such uncertainties are resolved by prospective relief rather than by financial exactions from public employees. "Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau* [*v. Haugen,* 543 U.S. 194, 198 (2004)]. That description is as apt here as it was it was in *Brosseau.*

Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved. Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bills violated the first amendment. She therefore is entitled to qualified immunity from liability in damages.

REVERSED.

TERENCE T. EVANS, Circuit Judge, joined by ILANA DIAMOND ROVNER, WOOD, and WILLIAMS, Circuit Judges, dissenting.

In concluding that *Hazelwood* extends to a university setting, the majority applies limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education. Because these restrictions on free speech rights have no place in the world of college and graduate school, I respectfully dissent.

The majority's conclusion flows from an incorrect premise-that there is no legal distinction between college and high school students. In reality, however, "[t]he Court long has recognized that the status of minors under the law is unique in many respects." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). Age, for which grade level is a very good indicator,[1] has always defined legal rights. As the Court has noted:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (internal citations omitted).

This principle is clear with respect to free speech rights, where the Court has delineated a consistent line between high-school-age students and those at the university level. As the Court noted in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 238 n. 4 (2000), "the right of teaching institutions to limit expressive freedom of students ha[s] been confined to high schools whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." (Internal citations omitted.) *See also Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

[1] According to the U.S. Census Bureau, only about one percent of those enrolled in American colleges and universities in 2002 were under the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey (CPS) Rep., Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

There are two reasons why the law treats high school students differently than it treats college students, who "are, of course, young adults," *Widmar v. Vincent,* 454 U.S. 263, 274 n. (1981): high school students are less mature and the missions of the respective institutions are different. These differences make it clear that *Hazelwood* does not apply beyond high school contact.

It is self-evident that, as a general matter, juveniles are less mature than adults. Indeed, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti,* 443 U.S. at 635 . . . . It is this reasoning that dictated the results in *Hazelwood*. In *Hazelwood,* the Court emphasized that a different First Amendment standard is appropriate in a high school setting because those students are young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics. *Hazelwood,* 484 U.S. at 272. It was, therefore, reasonable to restrict publication of an article about teenage pregnancy . . . . The same concerns simply do not apply to college students, who are certainly (as a general matter) more mature, independent thinkers. *Tilton v. Richardson,* 403 U.S. 672, 686 (1971), establishes this point. The Court upheld a federal law that provided funding to church-related colleges and universities for construction of facilities for secular educational purposes. The Court noted that precollege students may not have the maturity to make their own decisions on religion; however, "college students are less impressionable and less susceptible to religious indoctrinations."

Not only is there a distinction between college and high school students themselves, the missions of the two institutions are quite different. Elementary and secondary schools have "custodial and tutelary responsibility for children," *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls,* 536 U.S. 822, 829-30 (2002) (holding that "Fourth Amendment rights . . . are different in public schools than elsewhere"), and are largely concerned with the "inculcation" of "values." [*Bethel School District v.*] *Fraser,* 478 U.S. at 683; *see also Ambach v. Norwick,* 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]"). A university has a different purpose – to expose students to a "marketplace of ideas." *Keyishian v. Bd. of Regents of the Univ. of N.Y.,* 385 U.S. 589, 603 (1967) (emphasizing that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . .") *See also Bd. of Regents v. Southworth,* 529 U.S. 217, 231 (2000) ("[R]ecognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."); *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 836 (1995) (noting that intellectual curiosity of students remains today a central determination of a university's success and asserting that

restriction of that curiosity "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (noting that an atmosphere of " 'speculation, experiment and creation' " is "essential to the quality of higher education" (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))); *Widmar*, 454 U.S. at 267-68 n. 5. ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' "). As the Supreme Court perhaps best articulated in *Healy v. James*:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas,'" and we break no new constitutional ground in affirming this Nation's dedication to safeguarding academic freedom. 408 U.S. 169, 180-81 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 81 (1960), and *Keyishian*, 385 U.S. at 603).

Based on this important notion, I do not believe it is appropriate for this court to extend *Hazelwood* to the college and university setting.

The majority's holding, furthermore, is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech . . . . If the plaintiffs' allegations are true, this case epitomizes this concern. The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values. First, prior restraints are particularly noxious under the Constitution. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press] guaranty to prevent previous restraints upon publication"). Second, and even more fundamental, as Justice Frankfurter stated (albeit in somewhat dated language) in *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944), "one of the prerogatives of American citizenship is the right to criticize public men and measures." College students – voting-age citizens and potential future leaders –

should feel free to question, challenge, and criticize government action. Nevertheless, as a result of today's holding, Dean Carter could have censored the *Innovator* by merely establishing "legitimate pedagogical reasons." This court now gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment.

Finally, I disagree with the majority's conclusion that Dean Carter is entitled to qualified immunity. Prior to *Hazelwood,* courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *See, e.g., Stanley v. Magrath,* 719 F.2d 279 (8th Cir.1983); *Schiff v. Williams,* 519 F.2d 257 (5th Cir.1975); *Joyner v. Whiting,* 477 F.2d 456, 460 (4th Cir.1973); *Bazaar v. Fortune,* 476 F.2d 570 (5th Cir.1973), *adopted en banc in* 489 F.2d 225 (5th Cir.1973); *Trujillo v. Love,* 322 F. Supp. 1266 (D.Colo.1971); *Antonelli v. Hammond,* 308 F. Supp. 1329 (D.Mass.1970); *Dickey v. Alabama St. Bd. of Educ.,* 273 F. Supp. 613 (M.D.Ala.1967), *vacated as moot sub nom. Troy St. Univ. v. Dickey,* 402 F.2d 515 (5th Cir.1968); *Panarella v. Birenbaum,* 32 N.Y.2d 108, 343 N.Y.S.2d 333, 296 N.E.2d 238 (N.Y.1973); *Mazart v. State,* 109 Misc.2d 1092, 441 N.Y.S.2d 600 (N.Y.Ct.Cl.1981); *Milliner v. Turner,* 436 So.2d 1300 (La.Ct.App.1983). *Hazelwood* did not change this well-established rule. So, the question becomes, did anything after *Hazelwood* occur that would suggest to a reasonable person in Dean Carter's position that she could prohibit publication simply because she did not like the articles it was publishing?[3] The answer is clearly "no." In fact, a review of the cases, including those the majority relies on, establishes that no case law would have led any reasonable official in Dean Carter's position to believe she had such power.

To begin, both the First Circuit (explicitly) and Sixth Circuit (implicitly) are of the view that *Hazelwood* does not apply in the university setting. In *Student Government Association v. Board of Trustees of the University of Massachusetts,* 868 F.2d 473, 480 n. 6 (1st Cir.1989), the First Circuit held that *Hazelwood* "is not applicable to college newspapers." In *Kincaid v. Gibson,* 236 F.3d 342 (6th Cir.2001) (en banc), a dispute involving a college yearbook, the court determined that *Hazelwood* had "little application" to the case. *Id.* at 346 n. 5. In so noting, the court ruled that the university's yearbook constituted a limited public forum in which content-based regulations were subject to strict scrutiny. The court then held that the administration's decision to confiscate the yearbook, due to unhappiness over its content, violated the First Amendment.

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[3] Considering that the law was clearly established that college administrators could not control school newspapers, the majority wrongly focuses on the fact that post-*Hazelwood* decisions had not "clearly established that college administrators must keep hands off all student newspapers." The question is not whether later decisions established that college administrators "must keep hands off," but rather whether later decisions did anything to change the already clearly established rule. In other words, did decisions after *Hazelwood* say anything to suggest that college administrators *could* censor school newspapers.

The decisions the majority cites in support of its position, moreover, are inapplicable. *Bishop v. Aronov,* 926 F.2d 1066 (11th Cir.1991), and *Axson-Flynn v. Johnson,* 356 F.3d 1277 (10th Cir.2004), both concerned free speech rights *within* the classroom. *Bishop* held that a university could order a professor to stop interjecting his personal religious beliefs into his class comments during instruction time. *Axson-Flynn* held that an acting student at a university could be required to say script lines that conflict with her Mormon faith as part of the curriculum. These are very different situations than free speech rights of student journalists engaged in an extracurricular activity. Indeed, the Tenth Circuit recognized such a distinction and explicitly limited its holding: "We hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum." *Id.* at 1289. It specifically noted, "We acknowledge that some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities. However, because Axson-Flynn's speech occurred as part of a *curricular* assignment during class time and in the classroom, we need not reach any analysis of university's students' extracurricular speech." *Id.* at 1286 n. 6 (emphasis added) (internal citations omitted). Finally, I am hard-pressed to see the relevance of *Settle v. Dickson County School Board,* 53 F.3d 152 (6th Cir.1995). That case concerned a ninth grader who challenged her teacher's decision not to accept a research paper because it was on an unapproved topic. Regardless, *Kincaid,* not *Settle,* constitutes the Sixth Circuit's definitive word on the issue.

Therefore, considering that no court, both before or after *Hazelwood,* has held that a university may censor a student newspaper, and the only authorities to suggest otherwise are not directly on point, I believe that it was "clearly established" that the University could not deny funding to the school newspaper it found objectionable. The majority also states that Dean Carter is entitled to qualified immunity because "A reasonable person in Dean Carter's position was not bound to recognize that the *Innovator* operated in a designated public forum." Although [the "clearly established" test is] an objective standard, I believe it is noteworthy that, as the district court noted, "Defendants concede that the Innovator serves as a public forum." 174 F. Supp.2d 782, 786 (N.D.Ill.2001). A review of the facts, accepting all well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, support Dean Carter's litigation strategy [in the district court]. Governors State University, by express policy and practice, placed exclusive editorial control of the newspaper with the student editors. Indeed, its own policy stated that the student staff "will determine content and format of their respective publications without censorship or advance approval." The *Innovator* is an independent publication organized and published by students on their own time. The publication is not part of an academic program, but rather an extracurricular activity. The students are provided an advisor, but it is not a class taught by a faculty member, and the advisor did not make any

content decisions, only advice was offered. Considering these facts, a reasonable person in Dean Carter's shoes would have believed the *Innovator* operated as a public forum.

In conclusion, because I believe that *Hazelwood* does not apply, no pedagogical concerns can justify suppressing the student speech here. Dean Carter violated clearly established First Amendment law in censoring the student newspaper. I would affirm the judgment of the district court.

Notes and Questions

1. The majority opinion identifies two questions for determination: (1) on the basis of the facts alleged, whether the defendants' actions violated the student plaintiffs' First Amendment rights; and (2) if so, whether the individual defendants (specifically Dean Carter) would be relieved of liability for money damages under the "qualified immunity" doctrine. It is important to separate the analysis of the two questions and to understand the difference between them. It also is important to note that a grant of qualified immunity, as the majority provides to defendant Carter, does not end the litigation but only precludes the plaintiffs from obtaining a money damages remedy from that defendant. Qualified immunity is discussed in the Text Section 4.4.4.1.

2. The four dissenting judges on this *en banc* court disagree with the seven majority judges on both of the questions in the case (see note 1 above). In particular, they disagree on the applicability of the *Hazelwood* case – a point relevant to both questions. Which opinion has the better of the argument about *Hazelwood*?

3. The majority and dissenting opinions in *Hosty* both mention another student press case decided a few years before *Hosty* by another *en banc* court: *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001). *Kincaid* is discussed in the Text Section 10.3.3. How does the *Kincaid* court's analysis of First Amendment issues differ from the *Hosty* court's analysis? Which case do you think is the better reasoned?

4. The court in *Hosty* and the court in *Kincaid* both emphasize "public forum" analysis. What is the public forum issue, and how does each court resolve it? For more on the public forum concept, see the Text Section 9.4.2; and see also the Illustration of Public Forum Concepts in Sec. 9.4.2 of the Text.

5. If a court in a case like *Hosty* or *Kincaid* were to decline to apply *Hazelwood* or the *Hazelwood* "framework," what then happens to public forum analysis? Does public forum analysis continue to apply to student press cases, whether or not *Hazelwood* applies? If so, then what is the practical significance of declining to apply *Hazelwood*? In what salient respect(s) does an analysis using the *Hazelwood* framework (as in *Hosty*) differ from an analysis that does not use the *Hazelwood* framework (as in *Kincaid*)?

6. Under the facts alleged by the student plaintiffs in *Hosty,* would the defendants' actions be considered a "prior restraint" on the press? If so, what significance would this have for the analysis? See generally the Text Section 10.3.1.

SECS. 9.2., 9.3. and *10.3.*
Disciplinary Rules and Regulations;
Procedures for Suspension, Dismissal, and Other Sanctions; and
Student Press

Problem 19

The student newspaper at a public university has published a controversial article about a sophomore cheerleader in its annual humor issue. The newspaper is funded with student activity fees. The article purports to chronicle the cheerleader's intimate thoughts while leading cheers at a basketball game. The article is vulgar and probably offensive to many readers, and the object of the story is humiliated. The cheerleader and her parents are threatening to sue unless the institution punishes the student authors and editors and forces them to print a retraction in the student newspaper.

If you were the Dean of Students, what information would you seek? Would you consult legal counsel? If so, what questions would you ask and what advice would you request?

If you were the institution's legal counsel, what are the legal issues that you would address? How would you advise the Dean of Students to proceed? Would your analysis change if a student had published this information on the Internet, using the university's computer system?

SEC. 10.4.6. Sex Discrimination in Athletics

Cohen v. Brown University (Cohen II)
991 F.2d 888 (1st Cir. 1993)

OPINION BY: ELYA

In this watershed case, defendants-appellants Brown University, Vartan Gregorian, and David Roach appeal from the district court's issuance of a preliminary injunction ordering Brown to reinstate its women's gymnastics and volleyball programs to full intercollegiate varsity status pending the resolution of a Title IX claim. See *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992). After mapping Title IX's rugged legal terrain and cutting a passable swath through the factual thicket that overspreads the parties' arguments, we affirm.

I. BROWN ATHLETICS: AN OVERVIEW

College athletics, particularly in the realm of football and basketball, has traditionally occupied a prominent role in American sports and American society. For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.

The highway of opportunity runs in both directions. Not only student-athletes, but universities, too, benefit from the magic of intercollegiate sports. Successful teams generate television revenues and gate receipts, which often fund significant percentages of a university's overall athletic program, offering students the opportunity to partake of sports that are not financially self-sustaining. Even those institutions whose teams do not fill the grandstands of cavernous stadiums or attract national television exposure benefit from increased student and alumni cohesion and the support it engenders. Thus, universities nurture the legends, great or small, inhering in their athletic past, polishing the hardware that adorns field-house trophy cases and reliving heroic exploits in the pages of alumni magazines.

In these terms, Brown will never be confused with Notre Dame or the more muscular members of the Big Ten. Although its football team did play in the 1916 Rose Bowl and its men's basketball team won the Ivy League championship as recently as 1986, Brown's athletic program has only occasionally achieved national prominence or, for that matter, enjoyed

sustained success. Moreover, at Brown, as at most schools, women are a relatively inconspicuous part of the storied athletic past. Historically, colleges limited athletics to the male sphere, leaving those few women's teams that sprouted to scrounge for resources.

The absence of women's athletics at Brown was, until 1970, an ineluctable consequence of the absence of women; Brown sponsored a women's college – Pembroke – but did not itself admit women. In 1971, Brown subsumed Pembroke. Brown promptly upgraded Pembroke's rather primitive athletic offerings so that by 1977 there were fourteen women's varsity teams. In subsequent years, Brown added only one distaff team: winter track. Hence, in the 1991-92 academic year, Brown fielded fifteen women's varsity teams – one fewer than the number of men's varsity teams.

II. THE PLAINTIFF CLASS

In the spring of 1991, Brown announced that it, like many other schools, was in a financial bind, and that, as a belt-tightening measure, it planned to drop four sports from its intercollegiate varsity athletic roster: women's volleyball and gymnastics, men's golf and water polo. The University permitted the teams to continue playing as "intercollegiate clubs," a status that allowed them to compete against varsity teams from other colleges, but cut off financial subsidies and support services routinely available to varsity teams (e.g., salaried coaches, access to prime facilities, preferred practice time, medical trainers, clerical assistance, office support, admission preferences, and the like). Brown estimated that eliminating these four varsity teams would save $ 77,813 per annum, broken down as follows: women's volleyball, $37,127; women's gymnastics, $24,901; men's water polo, $9,250; men's golf, $6,545.

Before the cuts, Brown athletics offered an aggregate of 328 varsity slots for female athletes and 566 varsity slots for male athletes. Thus, women had 36.7% of the athletic opportunities and men 63.3%. Abolishing the four varsity teams took substantially more dollars from the women's athletic budget than from the men's budget, but did not materially affect the athletic opportunity ratios; women retained 36.6% of the opportunities and men 63.4%. At that time (and for a number of years prior thereto), Brown's student body comprised approximately 52% men and 48% women.

Following Brown's announcement of the cutbacks, disappointed members of the women's volleyball and gymnastics teams brought suit. They proceeded on an implied cause of action under Title IX, 20 U.S.C. §§ 1681-1688 (1988). . . The plaintiffs charged that Brown's athletic arrangements violated Title IX's ban on gender-based discrimination, a violation that was allegedly exacerbated by Brown's decision to devalue the two women's programs without

first making sufficient reductions in men's activities or, in the alternative, adding other women's teams to compensate for the loss.

On plaintiffs' motion, the district court certified a class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." And, after hearing fourteen days of testimony from twenty witnesses, the judge granted a preliminary injunction requiring Brown to reinstate the two women's teams pending the outcome of a full trial on the merits. See *Cohen*, 809 F. Supp. at 1001. We stayed execution of the order and expedited Brown's appeal.

III. TITLE IX AND COLLEGIATE ATHLETICS

Title IX prohibits gender-based discrimination by educational institutions receiving federal financial support – in practice, the vast majority of all accredited colleges and universities. The statute sketches wide policy lines, leaving the details to regulating agencies. Since this appeal demands that we invade terra incognita, we carefully recount the developments leading to the present version of Title IX and then examine the pertinent statutory and regulatory language.

A. Scope of Title IX

At its inception, the broad proscriptive language of Title IX caused considerable consternation in the academic world. The academy's anxiety chiefly centered around identifying which individual programs, particularly in terms of athletics, might come within the scope of the discrimination provision, and, relatedly, how the government would determine compliance. The gridiron fueled these concerns: for many schools, the men's football budget far exceeded that of any other sport, and men's athletics as a whole received the lion's share of dedicated resources – a share that, typically, was vastly disproportionate to the percentage of men in the student body.

Part of the confusion about the scope of Title IX's coverage and the acceptable avenues of compliance arose from the absence of secondary legislative materials. Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate. See 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh on privacy in athletic facilities); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh noting that proposed Title IX will not require gender-blended football teams). Nevertheless, under congressional direction to implement Title IX, the Secretary of Health, Education and Welfare (HEW) promulgated regulations in 1975, which included specific

provisions for college athletics. Four years later, HEW's Office of Civil Rights (OCR) added another layer of regulatory exegesis when, after notice and comment, it published a "Policy Interpretation" that offered a more detailed measure of equal athletic opportunity.

In 1984, the Supreme Court radically altered the contemporary reading of Title IX. The Court held that Title IX was "program-specific," so that its tenets applied only to the program(s) that actually received federal funds and not to the rest of the university. *Grove City College v. Bell*, 465 U.S. 555, 574 (1984). Because few athletic departments are direct recipients of federal funds – most federal money for universities is channelled through financial aid offices or invested directly in research grants – *Grove City* cabined Title IX and placed virtually all collegiate athletic programs beyond its reach.

In response to *Grove City*, Congress scrapped the program-specific aproach and reinstated an institution-wide application of Title IX by passing the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988). The Restoration Act required that if any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions. See *id*.; see also S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 6 (explaining that Congress wanted to prohibit discrimination throughout an institution if the institution received any federal funds). Although the Restoration Act does not specifically mention sports, the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes. See, e.g., 130 Cong. Rec. S12, 642 (daily ed. Oct. 2, 1984) (statement of Sen. Byrd decrying past discrimination against female athletes); 130 Cong. Rec. S11,253 (daily ed. Sept. 17, 1984) (statement of Sen. Hatch regarding importance of Title IX to ensuring development of women athletes); 130 Cong. Rec. S2,267 (daily ed. Mar. 2, 1984) (statement of Sen. Riegle noting extensive evidence of sex discrimination in education and athletics).

The appellants do not challenge the district court's finding that, under existing law, Brown's athletic department is subject to Title IX. Accordingly, we devote the remainder of Part III to deterrating the meaning of Title IX, looking first at the statute and then at the regulations.

B. Statutory Framework

Title IX, like the Restoration Act, does not explicitly treat college athletics.[6] Rather, the statute's heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions:

[6] This lacuna apparently results from a political compromise. After the Conference Committee deleted an amendment to Title IX that would have exempted "revenue-producing" athletics, Congress asked the

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (1988). After listing a number of exempt organizations, section 1681 makes clear that, while Title IX prohibits discrimination, it does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body. Thus, section 1681(a) shall not be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area:

> Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1681(b) (1988). Put another way, a court assessing Title IX compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.

That is not to say, however, that evidence of such a disparity is irrelevant. Quite the contrary: under the proviso contained in section 1681(b), a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender.

C. Regulatory Framework

As we mentioned above, the Secretary of HEW, following Congress's instructions, promulgated regulations implementing Title IX in the pre-*Grove City* era. See 40 Fed. Reg. 24,128 (1975). Thereafter, in 1979, Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education (DED). See 20 U.S.C. §§ 3401-3510

Secretary of HEW to provide regulations specifically governing athletics. See 44 Fed. Reg. 71,413 (1979).

(1988). In a wonderful example of bureaucratic muddle, the existing Title IX regulations were left within HHS's arsenal while, at the same time, DED replicated them as part of its own regulatory armamentarium. Compare 45 C.F.R. § 86 (1992) (HHS regulations) with 34 C.F.R. § 106 (1992) (DED regulations). Both sets of regulations were still in effect when the Restoration Act passed. They are identical, save only for changes in nomenclature reflecting the reorganization of the federal bureaucracy.

In short, like pretenders to the emirate of a deceased sheik, both HHS and DED lay a hereditary claim to this oasis which arises from the regulatory desert, asserting authority to enforce Title IX. Nevertheless, DED is the principle [sic] locus of ongoing enforcement activity. See 20 U.S.C. § 3441(a)(1) (transferring all education functions of HEW to DED); see also 20 U.S.C. § 3441(a)(3) (transferring education-related OCR work to DED). Therefore, like the parties, we treat DED, acting through its OCR, as the administrative agency charged with administering Title IX.[7]

Recognizing the agency's role has important practical and legal consequences. Although DED is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); see also *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that the Supreme Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration"). The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. See Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); see also *Chevron*, 467 U.S. at 844 (holding that where Congress has explicitly delegated responsibility to an agency, the regulation deserves "controlling weight"); *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *Alvarez-Flores v. INS*, 909 F.2d 1, 3 (1st Cir. 1990).

It is against this backdrop that we scrutinize the regulations and the Policy Interpretation.

1. **The Regulations**. DED's regulations begin by detailing Title IX's application to college athletics.[8] The regulations also recognize, however, that an athletic program may consist

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[7] From this point forward, we use the acronym "OCR" to refer to DED's Office of Civil Rights, which took on the education-related portfolio of HEW's Office of Civil Rights in May 1980. See 20 U.S.C. § 3441(a)(3).

[8] The regulations provide:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and

of gender-segregated teams as long as one of two conditions is met: either the sport in which the team competes is a contact sport or the institution offers comparable teams in the sport to both genders. See 34 C.F.R. § 106.41(b).

Finally, whether teams are segregated by sex or not, the school must provide gender-blind equality of opportunity to its student body. The regulations offer a non-exclusive compendium of ten factors which OCR will consider in assessing compliance with this mandate:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

34 C.F.R. § 106.41(c) (1992).[9] The district court rested its preliminary injunction on the first of these ten areas of inquiry: Brown's failure effectively to accommodate the interests and abilities

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> no recipient shall provide any such athletics separately on such basis. 34 C.F.R. § 106.41(a) (1992).

[9] The same regulation also stipulates that:

> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but [DED] may consider the failure to provide necessary

of female students in the selection and level of sports. See *Cohen*, 809 F. Supp. at 994. Hence, this area is the most critical in terms of evaluating the charges against Brown (although it is also the most difficult to measure).

2. The Policy Interpretation. In the three years next following the initial issuance of the regulations, HEW received over one hundred discrimination complaints involving more than fifty schools. In order to encourage self-policing and thereby winnow complaints, HEW proposed a Policy Interpretation. See 43 Fed. Reg. 58,070 (1978). It then promulgated the Policy Interpretation in final form, see 44 Fed. Reg. 71,413 (1979), a matter of months before the effective date of the statute through which Congress, emulating King Solomon, split HEW. The parties are in agreement that, at DED's birth, it clutched the Policy Interpretation, and, as a practical matter, that appears to be the case.[10] See, e.g., DED, *Title IX Athletics Investigator's Manual* 1, 2 (1990) (Manual) . . . Although we can find no record that DED formally adopted the Policy Interpretation, we see no point to splitting the hair, particularly where the parties have not asked us to do so. Because this document is a considered interpretation of the regulation, we cede it substantial deference. See *Martin v. OSHRC*, 499 U.S. 144, (1991); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

In line with the Supreme Court's direction that, "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language," *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) . . . the Policy Interpretation limns three major areas of regulatory compliance: "Athletic Financial Assistance (Scholarships)," see 34 C.F.R. § 106.37(c); "Equivalence in Other Athletic Benefits and Opportunities," see 34 C.F.R. § 106.41(c)(2)-(10); and "Effective Accommodation of Student Interests and Abilities," see 34 C.F.R. § 106.41(c)(1). The court below, see *Cohen*, 809 F. Supp. at 989, and a number of other district courts, see, e.g., *Roberts v. Colorado State Univ.*, 1993 U.S. Dist. LEXIS 2171 (D. Colo. 1993) [No. 92-Z-1310, slip op. at 3]; *Favia v. Indiana Univ. of Pa.*, No. 92-2045, 1992 WL 436239, at * 7 (W.D. Pa. Feb. 4, 1993), have adopted this formulation and ruled that a university violates Title IX if it ineffectively accommodates student interests and abilities regardless of its performance in other Title IX areas.

Equal opportunity to participate lies at the core of Title IX's purpose. Because the third compliance area delineates this heartland, we agree with the district courts that have so ruled and

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funds for teams for one sex in assessing equality of opportunity for members of each sex. 34 C.F.R. § 106.41(c) (1992).

[10] Congress clearly assigned HEW's regulatory duties in education to the nascent DED. See 20 U.S.C. § 3441. Moreover, in taking up its mantle, DED adopted exactly the regulation that the Policy Interpretation purported to interpret – sending an unmistakably clear signal of the agency's satisfaction with the Policy Interpretation.

hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.

3. Measuring Effective Accommodation. The parties agree that the third compliance area is the field on which this appeal must be fought. In surveying the dimensions of this battleground, that is, whether an athletic program effectively accommodates students' interests and abilities, the Policy Interpretation maps a trinitarian model under which the university must meet at least one of three benchmarks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. The first benchmark furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers "substantially proportionate" to the gender composition of their student bodies. Thus, a university that does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.

The second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance. For example, so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, benchmark two is satisfied and Title IX does not require that the

university leap to complete gender parity in a single bound. Or, if a school has a student body in which one sex is demonstrably less interested in athletics, Title IX does not require that the school create teams for, or rain money upon, otherwise disinterested students; rather, the third benchmark is satisfied if the underrepresented sex's discernible interests are fully and effectively accommodated.[13]

It seems unlikely, even in this day and age, that the athletic establishments of many coeducational universities reflect the gender balance of their student bodies. Similarly, the recent boom in Title IX suits suggests that, in an era of fiscal austerity, few universities are prone to expand athletic opportunities. It is not surprising, then, that schools more often than not attempt to manage the rigors of Title IX by satisfying the interests and abilities of the underrepresented gender, that is, by meeting the third benchmark of the accommodation test. Yet, this benchmark sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.

Although the full-and-effective-accommodation standard is high, it is not absolute. Even when male athletic opportunities outnumber female athletic opportunities, and the university has not met the first benchmark (substantial statistical proportionality) or the second benchmark (continuing program expansion) of the accommodation test, the mere fact that there are some female students interested in a sport does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark. Rather, the institution can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and reasonable expectation of intercollegiate competition for that team...." 44 Fed. Reg. at 71,418. Staying on top of the problem is not sport for the short-winded: the institution must remain vigilant, "upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex," *id.*, until the opportunities for, and levels of, competition are equivalent by gender.[15]

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[13] OCR also lists a series of illustrative justifications for the disparate treatment of men's and women's athletic teams, including (1) sports that require more resources because of the nature of the game (e.g., contact sports generally require more equipment); (2) special circumstances, such as an influx of first-year players, that may require an extraordinary infusion of resources; (3) special operational expenses (e.g., crowd control at a basketball tournament), as long as special operational expense needs are met for both genders; and (4) affirmative measures to remedy past limitations on athletic opportunities for one gender. 44 Fed. Reg. at 71,415-16.

[15] If in the course of adding and upgrading teams, a university attains gender parity between its athletic program and its student body, it meets the first benchmark of the accommodation test. But, Title IX does

Brown argues that DED's Policy Interpretation, construed as we have just outlined, goes so far afield that it countervails the enabling legislation. Brown suggests that, to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest. Put bluntly, Brown reads the "full" out of the duty to accommodate "fully and effectively." It argues instead that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise.

Because this is mountainous terrain, an example may serve to clarify the distinction between Brown's proposal and our understanding of the law. Suppose a university (Oooh U.) has a student body consisting of 1,000 men and 1,000 women, a one-to-one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, Oooh U. must only provide athletic opportunities in line with the two-to-one interested athlete ratio, say, 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet – but there would be no Title IX violation.

We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion (benchmark two), schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body (in Oooh U.'s case, a roughly equal number of slots for men and women, as the student body is equally divided), or meet benchmark three by fully accommodating interested athletes among the underrepresented sex (providing, at Oooh U., 250 slots for women). [16]

In the final analysis, Brown's view is wrong on two scores. It is wrong as a matter of law, for DED's Policy Interpretation, which requires full accommodation of the

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not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).

[16] Of course, if Oooh U. takes the benchmark three route, it will also have to provide at least the same number of slots for men; but, so long as women remain the underrepresented gender and their interests are fully accommodated, the university can provide as many (or as few) additional slots for men as it sees fit.

underrepresented gender, draws its essence from the statute. Whether Brown's concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor. See *Chevron*, 467 U.S. at 843 n.11 (holding that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold [it]") (collecting cases); *Massachusetts v. Secretary of Agric*., 984 F.2d 514, 522 (1st Cir. 1993) (similar).

Brown's reading of Title IX is legally flawed for yet another reason. It proceeds from the premise that the agency's third benchmark countervails Title IX. But, this particular imprecation of the third benchmark overlooks the accommodation test's general purpose: to determine whether a student has been "excluded from participation in, [or] denied the benefits of" an athletic program "on the basis of sex . . . ." 20 U.S.C. §1681(a). While any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute. No more is exigible. See *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 125 (1985).

As it happens, Brown's view is also poor policy for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX. Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should "take into account the nationally increasing levels of women's interests and abilities" and avoid "disadvantaging members of an underrepresented sex . . . ." 44 Fed. Reg. at 71,417.

Brown's proposal would also aggravate the quantification problems that are inevitably bound up with Title IX. Student plaintiffs, who carry the burden of proof on this issue, as well as universities monitoring self-compliance, would be required to assess the level of interest in both the male and female student populations and determine comparatively how completely the university was serving the interests of each sex. By contrast, as we read the accommodation test's third benchmark, it requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team. We think the simpler reading is far more serviceable.

Furthermore, by moving away from OCR's third benchmark, which focuses on the levels of interest and ability extant in the student body, Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community. In that way, Brown's proposal would do little more than overcomplicate an already complex equation.

We will not paint the lily. Brown's approach cannot withstand scrutiny on either legal or policy grounds. We conclude that DED's Policy Interpretation means exactly what it says. This plain meaning is a proper, permissible rendition of the statute.

IV. THE CONSTITUTIONAL CHALLENGE

We turn now to a series of case-specific issues, starting with Brown's constitutional challenge to the statutory scheme.

A. Equal Protection

Brown asseverates that if the third part of the accommodation test is read as OCR wrote it – to require full and effective accommodation of the underrepresented gender – the test violates the Fifth Amendment's Equal Protection Clause. We think not.

Brown assumes that full and effective accommodation disadvantages male athletes. While it might well be that more men than women at Brown are currently interested in sports, Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities. In the absence of any proof supporting Brown's claim, and in view of congressional and administrative urging that women, given the opportunity, will naturally participate in athletics in numbers equal to men, we do not find that the regulation, when read in the common-sense manner that its language suggests, see supra Part III(C)(3), offends the Fifth Amendment.

What is more, even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (noting that Congress need not make specific findings of discrimination to grant race-conscious relief); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (upholding social security wage law that benefitted women in part because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women"). Despite the little legislative history regarding discrimination in collegiate athletics that emerged during the consideration of Title IX, Congress did hold "extensive hearings on higher education" when Title IX was pending, in the course of which "much testimony was heard with respect to discrimination against women in higher education." H.R. Rep. No. 554, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2511. Athletics featured even more prominently in Congress's decision to reverse the *Grove City* rule. Under these circumstances, we find Brown's plaint unbecoming.

B. Affirmative Action

Brown rehashes its equal protection argument and serves it up as a nominally different dish, arguing that the district court's preliminary injunction constitutes "affirmative action" and violates the Equal Protection Clause because the court lacked a necessary factual predicate to warrant such a step. It is, however, established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant any appropriate relief on a cause of action appropriately brought pursuant to a federal statute. See *Franklin*, 112 S. Ct. at 1035 (upholding damage remedy for Title IX violation and noting that prospective relief would be inadequate); see also Fed. R. Civ. P. 54(c). Hence, this initiative, too, is bootless.

V. BURDEN OF PROOF

In addition to its constitutional challenges, Brown questions the district court's allocation of the burden of proof. It suggests that the analytic model of burden setting and shifting commonly accepted in Title VII and ADEA cases, see, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991), cert. denied, 112 S. Ct. 2965 (1992), is ripe for importation into the precincts patrolled by Title IX. We reject the suggestion.

In our view, there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear. To invoke the prophylaxis of Title IX, the statute, 20 U.S.C. § 1681(b), and the regulations, read together, require a Title IX plaintiff to show disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender. Then, the plaintiff must show that a second element – unmet interest – is present. In other words, the plaintiff must prove that the underrepresented gender has not been "fully and effectively accommodated by the present program." 44 Fed. Reg. at 71,418. If the plaintiff carries the devoir of persuasion on these two elements, she has proven her case unless the university shows, as an affirmative defense, "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members" of the underrepresented gender. *Id*.

Over and beyond the express dictates of the applicable statute and regulations, there is another valid reason for eschewing the Title VII paradigm in most Title IX cases. The scope and purpose of Title IX, which merely conditions government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards. See

Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990) (declining to apply Title VII analysis to Title IX litigation), aff'd, 112 S. Ct. 1028 (1992). Title IX, while it applies only to schools that receive federal funds, influences almost all aspects of educational management. In contrast, Title VII applies to a much wider range of institutions - virtually all employers – but targets only employment-related matters. Moreover, Title IX is largely aspirational – on the whole, affected institutions choose how to accomplish the statutory goal – whereas Title VII is largely peremptory – covered employers must adhere to statutorily prescribed standards. Thus, the former is a loosely laced buskin, inhospitable to the specialized choreography of presumption and production upon which the *Burdine/McDonnell Douglas* burden-shifting framework depends.

We conclude, therefore, that excepting perhaps in the employment discrimination context . . . the Title VII burden-of-proof rules do not apply in Title IX cases. Consequently, a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest, each by a fair preponderance of the credible evidence, so long as the defendant does not rebut the plaintiff's showing by adducing preponderant history-and-practice evidence.

VI. THE PRELIMINARY INJUNCTION

[The court reviews the standard for appellate review of a preliminary injunction.]

Here, the district court found that the quadrat of factors favored plaintiffs' position. See *Cohen*, 809 F. Supp. at 985-1001. Brown disagrees with these findings up and down the line, but offers developed argumentation only as to three of the four components. Because Brown does not explain its challenge to the district court's finding that the public interest would be disserved by leaving the two women's teams on the sidelines until the suit is finally resolved, we ignore its pro forma protest in that respect. Litigants cannot preserve an issue for appeal simply by raising a pennant and then moving on to another subject. . . . Accordingly, we limit our review to the three factors briefed and argued.

A. Likelihood of Success

It is old hat, but still very much in fashion, that a movant's likelihood of success at trial is particularly influential in the preliminary injunction calculus. . . . In this case, the district court paid meticulous attention to the parties' prospects for success over the long haul. The court plainly visualized both the factual intricacies and legal complexities that characterize Title IX

litigation. It held a lengthy adversary hearing and reviewed voluminous written submissions. And at journey's end, it correctly focused on the three-part accommodation test.

The court faultlessly dispatched the first two elements of the test. With respect to the comparison between Brown's athletic agenda and student body, we adopt the lower court's record-rooted finding that the University did not meet – or even closely approach – the "substantial proportionality" threshold because it offered too few varsity opportunities for women. See *Cohen*, 809 F. Supp. at 991. Cognizant, perhaps, that the raw numbers tell an unambiguous tale, Brown does not challenge the inviolability of this finding.

As to the test's second part, the court below found that, although Brown could point to "impressive growth" in its women's athletic program in the 1970s, the school had not continued filling the gap during the next two decades. *Id*. On this basis, the court concluded that Brown had not met the benchmark. See *id*. Brown asserts that the district court erred by not crediting it sufficiently for its dramatic expansion of women's sports in the 1970s, and we are not entirely unsympathetic to this plea. In the last analysis, however, this was a judgment call and the trial court's judgment was not unreasonable. While a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken, does not forever hold the institution harmless. Here, Brown labored for six years to weave a broad array of new activities into the fabric of its palestrian offerings. The district court apparently believed, however, that Brown then rested on its laurels for at least twice that long. The very length of this hiatus suggests something far short of a continuing practice of program expansion. And, moreover, a university must design expansion in whatever form and at whatever pace to respond to the flux and reflux of unserved interests. The court below found that Brown failed in this task. See *id*. The issue of responsiveness is fact-intensive and in most instances, as here, its resolution will be within the trier's province. We find no error, therefore, in the district court's resolution of the second aspect of the accommodation test.

The third benchmark presents a more problematic scenario. The district court incorrectly held that Brown bore the burden of showing that it had fully and effectively accommodated the interests and abilities of its women athletes. See *id*. at 997. Section 1681(b) requires that the plaintiffs, rather than the University, prove a shortfall in the full and effective accommodation of interested female athletes by showing, initially, both numerical disparity and unmet interest. See supra Part V. Nonetheless, we do not think that the court's bevue is fatal. Even when a trial court has misconstrued the law, an appellate tribunal may avoid remanding if the record is sufficiently developed and the facts necessary to shape the proper legal matrix are sufficiently clear. . . .

We find this to be a particularly auspicious setting in which to employ such a device. Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly underrepresented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, see, e.g., *Cook*, 802 F. Supp. at 737, there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.

In this instance, the district court's subsidiary findings of fact render it beyond cavil that the plaintiffs carried their burden of proof. The court found, for example, that there was "great interest and talent" amongst Brown's female undergraduates, which, following the cuts, would go unserved. *Cohen*, 809 F. Supp. at 992. Of particular moment, the court also found the interest and talent on campus ample to support women's varsity volleyball and gymnastics teams, see *id.* – a finding that is hardly surprising in view of the teams' robust health before the budget-cutters arrived on the scene. The court proceeded to note that, while club teams can be equivalent to intercollegiate teams when they regularly participate in varsity competition, see 44 Fed. Reg. at 71,413 n.1, the teams that Brown downgraded would not regularly be competing against varsity teams and would suffer a diminution of status in a wide range of other significant respects. See *Cohen*, 809 F. Supp. at 992-93.

The potency of this evidence is an effective antidote to the district court's partial misapplication of the burden of proof. Because the record contains nothing that would allow a trier to find that Brown's athletic agenda reflects the makeup of its student body or that the plaintiff class is so poorly populated as to warrant a reduction in women's sports, the court's error was harmless. In a nutshell, the plaintiffs met their challenge on parts one and three of the accommodation test. This conclusion, in partnership with the district court's supportable finding that Brown did not satisfactorily demonstrate a continuing expansion of its women's athletic lineup, strikes the gold. The court's prediction of plaintiffs' probable success was, therefore, adequately grounded.

B. Irreparable Injury

The next area of inquiry is irreparable harm. The district court heard from a variety of athletic administration experts. The court concluded that, absent judicial intervention, the plaintiffs would suffer irremediable injury in at least three respects: competitive posture, recruitment, and loss of coaching. As club teams, the district court thought women's volleyball and gymnastics would increasingly become less competitive, have fewer players, be unable to schedule varsity teams from other schools, become unattractive to potential stars making college choices, and suffer stagnation in the growth of individual talent due to the absence of coaching.

See *Cohen*, 809 F. Supp. at 992-93. Certainly, these harms exist to some degree. In highly nuanced cases involving a melange of competing considerations, the aggregate injury, and whether or not it is irreparable, come primarily within the trial court's ken. . . . So it is here. Although the types of harms the court catalogued might not all rise to the same level of seriousness, the overall record supports, even though it does not compel, the court's assessment of their cumulative severity. Given, especially, the lack of any other concinnous remedy pendente lite, we will not second-guess the district court's finding of irreparable injury.

C. The Balance of Harms

Finally, the district court found that the competing equities weighed in favor of granting the injunction. After hearing testimony from Brown's Financial Vice-President and its Associate Athletic Director, the district court concluded that the cost of the interim injunction would be relatively slight; and that, in view of discretionary funds already contained in the Athletic Department budget and a presidential "contingency fund," Brown possessed the wherewithal to defray the costs without undue hardship. See *Cohen*, 809 F. Supp. at 1000-01. By contrast, the court noted the volleyball and gymnastics programs' continuing deterioration in the aftermath of the demotion. See *id*. at 992-93. On balance, the court determined that the financial burden on Brown was tolerable, and, in any event, was overbalanced by the potential harm to the plaintiff class if the court took no action.

Brown contests the results of this balancing on the premise that the district court wrongly discounted the testimony of one of its witnesses and did not adequately consider the possibility that false hopes might be raised by a preliminary injunction. It is, however, axiomatic that a district court, sitting without a jury, may selectively discount testimony as it weighs conflicting viewpoints and adjudicates the facts. . . . This is a trial court's prerogative and, indeed, its duty.

It is similarly fundamental that a preliminary injunction, by its very nature, is sometimes ephemeral. Hence, the risk that some observers might read into a temporary restrainer more than it eventually proves to mean is endemic to the equitable device and cannot tip the scales against its use in any particular circumstance. It defies elemental logic to say that parties who the court has determined will probably succeed at trial should be denied the interim relief to which they are entitled because their ultimate victory is less than absolutely certain.

In fine, the district court did not overspill its discretion either in taking Brown's self-interested description of its financial plight with a grain of salt or in limiting the role that raising false hopes might play in the equitable calculus.

D. Summing Up

We summarize succinctly, beginning with the probability of plaintiffs' success. In an era where the practices of higher education must adjust to stunted revenues, careening costs, and changing demographics, colleges might well be obliged to curb spending on programs, like athletics, that do not lie at the epicenter of their institutional mission. Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place solely in comptrollers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes.

This case aptly illustrates the point. Brown earnestly professes that it has done no more than slash women's and men's athletics by approximately the same degree, and, indeed, the raw numbers lend partial credence to that characterization. But, Brown's claim overlooks the shortcomings that plagued its program before it took blade in hand. If a school, like Brown, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie.

The record reveals that the court below paid heed to these realities. It properly recognized that even balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruits of a university's athletic program remain ill distributed after the trimming takes place. Because the district court understood this principle, and because its findings of fact as to the case's probable outcome are based on substantial evidence, the court's determination that plaintiffs are likely to succeed on the merits is inexpugnable.

The district court displayed similar dexterity in touching the other three bases en route to a grant of injunctive relief: irreparability of injury, the relative weight of potential harms, and impact on the public interest. The court found that the harm to the plaintiff class was irremediable, absent prompt injunctive relief; that the balance of harms favored such relief; and that the overriding public interest lay in the firm enforcement of Title IX. In each of these areas, as in the likelihood-of-success arena, the court made serial findings that, taken at face value, amply justify injunctive relief. Because these findings derive adequate support from the record, the court's decree must stand as long as the specific relief the court ordered was appropriate. It is to this issue that we now turn.

VII. REMEDIATION

After applying the preliminary injunction standard, the district court ordered relief pendente lite, temporarily reinstating the women's volleyball and gymnastics teams. Brown argues that such specific relief is inappropriate because it intrudes on Brown's discretion. The point has some cogency. We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations. . . In addition, Title IX does not require institutions to fund any particular number or type of athletic opportunities – only that they provide those opportunities in a nondiscriminatory fashion if they wish to receive federal funds.

Nonetheless, the district court has broad discretionary power to take provisional steps restoring the status quo pending the conclusion of a trial. . . . Considering the district court's proper estimation and deft application of the preliminary injunction standard, see supra Part VI, we think that requiring Brown to maintain the women's volleyball and gymnastics teams in varsity status for the time being is a remedial choice within the district court's discretion. That is not to say, however, that the same remedy will be suitable at trial's end if the Title IX charges prove out against Brown. The district court has noted, we believe appropriately, that if it ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams. *Cohen*, 809 F. Supp. at 1001. Although the district court has the power to order specific relief if the institution wishes to continue receiving federal funds, see *Franklin*, 112 S. Ct. at 1035, the many routes to Title IX compliance make specific relief most useful in situations where the institution, after a judicial determination of noncompliance, demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX.

VIII. CONCLUSION

We need go no further. This litigation presents an array of complicated and important issues at a crossroads of the law that few courts have explored. The beacon by which we must steer is Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way. These considerations, each of which is in service to desirable ends, are necessarily in tension in Title IX cases. Thus, there are unlikely to be ideal solutions to all the vexing problems that might potentially arise.

This appeal exemplifies many of the difficulties inherent in Title IX litigation. We do not presume to say that the district court's interim solution is perfect, but it is fair and it is lawful. On the record compiled to date, the preliminary injunction requiring Brown to reinstate its women's volleyball and gymnastics teams for the time being came well within the encincture of judicial discretion. We will not meddle.

The preliminary injunction is affirmed, the temporary stay is dissolved, and the cause is remanded to the district court for further proceedings. Costs to appellees.

Notes and Questions

1. On remand, the district court found that Brown had violated Title IX, and ordered the university to submit a plan for achieving compliance with the statute. Brown submitted a plan, which the district court found unacceptable; the district court then ordered Brown to elevate four women's teams to varsity status. Brown appealed again. In *Cohen IV*, 101 F.3d 155 (1st Cir. 1996), the appellate court affirmed the trial court's finding on liability, but struck the trial court's imposed remedial plan, stating that the court should have given Brown a second opportunity to submit an acceptable plan. The case was eventually settled in 1998.

2. One of Brown's claims was that the Office for Civil Rights' (OCR) Policy Interpretation was contrary to the intent and language of Title IX and thus unenforceable. Although the Policy Interpretation was published in the *Federal Register*, it is not a regulation. *Cohen II* seems to treat the Policy Interpretation as though it has regulatory status. Would the Policy Interpretation carry greater weight with institutions and courts had it been developed into a regulation?

3. Individuals (or teams) who believe that an institution has violated Title IX may file either a complaint with OCR or a lawsuit in federal court. Although the ED regulations and Policy Interpretation permit claims of disparate impact to be made, it is likely that plaintiffs relying on the OCR regulations or Policy Interpretation will be limited to making claims of disparate treatment in federal court. For a discussion of the challenges plaintiffs face when litigating a Title IX claim in court, see the Text at pp. 782-784.

SEC. 10.4.6, 11.5.3. and *11.5.5. Sex Discrimination*

Problem 20[*]

A local private college is facing a severe budgetary shortfall, so administration officials have proposed a series of budget cuts to take effect at the end of the current academic year. The budget cuts are expected to affect numerous academic departments and extracurricular programs. Among its budget-reduction strategies, the administration has proposed eliminating several of the college's intercollegiate varsity athletic teams, including its men's swim team and its women's softball team. Members of these two teams vehemently oppose the cuts, and have filed separate administrative complaints and civil lawsuits in an effort to obtain immediate reinstatement of their respective programs.

The college does not receive any direct financial assistance from the federal government, but many of its students receive financial assistance in the form of Pell Grants, Direct Student Loans, and other federal student loans. Enrollment at the college is approximately 52% male and 48% female. Women's athletics teams at the college first reached varsity status in the early 1970s and continued to expand in number throughout the 1970s and 1980s. Women's softball was elevated from club to varsity status in 1985. Currently, women comprise approximately 39% of the athletes participating in varsity sports. After the budget cuts take effect, it is expected that women will comprise 38% of the college's participating varsity athletes. Since the announcement of the college's budget cuts, five of the thirteen members of this year's women's softball team have announced that they intend to transfer to other colleges. Although the men's swim team is among those teams that the college intends to eliminate, the women's varsity swim team, which has over 25 members, will be retained.

1. Is the college subject to the requirements of Title IX (does it receive federal financial assistance)? If so, is its athletic program subject to the requirements of Title IX?

2. Has the college complied with Title IX's requirement that it effectively accommodate the interests and abilities of women students?

[*] With thanks to Allen Kropp, guest lecturer in the graduate school, George Washington University, who drafted the original problem from which this problem was adapted.

3. On which of OCR's three "benchmarks" for measuring effective accommodation of student athletes' interests and abilities might the college base its defense? What arguments could the college raise under each?

4. Have the members of the men's swim team been discriminated against on the basis of sex in violation of Title IX? What arguments could they raise, and how should the college respond?

6. What additional facts do you need before you can resolve this dispute?

SEC. 10.4.9. Tort Liability for Athletic Injuries

Feleccia v. Lackawanna College
215 A.3d 3 (Pa. 2019).

OPINION BY: JUSTICE DOUGHERTY

In this discretionary appeal arising from the dismissal of personal injury claims on summary judgment, we consider whether the Superior Court erred in 1) finding a duty of care and 2) holding a pre-injury waiver signed by student athletes injured while playing football was not enforceable against claims of negligence, gross negligence, and recklessness. After careful review, we affirm the Superior Court's order only to the extent it reversed the trial court's entry of summary judgment on the claims of gross negligence and recklessness, and we remand to the trial court for further proceedings consistent with this opinion.

I.

Appellees, Augustus Feleccia and Justin T. Resch, (collectively, appellees) were student athletes who played football at Lackawanna Junior College (Lackawanna), a non-profit junior college. *See* Complaint at ¶¶ 29, 30. At all times relevant to this matter, the following individuals were employed by Lackawanna and involved in its football program: (1) Kim A. Mecca, the Athletic Director for Lackawanna College who oversaw all of Lackawanna's athletic programs, including the football program (AD Mecca); (2) Mark D. Duda, the head coach (Coach Duda); (3) William E. Reiss, an assistant and linebacker coach (Coach Reiss); (4) Daniel A. Lamagna, an assistant and quarterback coach (Coach Lamagna); (5) Kaitlin M. Coyne, hired to be an athletic trainer (Coyne); and (6) Alexis D. Bonisese, hired to be an athletic trainer (Bonisese) (collectively with Lackawanna referred to as appellants). *Id.* at ¶¶31-34, 40, 41, 43, 44.

Lackawanna had customarily employed two athletic trainers to support the football program. However, both athletic trainers resigned in the summer of 2009 and AD Mecca advertised two job openings for the position of athletic trainer. AD Mecca received applications from Coyne and Bonisese, recent graduates of Marywood University who had obtained Bachelor of Science degrees in Athletic Training. AD Mecca conducted telephone interviews with Coyne and Bonisese for the open athletic trainer positions at Lackawanna. *See Feleccia v. Lackawanna College*, 156 A.3d 1200, 1203 (Pa. Super. 2017).

At the time she applied and interviewed for the Lackawanna position, Coyne had not yet passed the athletic trainer certification exam, which she took for the first time on July 25, 2009,

and was therefore not licensed by the Board. Bonisese was also not licensed, having failed the exam on her first attempt, and still awaiting the results of her second attempt when she applied and interviewed for the Lackawanna position. Nevertheless, Lackawanna hired both Coyne and Bonisese in August 2009 with the expectation they would serve as athletic trainers, pending receipt of their exam results, and both women signed "athletic trainer" job descriptions. *Id.* After starting their employment at Lackawanna, Coyne and Bonisese both learned they did not pass the athletic trainer certification exam. Coyne informed AD Mecca of her test results, and AD Mecca also learned Bonisese had failed her second attempt at certification. *Id.* at 1203-04.

AD Mecca retitled the positions held by Coyne and Bonisese from "athletic trainers" to "first responders." *Id.* at 1204. AD Mecca notified Coyne and Bonisese via email and written correspondence that due to their failure to pass the certification exam, they would function as "first responders" instead of "athletic trainers." However, neither Coyne nor Bonisese executed new job descriptions, despite never achieving the credentials included in the athletic trainer job descriptions they did sign. Appellants were also aware the qualifications of their new hires was called into question by their college professors and clinic supervisors. *See Id.* More specifically, Shelby Yeager, a professor for Coyne and Bonisese during their undergraduate studies, communicated to AD Mecca her opinion that Coyne and Bonisese were impermissibly providing athletic training services in September 2009. Professor Yeager was aware Lackawanna did not have any full-time athletic trainers on staff and noted Coyne and Bonisese, as recent graduates, were inexperienced and did not have the required Board license. Professor Yeager stated that Coyne in particular was "ill-equipped to handle the rigors of a contact sport (like football) as an athletic trainer on her own regardless of whether she managed to pass [the certification] exam and obtain her state license." *Id.*, *quoting* Affidavit of Shelby Yeager. With regard to Bonisese, Bryan Laurie, who supervised her as a student, rated her performance as "below average/poor" and provided his assessment that she was not qualified to act as an athletic trainer in March of 2010. *Id.*, *citing* Affidavit of Bryan Laurie.

Appellee Resch started playing football at the age of six, and continued playing through high school. *Id.* at 1204-05. Upon graduating from high school in 2008, Resch was accepted at Lackawanna and, hoping to continue playing football, met with Coach Duda prior to arriving for classes. Resch tried out for the Lackawanna football team in the fall of 2008. Resch not only failed to make the roster, but was also placed on academic probation, so he was ineligible to play football in the spring of 2009.

Appellee Feleccia also began playing football as a child at the age of ten, and played through high school. Feleccia was recruited by Coach Duda to play football at Lackawanna. *See id.* Feleccia did not make the team in the fall of 2008, but practiced with them during that time. During a scrimmage in the fall of 2008, Feleccia tore the labrum in his left shoulder, which was

surgically repaired. Feleccia was also placed on academic probation after the fall 2008 semester and temporarily withdrew from Lackawanna. *See id.*

In mid-January 2010, Resch and Feleccia returned to Lackawanna for the spring semester with the aspiration to make the football team. *Id.* Lackawanna required appellees to fill out and sign various documents in a "participation packet" before playing with the team, including a "Waiver of Liability and Hold Harmless Agreement" (the Waiver) and a form including an "Information/Emergency Release Consent" (the Consent). *See* Appellees' Brief in Opposition to MSJ at Exhibit 18(b). Appellee Resch "skimmed" and signed the Waiver on March 22, 2010. *Feleccia*, 156 A.3d at 1205. Feleccia also executed the Waiver on March 22, 2010. The Waiver provided as follows:

> 1. In consideration for my participation in _[Football]_____ (sport), I hereby release, waive, discharge and covenant not to sue Lackawanna College, its trustees, officers, agents, and employees from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by me, or to any property belonging to me, while participating in such athletic activity.
>
> 2. To the best of my knowledge, I am not aware of any physical disability or health-related reasons or problems which would preclude or restrict my participation in this activity. I am fully aware of the risks and hazards connected with __[Football]_____ (sport), and I hereby elect to voluntarily participate in said activity, knowing that the activity may be hazardous to me and my property. I voluntarily assume full responsibility for any risks of loss, property damage, or personal injury, including death, that may be sustained by me, or any loss or damage to property owned by me, as a result of being engaged in such activity.
>
> 3. I have adequate health insurance necessary to provide for and pay any medical costs that may directly or indirectly result from my participation in this activity. I agree to indemnify and hold harmless Lackawanna College, its trustees, officers, agents, and employees, from any loss, liability, damage or costs, including court costs and attorneys' fees that may be incurred, due to my participation in said activity.
>
> 4. It is my express intent that this Release and Hold Harmless Agreement shall bind my family, if I am alive, and my heirs, assigns and personal representative, if I am deceased, and shall be deemed as a release, waiver, discharge and covenant not to sue Lackawanna College, its trustees, officers, agents and employees. I hereby further agree that this Waiver of Liability and Hold Harmless Agreement shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.
>
> In signing this release, I acknowledge and represent that I have read the foregoing Waiver of Liability and Hold Harmless Agreement, understand it and sign it voluntarily; no oral

representations, statements, or inducements, apart from the foregoing written agreement, have been made; I am at least eighteen (18) years of age and fully competent; and I execute this Release for full, adequate and complete consideration fully intending to be bound by the same. Parent/Guardians' signature required for individuals under eighteen (18) years of age.

Waiver attached as Exhibit A to Appellants' Answer with New Matter.

Appellees also signed the Consent that provided, in pertinent part, as follows:

> (1) I do hereby off[er] my voluntary consent to receive emergency medical services in the event of an injury during an athletic event provided by the athletic trainer, team physician or hospital staff.

Consent attached as part of Exhibit 18(b) to Appellees' Brief in Opposition to MSJ.

On March 29, 2010, appellees participated in the first day of spring contact football practice. The team engaged in a variation of the tackling drill known as the "Oklahoma Drill." Appellees had previously participated in the Oklahoma Drill, or a variation of it, either in high school or at Lackawanna football practices, and were aware the drill would take place during practices. While participating in the drill, both Resch and Feleccia suffered injuries. Resch attempted to make a tackle and suffered a T-7 vertebral fracture. Resch was unable to get up off the ground and Coyne attended to him before he was transported to the hospital in an ambulance. *See Feleccia*, 156 A.3d at 1207. Notwithstanding Resch's injury, the Lackawanna football team continued practicing and running the Oklahoma Drill. Later that same day, Feleccia was injured while attempting to make his first tackle, experiencing a "stinger" in his right shoulder, *i.e.*, experiencing numbness, tingling and a loss of mobility in his right shoulder. *Id.* Bonisese attended Feleccia and cleared him to continue practice "if he was feeling better." *Id.* Feleccia returned to practice and then suffered a traumatic brachial plexus avulsion while making a tackle with his right shoulder. *Id.*

Appellees filed suit against appellants, Lackawanna, AD Mecca, Coach Duda, Coach Reiss, Coach Lamagna and Coyne and Bonisese, asserting claims for damages caused by negligence, including negligence *per se*. The complaint also sought punitive damages, alleging appellants acted "willfully, wantonly and/or recklessly." Complaint at ¶¶82, 97, 98, 102 & 103. Appellants filed preliminary objections which were overruled, and filed an answer with new matter raising defenses, including that the Waiver precluded liability on all of appellees' claims.

At the close of discovery, appellants filed a motion for summary judgment, relying primarily on the Waiver; appellants argued they were entitled to judgment as a matter of law due to appellees' voluntary release of appellants from any and all liability for damages resulting from participation in the Lackawanna football program. . . .

The trial court granted summary judgment in favor of appellants. The court ruled the

Waiver: (1) did not violate public policy; (2) was a contract between Lackawanna and college students relating to their own private affairs, and (3) was not a contract of adhesion. *See Feleccia v. Lackawanna College*, 2016 WL 409711, at *5-*10 (Pa.Com.Pl. Civil Div. Feb. 2, 2016), *citing Chepkevich v. Hidden Valley Resort, L.P.*, 607 Pa. 1, 2 A.3d 1174 (2010) (setting forth elements of valid exculpatory agreements).

* * * *

Appellees filed an appeal and the Superior Court reversed. Although the panel agreed with the trial court's holding the Waiver was valid under *Chepkevich*, the panel disagreed that the Waiver barred all of appellees' claims as a matter of law. The panel first observed the Waiver was "not sufficiently particular and without ambiguity" to relieve appellants of liability for their own acts of negligence. *Feleccia*, 156 A.3d at 1212-13, *quoting Chepkevich*, 2 A.3d at 1189 (exculpatory clause is unenforceable "unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence.").

The panel also held the trial court erred in failing to address appellees' allegations underlying their claim for punitive damages, and whether the Waiver applied to preclude liability based on those allegations. *Id.* at 1213. The panel recognized this Court's jurisprudence holding exculpatory clauses are not enforceable to preclude liability for reckless conduct. *Id*. at 1214, *citing Tayar v. Camelback Ski Corp*., 616 Pa. 385, 47 A.3d 1190 (2012).

Finally, the panel's "most important" reason for reversing the trial court's grant of summary judgment was that, after reviewing the record in the light most favorable to appellees as the non-moving parties, there were genuine issues of material fact as to "whether the College's failure to have qualified medical personnel at the March 29, 2010 practice constitute[d] gross negligence or recklessness," and whether that failure caused appellees' injuries or increased their risk of harm. *Id.* at 1214, 1219. The panel's determination in this regard was based on its view that Lackawanna had a "duty of care to its intercollegiate student athletes ... to have qualified medical personnel available at the football tryout on March 29, 2010, and to provide adequate treatment in the event that an intercollegiate student athlete suffered a medical emergency." *Id.* at 1215. The panel relied in part on *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993), where the Third Circuit predicted this Court "would hold that a special relationship existed between the [c]ollege and [student-athlete] that was sufficient to impose a duty of reasonable care on the [c]ollege." *Id.* at 1367. The panel further held it was for a jury to decide whether appellees signed the Waiver "unaware that [Lackawanna's] athletic department did not include qualified athletic trainers." *Feleccia,* 156 A.3d at 1219. Accordingly, the panel remanded the matter for trial.

Upon petition by appellants we granted allowance of appeal to address following issues:

a. Is a Pennsylvania college required to have qualified medical personnel present at intercollegiate athletic events to satisfy a duty of care to the college's student-athletes?

b. Is an exculpatory clause releasing "any and all liability" signed in connection with participation in intercollegiate football enforceable as to negligence?

Feleccia v. Lackawanna College, 644 Pa. 186, 175 A.3d 221 (2017) (*per curiam).*

This matter presents pure questions of law, over which our standard of review is *de novo* and our scope of review is plenary. . . .

II.

A. Is a Pennsylvania college required to have qualified medical personnel present at intercollegiate athletic events to satisfy a duty of care to the college's student-athletes?

Appellants argue the Superior Court created a brand new common law duty of care requiring colleges to have qualified medical personnel available to render treatment at every practice and every game. Appellants aver the Superior Court did so without attempting to analyze the factors set forth in *Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166, 1169 (2000) (before recognizing new duty of care courts must analyze the relationship between the parties; the social utility of the actor's conduct; the nature of the risk imposed and foreseeability of the harm incurred; the consequences of imposing a duty upon the actor; and the overall public interest in the proposed solution). Appellants' Brief at 18-20, *citing Feleccia*, 156 A.3d at 1215. Appellants assert that, in creating this new duty of care, the Superior Court relied only on a decades-old, non-binding federal decision. *Id., citing Kleinknecht*, 989 F.2d at 1371. Appellants argue that, had the Superior Court applied the *Althaus* factors instead, it would not have created such a duty. Appellants' Brief at 20-22. Appellants argue a proper analysis of these factors either weighs against the creation of a new duty or is neutral. Accordingly, appellants request we reverse the Superior Court's decision to the extent it created a new duty.[5]

Appellees respond that the panel did not create a new, onerous duty, and that appellants actually failed to comply with existing common law and statutory duties to have qualified medical personnel available at intercollegiate athletic events. . . .

Appellees also submit appellants' claim the Superior Court ignored the *Althaus* factors is disingenuous. Appellees note the panel explicitly relied on *Kleinknecht* and, although the federal decision predated *Althaus*, the Third Circuit considered the same factors ultimately set forth in *Althaus*. Appellees' Brief at 39-40, *citing Feleccia*, 156 A.3d at 1215 (*Kleinknecht* court recognized: special relationship between college and student-athlete requiring college to act with reasonable care towards athletes; risk of severe injuries during athletic activities was foreseeable;

and college acted unreasonably in failing to protect against risk). In any event, appellees reiterate, the Superior Court did not create a new common law duty, but rather recognized the "duty of care is necessarily rooted in often amorphous public policy considerations[.]" Appellees' Brief at 38, *quoting Althaus*, 756 A.2d at 1169.

Finally, appellees observe appellants themselves undertook the duty to protect their student-athletes by customarily hiring licensed athletic trainers prior to 2009, and holding out Coyne and Bonisese as "athletic trainers" in the documentation regarding their employment, including executed job descriptions, where Coyne and Bonisese acknowledged they were required to have passed the national certification exam, which is a pre-requisite to use of the title "athletic trainer." *See* Appellees' Brief at 41-43, *quoting* Rstmt (2d) of Torts, § 323 ("One who undertakes ... to render services to another ... is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking[.]"). Appellees argue the evidence presented was sufficient to raise factual jury questions regarding whether appellants breached this duty and whether that breach led to appellees' injuries.

Having considered the parties' arguments and the opinion below, we acknowledge the Superior Court articulated a duty not previously recognized by Pennsylvania Courts: a college has a "duty of care to its intercollegiate student athletes requir[ing] it to have qualified medical personnel available at [athletic events, including] the football tryout, ... and to provide adequate treatment in the event that an intercollegiate student athlete suffer[s] a medical emergency." *Feleccia*, 156 A.3d at 1215, *citing Kleinknecht*, 989 F.2d at 1369-70. We further recognize the Superior Court did not analyze the *Althaus* factors, as required when imposing a previously unarticulated common law duty. *Althaus*, 756 A.2d at 1169. Instead, the panel relied on non-binding federal case law to impose what it viewed as a new common law duty. In this specific regard, the panel erred.

Courts should not enter into the creation of new common law duties lightly because "the adjudicatory process does not translate readily into the field of broad-scale policymaking." *Lance v. Wyeth*, 624 Pa. 231, 85 A.3d 434, 454 (2014), *citing Seebold*, 57 A.3d at 1245; *see also Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP*, 605 Pa. 269, 989 A.2d 313, 333 (2010) ("Unlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion"). We also acknowledge it "is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations." *Seebold*, 57 A.3d at 1245 & n.19 (additional citations omitted). "[T]he Court has previously adopted the default position that, unless the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating, we will not impose new affirmative duties." *Id.* at 1245 (citations

omitted).

Applying the *Althaus* factors is not a mere formality, but is necessary when courts announce a new common law duty. . . . The Superior Court did not engage these factors, nor did the summary judgment record include relevant data regarding, for example, injury rates at practices, the consequences of having (or not having) available qualified medical professionals, the budgetary or other collegiate resource impact, or the relative public policy concerns involved.

Importantly, however, an *Althaus* analysis was not necessary here because our review reveals the present circumstances involve application of existing statutory and common law duties of care. . . .

Additionally, we have adopted as an accurate statement of Pennsylvania law the Restatement (Second) of Torts § 323 (1965). *Gradel v. Inouye*, 491 Pa. 534, 421 A.2d 674, 677-78 (1980) ("Section 323(a) of the Restatement of Torts has been part of the law of Pennsylvania for many years."). Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement. (Second) of Torts, § 323 (1965). *See also Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 746 (1984) (landlord that undertook duty to provide secured parking for tenants may be liable for damages arising from failure to exercise reasonable care in doing so).

Application of these legal principles to the present factual scenario supports a determination that "affirmative conduct" by appellants created a "special relationship" with and increased risk of harm to its student athletes such that appellants had a duty to "exercise reasonable care to protect them against an unreasonable risk of harm arising" from that affirmative conduct. *Dittman, supra*. In addition, the record supports a finding appellants undertook a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events, including the football practice on March 29, 2010, although it remains to be determined whether the steps actually taken by appellants satisfied that duty. *See Wilson v. PECO Energy Co.*, 61 A.3d 229, 233 (Pa. Super. 2012) (sufficient facts alleged to overcome summary judgment and reach jury on question of scope of duty undertaken and its breach).

Specifically, when we consider the record in the light most favorable to appellees as the non-moving parties, we observe the following: before hiring Coyne and Bonisese, Lackawanna customarily employed athletic trainers, who were licensed as required by applicable statutes and

regulations; Lackawanna required its student athletes including appellees to execute the Consent to treatment by "athletic trainer, team physician or hospital staff" in the event of an emergency during participation in the football program; Lackawanna held out Coyne and Bonisese as athletic trainers to appellees and their teammates, despite its knowledge they lacked the statutorily required licenses; Lackawanna demonstrated its awareness that Coyne and Bonisese did not have the qualifications of athletic trainers by renaming them "first responders," but did not alter their job descriptions, which encompassed the duties of "athletic trainers"; Coyne and Bonisese were the only individuals present at the March 29, 2010 football tryout to provide treatment to injured student athletes; the coaching staff propagated the misrepresentation of Coyne and Bonisese as athletic trainers; and Coyne and Bonisese performed the role of athletic trainers by attending appellees when they were injured, and directing appellee Feleccia to return to practice when he was "feeling better."

Under these circumstances, appellants clearly created an expectation on which the student athletes might reasonably rely — *i.e.* in the case of injury during an athletic event, they receive treatment from a certified athletic trainer, as clearly outlined in the Consent they were required to sign. We thus easily conclude appellants undertook a duty to provide treatment by a certified athletic trainer at the March 29, 2010 practice. We further conclude the record, taken in the light most favorable to appellees, demonstrates the existence of a genuine issue of material fact sufficient to overcome summary judgment regarding whether appellants breached this duty and caused appellees' injuries. Thus, we hold the trial court erred in entering summary judgment in favor of appellants.

B. Is the Waiver enforceable as to the negligence claims?

Notwithstanding the existence of a duty on the part of appellants, and factual allegations of a breach of that duty which would support a negligence claim, we must now consider whether the Waiver completely precludes any liability on such a claim, or on appellees' additional claims of gross negligence and recklessness. Appellants observe that by signing the Waiver appellees released "any and all liability, claims, demands, actions and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained" while playing football at Lackawanna. . . .

Appellees submit the only issue preserved by appellants with respect to the validity of the Waiver is whether it is enforceable as to negligence, and that in this regard, the Superior Court correctly determined the Waiver is not sufficiently explicit regarding appellants' own negligence to be enforceable. Appellees further assert the law is clear the Waiver is not enforceable to protect appellants from liability arising from gross negligence or recklessness, and the Superior

Court properly remanded for further proceedings to determine whether appellants' conduct constituted gross negligence or recklessness. Appellees' Brief at 45-46, *citing Tayar*, *supra*, and *Chepkevich*, *supra*.

At the outset, we note appellants concede, as they must, that appellees' claims of liability arising from recklessness are not precluded by the Waiver. *See, e.g. Tayar*, 47 A.3d at 1203 (finding public policy prohibits pre-injury waivers from releasing reckless behavior). The issue before us is thus narrowed to whether the Waiver, which purports to release "any and all liability," precludes liability on appellees' claims of negligence and, relatedly, gross negligence. We bear in mind that exculpatory contracts are generally disfavored, and subject to close scrutiny. *See Employers Liability Assur. Corp. v. Greenville Bus. Men's Ass'n*, 423 Pa. 288, 224 A.2d 620, 623 (1966) ("contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law"); *see also Tayar*, 47 A.3d at 1199. Accordingly, exculpatory contracts are valid and enforceable only when "certain criteria are met." *Tayar*, 47 A.3d at 1200 & n.8, *citing Chepkevich* and *Topp Copy*. Our case law provides "guiding standards" for assessing the enforceability of exculpatory contracts. *See, e.g.*, *Topp Copy*, 626 A.2d at 99 (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking protection under the clause).

i. Ordinary Negligence

The Superior Court considered the Waiver to be unenforceable as to appellees' claims of negligence because its "language does not indicate that Lackawanna was being relieved of liability for its own acts of negligence." *Feleccia*, 156 A.3d at 1213. The court further found fault with the Waiver because it did not specifically include the word "negligence." *Id.* at 1212-13. Although our cases have directed that exculpatory clauses must clearly provide "a person is being relieved of liability for his own acts of negligence[,]" we have not prescribed specific language. *Chepkevich*, 2 A.3d at 1189, *quoting Topp Copy*, 626 A.2d at 99. In this case, the Waiver purported to protect appellants from "any and all liability" arising out of "any injury" sustained by student athletes while playing football at Lackawanna. We have determined such language is sufficient to express the parties' intention to bar ordinary negligence claims. *See Topp Copy*, 626 A.2d at 99, 101 (lease agreement releasing lessor from ' "any and all liability" clearly and unambiguously covered negligence claims'); *see also Cannon v. Bresch*, 307 Pa. 31,

160 A. 595, 596 (1932) (lease releasing landlord from "all liability" was sufficient to cover liability for negligence).

The Superior Court, in reaching the opposite result, failed to acknowledge the trial court did not find the mere existence of the Waiver automatically extinguished all potential claims of liability. Rather, the trial court applied the *Topp Copy* guiding standards to determine "whether the [exculpatory] clause 'spells out the intention of the parties with particularity and shows the intent to release [appellants] from liability by express stipulation.' " Trial Court op. at 19, *quoting McDonald v. Whitewater Challengers, Inc.*, 116 A.3d 99, 121 (Pa. Super. 2015), *quoting Chepkevich*, 2 A.3d at 1191. The trial court examined the facts of record, including the parties' intentions related to the execution of the Waiver as well as whether the risks undertaken by appellees and injuries suffered were encompassed within its terms. Trial Court op. at 18-22. The trial court determined it could not "say that the risks associated with Lackawanna's Oklahoma Drill are so far beyond those risks ordinarily inherent to the sport of football and addressed in the Waiver as 'risks and hazards' typical of the sport that we must, as a matter of law, invalidate the Waiver." *Id.* at 21-22. The trial court thus found the Waiver was enforceable and entered summary judgment in favor of appellants. We conclude that the Superior Court's reversal of this holding with respect to appellees' claims of ordinary negligence was error. *See, e.g., Chepkevich*, 2 A.3d at 1194-95 (release enforceable to preclude liability for general claims of negligence); *see also, Topp Copy*, 626 A.2d at 101 (release of "any and all" liability sufficient to preclude liability resulting from landlord's negligence); *see also Cannon*, 160 A. at 597 ("The covenant in this lease against liability for acts of negligence does not contravene any policy of the law.").

ii. Gross Negligence

As we have seen, appellees' claims of ordinary negligence are barred by the Waiver, their claims of recklessness are not, and the allegations of recklessness will be tested at trial on remand. We have yet to rule on whether appellees may also proceed to trial on their allegations of gross negligence, or whether such claims are precluded by the Waiver. *See Tayar*, 47 A.3d at 1199 n.7 ("[A]s gross negligence is not implicated in the instant matter, we leave for another day the question of whether a release for gross negligence can withstand a public policy challenge.").

Appellants consider gross negligence to be more closely aligned with negligence than recklessness, describing it as a form of negligence where there is a more significant departure from the standard of care, but without the "conscious action or inaction" that characterizes recklessness. *See* Appellants' Brief at 52. Appellants view gross negligence as a type of negligence that is covered by the Waiver and precludes appellees' action for damages. *Id.* at 53-54.

Appellees respond that gross negligence is "more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference.... The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." Appellees' Brief at 50, *quoting Bloom v. Dubois Reg'l Med. Ctr.*, 409 Pa.Super. 83, 597 A.2d 671, 679 (1991); *accord Albright v. Abington Mem'l Hosp.*, 548 Pa. 268, 696 A.2d 1159, 1164 (1997) ("We believe that this definition is a clear, reasonable, and workable definition of gross negligence[.]"). Here, appellees assert, there were sufficient facts presented for the jury to conclude appellants' conduct was grossly negligent, and public policy compels the conclusion such conduct should not be immunized by the Waiver. Appellees' Brief at 52-53.

A determination that a contract is unenforceable because it contravenes public policy "requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards." *See Tayar*, 47 A.3d at 1199, *citing Williams v. GEICO Gov't Employees Ins. Co.*, 613 Pa. 113, 32 A.3d 1195, 1200 (2011). "It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring...." *Id.*, *quoting Williams*, 32 A.3d at 1200. Our law is clear that pre-injury exculpatory contracts purporting to protect a party from liability arising from recklessness are unenforceable on this public policy basis.

Although we have equated "gross negligence" with "recklessness" in the criminal law context, we have not expressly applied that equation in the civil context. . . .

Thus, although we have not previously settled on a definitive meaning of the term "gross negligence" as compared to "ordinary negligence" in the civil context, we have recognized there is a difference between the two concepts, and they are distinguished by the degree of deviation from the standard of care. . . .

Gross negligence has thus been consistently recognized as involving something more than ordinary negligence, and is generally described as "want of even scant care" and an "extreme departure" from ordinary care. . . .

As we have seen, gross negligence does not rise to the level of the intentional indifference or "conscious disregard" of risks that defines recklessness, but it is defined as an "extreme departure" from the standard of care, beyond that required to establish ordinary negligence, and is the failure to exercise even "scant care." *Royal Indem. Co.*, 255 F.Supp.2d at 505. *See also* 2 DAN B. DOBBS, THE LAW OF TORTS § 140 (gross negligence is "a high, though unspecified degree of negligence, or as courts sometimes say, the failure to use even slight care.") Thus, gross negligence involves more than a simple breach of the standard of care (which would establish ordinary negligence), and instead describes a "flagrant" or "gross deviation" from that standard. *Bloom*, 597 A.2d at 679 (gross negligence involves behavior that

is "flagrant, grossly deviating from the ordinary standard of care"). As such, the same policy concerns that prohibit the application of a waiver in cases of recklessness — *i.e.*, allowing it would incentivize conduct that jeopardizes the signer's health, safety and welfare to an unacceptable degree requires a similar holding with regard to gross negligence.[13] Accordingly, we hold the Waiver is not enforceable to preclude liability arising from appellees' claims of gross negligence, and the allegations supporting such claims should be tested at trial on remand.

III. Conclusion

For all the foregoing reasons, we hold appellants had a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events, including the football practice of March 29, 2010, and there is a genuine issue of material fact regarding whether appellants breached this duty. Moreover, although the Waiver bars recovery for appellees' damages arising from ordinary negligence, we hold the Waiver does not bar recovery for damages arising from gross negligence or recklessness, and there remain factual questions regarding whether appellants' conduct constituted gross negligence or recklessness. Accordingly, we affirm the Superior Court's order only to the extent it vacated the trial court's entry of summary judgment on these claims specifically, and we remand this matter to the trial court for further proceedings consistent with this opinion.

* * * *

Notes and Questions

1. This case is discussed in Section 10.4.9 at p. 850 of the text.

2. For what reasons did the court decide that a special relationship existed between the athletes and the college? What duties arose on the part of the college and its employees as a result of this special relationship?

3. While deciding that a special relationship existed between the athletes and the college based on the affirmative actions of the college, the court did not address the issue of whether a general duty should be imposed on Pennsylvania colleges to have qualified medical personnel at athletic events, including practices. Do you think that courts should impose such a general duty on colleges and universities?

4. The lower courts affirmed that the college athletes could sign a valid waiver, at least as to negligent acts by the college or its agents or employees. Do you agree that, as a matter of public policy, that such waivers should be enforceable?

K.

CHAPTER XI: THE COLLEGE AND GOVERNMENT

SEC. 11.1.2. Trespass Statutes and Ordinances

State v. Schmid
Supreme Court of New Jersey
84 N.J. 535, 423 A.2d 615 (1980)

OPINION: The opinion of the Court was delivered by HANDLER, J.

While distributing political literature on the campus of Princeton University, defendant Chris Schmid, a member of the United States Labor Party, was arrested and charged by the University with trespass upon private property. He was subsequently convicted under the State's penal trespass statute. On this appeal he challenges the conviction on the grounds that it stems from a violation of his federal and state constitutional rights to freedom of speech and assembly.

I.

On April 5, 1978, Chris Schmid was distributing and selling political materials on the main campus of Princeton University, a private, non-profit institution of higher education located in the Borough of Princeton, New Jersey. These materials dealt with the City of Newark mayoral campaign and with the United States Labor Party in general. Schmid was not a student at Princeton University nor was the Labor Party a university-affiliated or campus-based organization. On certain previous occasions, members of the Labor Party had unsuccessfully sought to obtain University permission to distribute and sell political materials on campus. On this particular occasion in April 1978, however, no such permission was either sought or received.

Under the University regulations then in effect, permission was a prerequisite for the on-campus distribution of materials by off-campus organizations. No such permission was required, however, for the same activity by a university-affiliated organization or by Princeton students. The regulatory language pertaining to off-campus organizations stated in part:

> Demonstrations and the distribution of leaflets, statements, or petitions...are permitted on the campus unless, or until, they disrupt regular essential operations

of the University or significantly infringe on the rights of others. On the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest. [University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1976.] These regulations further provided that no solicitation of either sales or charitable contributions was to be permitted on campus without the express authorization of the appropriate University officials. Moreover, door to door political or charitable solicitation was generally prohibited. *Ibid*. The University revised these regulations in 1979.[1]

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[1] The revised regulations now read in pertinent part as follows.

REGULATIONS GOVERNING SOLICITATION (INCLUDING COMMERCIAL SALES, FUND-RAISING, AND DISTRIBUTION OF LITERATURE) BY OFF-CAMPUS INDIVIDUALS OR ORGANIZATIONS

No individual or organization may distribute literature, advertise, or otherwise solicit customers, seek donations, or make sales on campus without the express authorization of the Office of the Dean of Student Affairs.

COMMERCIAL SALES. The Office of the Dean of Student Affairs may grant permission for solicitations and sales by off-campus business concerns only when specifically requested to do so by a recognized University students [sic], faculty, or employee organization. Such permission, when granted, will be subject to such limitations as the Dean of Student Affairs may prescribe.

CHARITABLE, POLITICAL, OR RELIGIOUS SOLICITATION. As a general rule, representatives of off-campus political, religious, and charitable groups will not be permitted to solicit on campus. However, individuals acting on behalf of candidates for public office or of bona fide political or religious organizations may obtain permission to sell or distribute their political or religious literature under the following guidelines:

1. Non-members of the University community who are acting on behalf of candidates for public office or of bona fide political or religious organizations, and who wish to seek permission to distribute and/or sell political and religious literature on the campus should apply to the Office of the Dean of Student Affairs between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

2. In choosing among the six sites where political and religious literature may be sold or distributed which were recommended by the Council of the Princeton University Community preference will be given to three locations: the area adjacent to the Student Center (on the Library side), the area surrounding Alexander Hall, and the area around the University Store.

3. Permission for the sale or distribution of political and religious literature may be granted only for the hours between 9:00 a.m. and 5:00 p.m. seven days a week.

4. The number of persons who, at any one time, will be permitted to sell or distribute literature for any particular candidate or group is limited to one or two at any given location, and to five or six on the campus as a whole.

Schmid stipulated that he had been aware in April 1978 that the existing University policy was against allowing "persons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions." He had, in fact, previously been told on February 15, 1978 that his presence and activity on campus without permission were "forbidden" and that he "was subject to arrest for trespassing if he entered on campus to solicit again [without University permission]."

Schmid was arrested for trespass on University property on the day in question by a member of the Princeton University Security Department and charged as a disorderly person under N.J.S.A. 2A:170-31.[2] He was convicted of trespass in Princeton Borough Municipal Court on October 20, 1978 and fined $15 plus $10 costs. On February 20, 1979, following a trial de nova in Superior Court, Law Division, pursuant to R. 3:28 8, Schmid was again found guilty of trespass and the same monetary penalty was reimposed. While defendant's appeal was pending in the Appellate Division, this Court directly certified the case under R. 2:12-1. 81 N.J. 344 (1979). At the Court's invitation, Princeton University intervened in this appeal. The

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5. The number of occasions on which candidates or groups will be permitted to sell or distribute literature will be limited normally to six visits during a given month. In special situations, such as an approaching election, more frequent visits may be permitted.

6. The total number of people distributing or selling literature at any one location on campus will be limited. When several groups wish to distribute literature at a particular location, in accordance with general University policy, preference in use of campus facilities will be given to members of the University community. In acting on requests from members of outside political or religious groups and representatives of candidates, individuals who are sponsored by members of the University community will be preferred.

7. Harassment of members of the University community by those selling or distributing literature, or sale or distribution outside of the hours or locations for which permission has been granted, will be cause for the immediate revocation of permission for the sale or distribution of literature by those involved.

8. Decisions regarding requests under these guidelines will need to take into account both any special circumstances that may relate to University activities and the burden that permission to sell or distribute political or religious literature may place on the University's security forces and administrative staffs. [University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1979.]

[2] That statute provided in pertinent part that any person who trespasses on any lands...after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof, or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [N.J.S.A. 2A:170-31.] The offense covered by that statute, repealed by L. 1978, c. 95, § 2C:98-2 (effective September 1, 1979), is now contained in the New Jersey Code of Criminal Justice as N.J.S.A. 26:18-3 (L. 1978, c. 95, § 2C:18-3, effective September 1, 1979). The correct statute to be applied here, of course, is N.J.S.A. 2A:170-31, which was in effect at the time of the alleged offense. See N.J.S.A. 2C:1-1(b).

Association of Independent Colleges and Universities in New Jersey also filed an amicus curiae brief with this Court.

Defendant contends on this appeal that his trespass conviction offends both the federal and the State Constitutions. He specifically asserts that his conduct distributing political literature on the main campus of Princeton University constituted an exercise of his freedoms of speech and assembly, an exercise protected both by the First Amendment to the United States Constitution and by Article I, paragraphs 6 and 18 of the New Jersey Constitution; he maintains that the University was thus constitutionally obligated to permit this activity on its campus. In opposition, the State and the University contend that defendant's conduct encroached unlawfully upon legitimate and protectable private property rights. They argue that the University as a private entity had not undertaken state governmental action and had not invited or made a public use of its property sufficient to subject it to the strictures of the speech and assembly guarantees under either the federal or the State constitution. For these reasons, they urge that the University, in prosecuting Schmid for trespass upon private property, did not violate his individual constitutional rights.

We now address the respective federal and State constitutional issues framed by this appeal.

II.

* * * *

III.

Defendant asserts that, under the State Constitution, he is afforded protection of his expressional rights even if it is not clear that the First Amendment would serve to grant that protection. The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. *PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 80-81, 100 S. Ct. at 2040, 64 L.Ed.2d at 752. The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression.

* * * *

On numerous occasions our own courts have recognized the New Jersey Constitution to he an alternative and independent source of individual rights. See, e. g., *Smith v. Penta*, 81 N.J. 65, 73-76, 405 A.2d 350 (1979); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 177, 330 A.2d 1 (1974); *id*. at 193-194 (Pashman, J., dissenting). Mr. Justice Brennan in his oft-cited piece in 90 *Harv.L.Rev., supra*, at 499 drew support for this proposition from *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 n.2 (1975), wherein Justice Sullivan had observed that although the New Jersey constitutional provision relating to searches and seizures was identical to the federal Fourth Amendment provisions, "'we have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning.'"

The guarantees of our State Constitution have been found to extend to a panoply of rights deemed to be most essential to both the quality of individual life and the preservation of personal liberty. See, e. g., *Levine v. Institutions & Agencies Dept. of N. J*., 84 N.J. 234, 244-249, 258, 418 A.2d 229 (1980) (right to an education); *id*. at 273 (Pashman, J., dissenting); *State v. Ercolano*, 79 N.J. 25, 30, 34, 397 A.2d 1062 (1979) (privacy based freedom from "unreasonable searches and seizures"); *State v. Slockbower*, 79 N.J. 1, 4, 397 A.2d 1050 n.2 (1979) (same); *State v. Tropea*, 78 N.J. 309, 313, 394 A.2d 355, n.2 (1978) (double jeopardy and fundamental fairness); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79, 389 A.2d 465 (1978) (equal protection); *State v. Saunders*, 75 N.J. 200, 216-217, 381 A.2d 333 (1977) (right of sexual privacy); *id*. at 224-225 (Schreiber, J., concurring); In re *Quinlan*, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647 (1976), cert. den. sub nom. *Garger v. New Jersey*, 429 U.S. 922, 97 S. Ct. 319, 50 L.Ed.2d 289 (1976) (right of choice to terminate life support systems as aspect of right of privacy); *State v. Johnson, supra*, 68 N.J. at 353 (freedom from "unreasonable searches and seizures"); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (double jeopardy and fundamental fairness); *Robinson v. Cahill*, 62 N.J. 473, 482, 509, 303 A.2d 273 (1973), cert. den. sub nom. *Dickey v. Robinson*, 414 U.S. 976, 94 S. Ct. 292, 38 L.Ed.2d 219 (1973) (*Robinson I*) (right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (right to vote); *Cooper v. Nutley Sun Printing Co*., 36 N.J. 189, 191, 195-196, 175 A.2d 639 (1961) (right of employees to organize and bargain collectively); *State v. Hannah*, 171 N.J.Super. 325, 330, 408 A.2d 1349 (App.Div.1979) (right to a public criminal trial inheres in the public); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 300-301, 343 A.2d 148 (Law Div.1975) (freedom of the press); *Gray v. Serruto Builders, Inc*., 110 N.J.Super. 297, 306-307, 265 A.2d 404 (Ch.Div.1970) (right to be free from racial discrimination); cf. *State v. Carpentieri*, 82 N.J. 546, 572-573, 414 A.2d 966 (1980) (Pashman, J., dissenting) (freedom from "unreasonable searches and seizures"). *Contra*, *Anderson v. Sills*, 143 N.J.Super. 432, 442, 363 A.2d 381 (Ch.Div.1976). As Justice Schreiber pointed out in his concurring opinion in *State v. Saunders, supra*, with respect to fundamental personal rights, "individuals have freedom to think,

decide and act as they see fit; this freedom is an aspect of their right of privacy" guaranteed by the New Jersey Constitution, N.J.Const. (1947), Art. I, par. 1, quite apart from the federal Constitution. 75 N.J. at 225.

Most recently, this Court recognized through Chief Justice Wilentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly protected under the State Constitution (N.J.Const. (1947), Art. I, par. 6), state statutory enactments (e. g., N.J.S.A. 2A:84A 21 et seq. ("shield law")), and state decisional law. *See State v. Boiardo*, 83 N.J. 350, 353, 416 A.2d 793 (1980) (*Boiardo II*); *State v. Boiardo*, 82 N.J. 446, 458, 414 A.2d 14 (1980) (*Boiardo I*); In re *Farber*, 78 N.J. 259, 286-287, 394 A.2d 330 (Pashman, J., dissenting). The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom, does not accord to it the degree of protection that may be available through state law. *Branzburg v. Hayes*, 408 U.S. 665, 706, 92 S. Ct. 2646, 2669, 33 L.Ed.2d 626, 654 (1972); see also, e. g., *Keene Publishing Corp. v. Cheshire County Superior Court, supra; Westchester Rockland Newspapers, Inc. v. Leggett, supra.*

A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms, viz:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. . . . [N.J.Const. (1947), Art. I, par. 6.]
>
> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J.Const. (1947), Art. I, par. 18.]

The constitutional pronouncements, more sweeping in scope than the language of the First Amendment,[3] were incorporated into the organic law of this State with the adoption of the

[3] Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. This option was noted by Justice Sullivan in *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 (1975). As Justice Mosk of the California Supreme Court has observed, "it is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *People v. Brisendine*, 13 Cal.3d 528, 550, 531 P.2d 1099, 1113, 119 Cal.Rptr. 315, 329 (Sup.Ct. 1975), see Note, "Expanding State Constitutional Protections and the New Silver

1844 Constitution. N.J.Const. (1844), Art. I, pars. 5 and 18. They were, however, directly derived from earlier sources, e.g., the free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York (now N.Y. Const. (1938), Art. § 8). Heckel, *The Bill of Rights*. (Monograph), in 2 *Proceedings of the New Jersey Constitutional Convention of 1947*, 1336, 1344 (1951) (hereinafter Heckel, *Bill of Rights*); *id*. at 1357-1358. This early constitutional model itself has been recognized as constituting an independent source of protectable individual rights. See *Cooper v. Morin, supra*, 49 N.Y.2d at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 174; *Westchester Rockland Newspapers, Inc. v. Leggett, supra*, 48 N.Y.2d at 436, 442, 399 N.E.2d at 521, 525, 423 N.Y.S.2d at 634, 638; *Sharrock v. Dell Buick Cadillac, Inc., supra*, 45 N.Y.2d at 160-161, 379 N.E.2d at 1173, 408 N.Y.S.2d at 43-44.

Although our own courts have seldom been invited or required to view the New Jersey constitution as a separate basis for delineating the scope of individual speech and assembly freedoms, the philosophy recognizing the importance of such rights has been frequently voiced. In a case decided last term dealing with such expressional rights in the context of municipal zoning restrictions, Justice Clifford observed as follows:

> Political speech...occupies a preferred position in our system of constitutionally-protected interests. [*State v. Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government "allow the widest room for discussion, the narrowest range for its restriction." [*Id.* at 412 (citation omitted).]

See *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 277, 96 A.2d 519 (1953) (under the facts, there was a First Amendment violation in the denial of theatre license since "speech[, including the "performance of a play or show" (*id*. at 270),] is to be presumed to be protected speech and...the presumption is not the other way"); *State v. Butterworth*, 104 N.J.L. 579, 582, 142 A. 57 (E. & A.1928) (in overturning the unlawful assembly convictions of striking workers, Court observed that "these constitutional mandates [the First Amendment and N.J.Const. (1844), Art. I, par. 18], being in favor of the liberty of the people, must be given the most liberal and comprehensive construction").

Our courts have also on occasion observed that the State Constitution serves only to limit the sovereign power that inheres directly in the people and indirectly in their elected representatives. *Smith v. Penta, supra*, 81 N.J. at 74; *Gangemi v. Berry*, 25 N.J. 1, 8-9, 134 A.2d 1 (1957). Hence, the explicit affirmation of these fundamental rights in our Constitution can be

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Platter: After They've Shut the Door, Can They Bar the Window?," 8 *Loyola U.L.J.* 186, 192 (1976); see also Z. Chafee, *Free Speech in the United States* 5-6 (1941).

seen as a guarantee of those rights and not as a restriction upon them. See 16A Am.Jur.2d, *Constitutional Law*, § 439 at 208 (1979). It has been recognized that the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation. *Peper v. Princeton Univ. Bd. of Trustees, supra*, 77 N.J. at 76-77. "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence. . . ." *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 177 (Hughes, C. J.); see *Robinson I, supra*, 62 N.J. at 513; *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161, 212 A.2d 1, 173-175 (1965). Furthermore, the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. See In re *Quinlan, supra*, 70 N.J. at 19 n.1; cf. *Mt. Laurel v. Public Advocate of N. J.*, 83 N.J. 522, 535-536, 416 A.2d 886 (1980) (state statute creating Office of Public Advocate to enforce the rights of citizens as an aspect of the public interest is not unconstitutional). This constitutional imperative, applicable to the freedoms of speech and assembly, comports with the presumed intent of those who framed our present Constitution. See Heckel, *Bill of Rights, supra* at 1344-1345, 1357-1358.

Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism.[4] *Robinson I, supra*, 62 N.J. at 490. See also *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 192-193 (Pashman, J., dissenting) (citing *Cooper v. Nutley Sun Printing Co., supra*, 36 N.J. at 196-197; *Gray v. Serruto Builders, Inc., supra*, 110 N.J.Super. at 306-307; Countryman, "The Role of a Bill of Rights in a Modern State Constitution," *supra*, 45 *Wash.L.Rev*. at 473; Project Report, "Toward an Activist Role for State Bills of Rights," supra, 8 *Harv.C.R.-C.L.L.Rev*. at 338 (analyzing N.J.Const. (1947), Art. I, par. 6)). Hence, federal requirements concerning "state action," founded primarily in the language of the Fourteenth Amendment and in principles of federal state relations, do not have the same force when applied to state based constitutional rights.

It is also clear that while state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution, there nonetheless exist meaningful parallels between the federal Constitution and state constitutions, especially in the areas where constitutional values are shared, such as speech and assembly. Indicative of such mutuality, our

[4] This point was expressed in dissent by Justice Pashman who stated that "one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state." *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 193, 330 A.2d 1 (1974) (Pashman, J. dissenting) (citations omitted).

State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech." N.J.Const. (1947), Art. I, par. 6.

We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.

Against this constitutional backdrop must be addressed the question of whether the State Constitution's guarantees of speech and assembly under Article I, paragraphs 6 and 18 apply to the distribution of political materials by defendant Schmid upon the Princeton University campus on April 5, 1978. This question brings us to the heart of the problem – the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly.

In the comparable federal setting, private property not used by the public or made available for public use does not ordinarily become subject directly to restrictions in favor of the public. *Hynes v. Oradell*, 425 U.S. 610, 619-620, 96 S. Ct. 1755, 1760, 48 L.Ed.2d 243, 252 (1976). Moreover, private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner, supra*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. See, 447 U.S. at 82, 100 S. Ct. at 2041, 64 L.Ed.2d at 752; *Hudgens v. NLRB, supra*, 424 U.S. at 519-520, 96 S. Ct. at 1036, 47 L.Ed.2d at 206-207. Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. *Marsh v. Alabama, supra*, 326 U.S. at 506, 66 S. Ct. at 278, 90 L.Ed. at 268.

There is a parallel under our State Constitution. The state constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory restrictions upon its reasonable use. *Robins v. Prune Yard Shopping Center, supra*, 23 Cal.3d at 910-911, 592 P.2d at 347-348, 153 Cal.Rptr. at 860-861; see *King v. South Jersey Nat'l Bank*,

supra, 66 N.J. at 175. The constitutional protection of private property against undue interference or "taking" is secured by our own Constitution. N.J.Const. (1947), Art. I, pars. 1 and 20.

On the other hand, it is also clear that private property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare. See, e. g., *Vasquez v. Glassboro Service Ass'n*, 83 N.J. 86, 100-101, 415 A.2d 1156 (1980); *Garrow v. Elizabeth General Hosp. & Dispensary*, 79 N.J. 549, 560-561, 401 A.2d 533 (1979); *Doe v. Bridgeton Hosp. Ass'n*, 71 N.J. 478, 487-488, 366 A.2d 641 (1976), *cert. den.*, 433 U.S. 914, 97 S. Ct. 2987, 53 L.Ed.2d 1100 (1977); *State v. Shack*, 58 N.J. 297, 305-308, 277 A.2d 369 (1971); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 395-401, 192 A.2d 817 (1963); *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J.Super. 379, 386-387, 324 A.2d 35 (App.Div.1974), *certif. den.*, 66 N.J. 317 (1974); cf. *State v. Miller, supra*, 83 N.J. at 415 (1980) (while "preservation of aesthetics and property values is a legitimate end for a municipal zoning ordinance," an ordinance generally prohibiting property owners from placing signs on their property violates the protected First Amendment interests of those property owners). In this regard, the United States Supreme Court has recently acknowledged that it is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation. . . . [*PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 81, 100 S. Ct. at 2040-2041, 64 L.Ed. 2d at 752.]

The California Supreme Court, in the same case, found that such restrictions upon private property could properly be imposed in order to protect the rights of free speech and petition, viz:

> To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights. [*Robins v. PruneYard Shopping Center, supra*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal.Rptr. at 859.]

We are thus constrained to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property. In seeking this optimum, we can derive some guidance from certain of the Supreme Court cases, such as *Marsh v. Alabama, supra; Lloyd Corp. v. Tanner supra*, and *PruneYard Shopping Center v. Robins, supra*, which recognize generally that the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property. Since it is our State Constitution which we

are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property. See *Vasquez v. Glassboro Service Ass'n, supra*, 83 N.J. at 100-101; *State v. Shack, supra*, 58 N.J. at 305-308, *Zelenka v. Benevolent & Protective Order of Elks, supra*, 129 N.J.Super. at 386-387.

Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can he restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Even when an owner of private property is constitutionally obligated under such a standard to honor speech and assembly rights of others, private property rights themselves must nonetheless be protected. The owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis – assessing the reasonableness of such restrictions – that weight may be given to whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity. While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Taken together, these are the relevant considerations which must be brought to bear in order to reach an ultimate determination in this case as to the constitutionality of Schmid's trespass conviction for attempting to exercise his rights of speech and assembly upon the Princeton University campus. The record in this appeal is to be assessed in light of the constitutional standard herein set forth.

IV.

The application of the appropriate standard in this case must commence with an examination of the primary use of the private property, namely, the campus and facilities of

Princeton University. Princeton University itself has furnished the answer to this inquiry in expansively expressing its overriding educational goals, viz: The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom.

* * * *

Free Speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight. . . . [University Regulations, *supra* (1975 as amended 1976).] No one questions that Princeton University has honored this grand ideal and has in fact dedicated its facilities and property to achieve the educational goals expounded in this compelling statement.

In examining next the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the University's expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University. The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world," i.e., the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideals and objectives.[5]

The further question is whether the expressional activities undertaken by the defendant in this case are discordant in any sense with both the private and public uses of the campus and facilities of the University. There is nothing in the record to suggest that Schmid was evicted

[5] Princeton University in its regulations has dealt extensively with "community use of University resources." Public participation in activities involving the use of University facilities may be by explicit invitation relating to "activities...[which] are an integral part of the University's function a an educational institution." by "implicit invitation" as to its grounds and walkways "generally available to the public," by "participation in University-sponsored or sanctioned programs," or by "private Invitation." If no other form of invitation is applicable. University Regulations, *supra* note 2 (1975, as amended 1976).

because the purpose of his activities, distributing political literature, offended the University's educational policies. The reasonable and normal inference thus to be extracted from the record in the instant case is that defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes.[6] Further, there is no indication that, even under the terms of the University's own regulations, Schmid's activities in any way, directly or demonstrably "disrupted the regular and essential operations of the University" or that in either the time, the place, or the manner of Schmid's distribution of the political materials, he "significantly infringed on the rights of others" or caused any interference or inconvenience with respect to the normal use of University property and the normal routine and activities of the college community.

Without necessarily endorsing any of the foregoing conclusions, the University nevertheless contends that its solicitation regulation was properly invoked against Schmid in this case because it requires that there be a specific invitation from on-campus organizations or students and a specific official authorization before an individual may enter upon University premises even for the purpose of exercising constitutional rights of speech and assembly. It points out that Schmid failed to obtain such permission. The University stresses the necessity for and reasonableness of such a regulation.

In addressing this argument, we must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in

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[6] Supportive of this conclusion is the following excerpt from Princeton University President William G. Bowen in "The Role of the University as an Institution in Confronting External Issues" (January 6, 1978):

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions. . . . Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society-a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint or the loneliest dissenter, is encouraged to think independently.

As noted by Professor Emerson, "freedom of expression is [both] an essential process for advancing knowledge and discovering truth" and "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." T. Emerson, *The System of Freedom of Expression* 6, 7 (1970).

controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. See, e.g., *Healy v. James, supra*, 408 U.S. at 180, 92 S. Ct. at 2345, 33 L.Ed.2d at 279; *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L.Ed.2d 731, 741-742 (1969).[7] Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

In this case, however, the University regulations that were applied to Schmid (in contrast to those subsequently adopted, *supra* at 539-541 n.2) contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests if the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. Cf. *Tinker v. Des Moines Indep. Community School Dist., supra*, 393 U.S. at 513, 89 S. Ct. at 740, 21 L.Ed.2d at 741 (exercise of right of free speech on public school grounds must not interfere with educational mission of the institution); *Cox v. Louisiana*, 379 U.S. 536, 556-558, 85 S. Ct. 453, 465-466, 13 L.Ed.2d 471, 485-486 (1965) (vague statutes cannot be used to prosecute persons for exercising their First Amendment rights); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 93-94 (2 Cir. 1968), *cert. den.*, 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (public authority may issue reasonable regulations for use of bus terminal for public demonstrations; such regulations should balance right of free expression with public right to use terminal for transportation purposes). In these circumstances, given the absence of adequate reasonable regulations, the required accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. See *PruneYard Shopping Center v.*

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[7] The public's right to exercise its freedom of speech does not mandate unrestricted access to university facilities. Even with respect to public property, the public's use of that property for First Amendment activity may be restricted, if not actually prohibited. See. e. g., *Adderleym v. Florida*, 385 U.S. 39, 47, 87 S. Ct. 242, 247, 17 L.Ed.2d 149, 155-156 (1966) (public may be prohibited from demonstrating on the grounds of county jail); *American Future Systems, Inc. v. Pennsylvania State Univ.*, 618 F.2d 252, 255 (3 Cir. 1980) (state university regulation forbidding sales demonstrations and solicitation in university-owned and operated residence halls is constitutional); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 94 (2 Cir. 1968). *cert. den.*, 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (regulations may limit public's use of public property for expressional activity to ensure that that activity does not interfere with the use to which the property is dedicated).

Robins, supra, 447 U.S. at 82-84, 100 S. Ct. at 2041-2042, 64 L.Ed.2d at 753 (absent any regulations governing expressional activity, such activity reasonably exercised on private property devoted to public use is protectable under state constitution and does not constitute impermissible infringement upon private property rights). It follows that in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus.

We are mindful that Princeton University's regulatory policies governing the time, place, and manner for the exercise of constitutionally protected speech and associational rights have been modified substantially since the events surrounding Schmid's arrest and now more fully and adequately define the nature of these restrictions. As we have indicated, the content of such regulations, recognizing and controlling the right to engage in expressional activities, may be molded by the availability of alternative means of communication. *Supra* at 563-564. These current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth. As noted, however, these regulations were not in place when the University interfered with Schmid's reasonable efforts to communicate his political views to those present on its campus in April 1978. Hence, Schmid suffered a constitutional impairment of his State constitutional rights of speech and assembly and his conviction for trespass must therefore be undone.

Accordingly, for the reasons set forth, the judgment below is reversed.

Notes and Questions

1. Does the court's opinion in *Schmid* unduly interfere with the autonomy of private colleges and universities? Should the court have recognized some type of "institutional academic freedom" that would protect private institutions against such exercises of state power? See generally the Text Section 6.1.7; and see also Finkin, "On 'Institutional' Academic Freedom," 61 *Tex. L. Rev*. 817 (1983).

2. Regarding use of state constitutions as a source of individual rights, see the Text Section 1.5.3; and regarding state constitutions generally, see the Text Section 1.4.2.1.

3. Princeton University revised its pertinent regulations in 1979, after the *Schmid* case was underway but before the Supreme Court of New Jersey's decision in 1980. What is the New Jersey's court's view of these amended regulations? How do they resolve the kind of problem raised in *Schmid*? Do these amended regulations constitute good policy?

4. *Schmid* concerned the situation where a member of the surrounding community enters the campus. For other examples of legal issues that may arise in this situation, see the Text Section 11.1.2. (The *Schmid* case is discussed on pp. 869-871 of this section.) Legal issues also may arise in the reverse situation, where a student or faculty member from the campus undertakes some activity in the surrounding community.

SECS. 11.2.2. and 11.2.3. *State Chartering and Licensure of Private Postsecondary Institutions*

Nova University v. Educational Inst. Licensure Commn.
483 A.2d 1172 (1984)

JUDGES: Before MACK and NEWMAN, Associate Judges, and GALLAGHER, Associate Judge, Retired.

OPINION: NEWMAN, Associate Judge:

Nova University (Nova) seeks review of an Order of the Educational Institution Licensure Commission (Commission) denying Nova's application for a license to offer Doctorate of Public Administration degree courses in the District of Columbia. The Commission denied the license, without prejudice, on the grounds that Nova had not complied with the District's licensing statutes and regulations with respect to adequate full-time faculty and adequate library resources.

Nova challenges the denial of its application for a license on the grounds that: (1) D.C. Code § 29-815 (1981), the District's licensing statute, is not applicable to schools, such as Nova, whose degrees are conferred outside the District of Columbia; (2) D.C. Code § 29-815 is unconstitutional on its face and as applied to Nova because it violates the First Amendment; (3) D.C. Code § 29-815 and the regulations guiding the issuance of licenses are unconstitutionally vague; and (4) the Commission's denial of a license was arbitrary, capricious, and unsupported by substantial evidence in the record.

We disagree with each of Nova's contentions, and therefore affirm the Commission's decision.

I.

A preliminary review of the legislation relevant to this case and its history are helpful to place in context the issues raised by Nova. In 1929, the District of Columbia was not only the capital of the United States, but the "capital" for practically all diploma mills operating not only in the District, but throughout the United States and the world. *S. REP*. No. 611, 70th Cong., 1st Sess. (1928). This dubious distinction resulted from the District's lax laws relating the incorporation of educational institutions, the power these institutions had to confer degrees under their general charters, and the opportunity to advertise themselves as operating under the

authority of the United States Government or Congress. *Id*. at 2. Hundreds of fraudulent institutions of "learning" incorporated in the District and sold degrees from baccalaureate to doctoral in every conceivable field of study with little or no academic work; in addition, the charters themselves were sold to individuals who carried on the "educational" programs in other states and countries. *Id*. at 2. At the urging of the United States Attorney's Office, local citizens and schools, sister jurisdictions and foreign countries, Congress enacted a statute "to Regulate Degree-Conferring Institutions in the District of Columbia." Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929) (codified at D.C. Code §§ 29-815 to 818 (1981)). The statute requires licensing of all degree-conferring institutions incorporated in the District or incorporated in another state but operating in the District, and is set out in relevant part below:

> § 29-815. License to confer degrees – Issuance by Educational Institution Licensure Commission required.
>
> No institution...incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia..., undertaking to confer any degree, operate in the District of Columbia, unless..., by virtue of a license from the Educational Institution Licensure Commission, which before granting any such license may require satisfactory evidence:
>
> (1) That in the case of...an incorporated institution, a majority of the trustees, directors, or managers of said institution are persons of good repute and qualified to conduct an institution of learning;
>
> (2) That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree...;
>
> . . . .
>
> (4) That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment.

D.C. Code § 29-815 (1981).

The statute provides for criminal penalties against anyone "who shall, directly or indirectly, participate in, aid, or assist in the conferring of any degree by any unlicensed...institution. . . . D.C. Code § 29-819 (1981).

In 1977, the Council of the District of Columbia established the Educational Institution Licensure Commission to perform licensing functions under D.C. Code § 29-815. See D.C. Code § 31-1601 to 1608 (1981). The purpose of this legislation is outlined in its opening section and set out, in part, below:

> To provide for the protection, education, and welfare of the citizens of the District of Columbia, its private educational institutions, and its students, by:
>
> (1) Establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility to protect against substandard, transient, unethical, deceptive, or fraudulent institutions and practices;
>
> (2) Prohibiting the granting of false or misleading educational credentials;
>
> (3) Regulating the use of academic terminology in naming or otherwise designating educational institutions;
>
> (4) Prohibiting misleading literature, advertising, solicitation, or misrepresentation by educational institutions or their agents.

D.C. Code § 31-1601 (1981).

In 1980, the Council amended the 1977 statute, giving legislative sanction to regulations previously promulgated by the Commission's predecessor, the Board of Higher Education. D.C. Code § 31-1606(a) (1981). These regulations set forth the procedures and criteria by which licenses are issued and revoked. See *Regulations Relating to the Licensing of Institutions Which Confer Degrees* (1978) [hereinafter *Regulations*].

Section III of the *Regulations* contains eleven criteria the Commission is to consider in issuing licenses, involving inquiry into: institutional control; administrative staff and procedures; financial resources; number and quality of faculty; curricula, correspondence, extension, and summer session programs; admission requirements; library; physical plant and equipment; student personnel, health, and recreational services; and institutional publications. Applicants for

a license are required to submit a statement as to how they plan to meet the criteria or give reasons why they consider themselves justified in not meeting a particular requirement. *Regulations* at § III (1)-(11). The regulations provide for flexibility, recognizing that "the...criteria will not be equally applicable to each institution wishing to award degrees." *Id*. Applicants are entitled to a de novo hearing prior to the denial of a license, and to judicial review if a license is denied. *Id*. at § IV (e), (4)(2).[1]

II.

It is against this statutory background that this case arose. Nova University is a non-profit corporation organized and existing under the laws of Florida. In addition to undergraduate, graduate, and professional curricula taught at its home campus in Fort Lauderdale, Nova has instituted a variety of field-based, or external degree programs, designed to lead to the conferral by Nova in Florida of various degrees for professional persons. The field-based program of concern here is the Doctorate of Public Administration (DPA). Candidates for this degree are not required to fulfill traditional residence requirements at the Nova campus in Fort Lauderdale. Instead, they form "clusters" of 20 to 25 students who meet at a site in the areas where they live. At the time of the hearing, Nova was operating 11 clusters at various locations throughout the United States, with plans to increase to 15 in the near future.

Nova's DPA program requires a minimum of three years to complete and consists of nine sequences (analogous to semesters or quarters), with each sequence consisting of three to four "units" (analogous to courses). Six of the nine sequences are taught at the cluster sites, and each of the units meets once a month for approximately eighteen to twenty hours from Friday night through Saturday. The remaining three sequences are taught in residence in Ft. Lauderdale. Each of these last about one week and occur annually.

The faculty of the DPA program consists of approximately nine professors from Nova's Florida campus and thirty-three national members, called preceptors. Generally, preceptors travel to the clusters to teach local course units and the Florida – based faculty teaches Florida units. Preceptors are academicians and practitioners in the public administration field, most of whom also teach at universities with traditional residence requirements. In addition, each cluster is coordinated by a cluster director, a contract employee living in the cluster area whose role consists of administrative and recruitment duties as well as counseling students.

[1] Section IV of the Commission's *Regulations* regarding the applicant's right to a hearing and appeal parallel the District of Columbia Administrative Procedure Act, D.C. Code §§ 1-1509, 1510 (1981 & 1984 Supp.).

In addition to preparing papers in anticipation of the unit sessions, students must complete a series of research papers, pass comprehensive written and oral examinations, and complete a final paper, an "analytical research project," which Nova deems to be the equivalent of a doctoral dissertation. The research papers are supervised by Nova's faculty in Ft. Lauderdale, during the annual week-long conferences, as well as by telephone and written communication. The two-day comprehensive written examination is prepared and graded by the faculty in Florida, but administered locally. The oral examination is taken in Florida and administered by faculty members. If a student successfully completes the course work, comprehensive oral and written tests, and analytical research project, Nova awards a Doctor of Public Administration, under powers derived from its incorporation in Florida.

Since 1971, Nova has been accredited by the Southern Association of Colleges and Schools (SACS), the officially recognized regional accrediting association of the southeastern United States. Nova's accreditation was most recently affirmed for a ten-year period after a review in 1974-75 of its educational programs, including its external degree programs, such as the one here at issue. In 1980, SACS separately reviewed Nova's field-based programs, including the DPA program, and this review had no effect on Nova's accreditation.

In October 1980, Nova applied to the Commission for a license to offer DPA degree courses in the District of Columbia. In response to Nova's application, the Commission appointed a three-person evaluation team, composed of non-members of the Commission and approved by Nova, to visit Nova in Florida to determine whether Nova's DPA program met the District's statutory and regulatory criteria for licensing.

The team issued a report recommending denial of a license. Nova responded to the team report, pointing out what it believed were factual errors, and providing the Commission with additional information and proposals. The Commission then appointed a Task Force, made up of two Commission members, to evaluate the team's report and Nova's response. On March 4, 1981, the Task Force submitted its findings and concluded that the Commission should deny licensure. The Commission approved the recommendations of the site evaluation team and notified Nova of its intention to deny a license, the reasons for this intent, and Nova's right to request a hearing.

A de novo hearing was held before the Commission on August 19, 23, and 24, 1982. On January 19, the Commission rendered its decision denying Nova's license application, concluding that Nova failed to demonstrate that it would have adequate full-time faculty or adequate library resources in the District of Columbia as required by D.C. Code § 29-815(4) and the *Regulations* § IV(e). Although the Commission denied the license, it did so without prejudice to Nova renewing its application, and offered to explain to Nova how it could meet the faculty and library requirements.

III.

As a preliminary matter, we must address Nova's contention that this court can and should avoid the constitutional questions raised in this case by interpreting D.C. Code § 29-815 as excluding Nova from the licensing requirement. Section 29-815 requires "any institution incorporated outside of the District of Columbia...undertaking to confer any degree, operate in the District of Columbia ..." unless it obtains a license from the Commission. Nova suggests that we interpret the statute as reading "undertakes to confer any degree in the District of Columbia." Such a reading would exclude Nova from the license requirement because Nova confers its degree in Florida.

In urging this statutory interpretation, Nova reminds us of the well-established rule of statutory construction – a court "will not pass on the constitutionality of an act...if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27, (1980). . . . The operative words of this axiom, however, are "fairly possible," for a court cannot avoid constitutional questions by interpreting a statute in a way that is unreasonable in light of the language, purpose, and history of the legislation. See, e.g., *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 103 S. Ct. 2926, 2933, n. 10, (1983).

Examining the language of § 29-815 we note the quite obvious fact that the statute does not contain the words Nova urges us to insert. Rather, the statute plainly requires degree-conferring institutions incorporated outside the District to obtain a license to operate in the District without regard to where the degree is conferred.[2] Operating" is defined as "maintain[ing] any facility or location in the District...through which education is offered or given, or educational credentials are offered or granted, and includes contracting with any person, group, or entity, to perform any such act." D.C. Code § 31-1602(11) (1981). Given this definition and the fact that no words in the statute limit the licensing requirement to schools conferring degrees in the District, this plain language alone is sufficient for this court to reject Nova's argument. We have stated on numerous occasions that when the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute. See, e.g., *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979); *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976); *Harrison v. J. H. Marshall & Associates*, 271 A.2d 404, 406 (D.C. 1970). Much less are courts free to insert words into a statute that is complete and clear on its face where, as here, the words would render the "operating" clause of

[2] Compare *Nova University v. The Board of Governors of the University of North Carolina*, 305 N.C. 156, 287 S.E.2d 872 (1982). North Carolina's licensing statute expressly authorizes licensing to confer degrees, and contains no licensing requirement to "operate." The North Carolina court held that the statute could not be construed beyond its terms to authorize the Board to require a license for Nova's teaching of degree-credit courses in North Carolina where the degree was to be conferred in Florida.

the statute superfluous and be contrary to the clear intent of Congress. See *Hurst v. V & M of Virginia*, Inc., 293 Md. 575, 446 A.2d 55, 56-57 (1982).

The language of the statute, as well as its legislative history, plainly indicate Congress' intention to comprehensively regulate degree conferring institutions operating in the District of Columbia, whether the institutions were incorporated in the District or were foreign corporations seeking to operate in the District.

IV.

We turn now to Nova's argument that § 29-815 violates the First Amendment "on its face"[3] and as applied to Nova. As discussed previously, D.C. Code § 29-815 requires private educational institutions incorporated in the District to obtain a license as a condition to conferring a degree. Nova does not challenge this aspect of the statute, stating that the District may arguably regulate the "conduct" of degree conferral. However, Nova contends that the additional statutory requirement that private schools incorporated elsewhere and which undertake to confer degrees obtain a license as a condition to "operating" in the District, is unconstitutional because it licenses and regulates "pure speech" on the basis of quality. Nova points out that it has the authority to confer degrees from the state of Florida and seeks only to teach its degree program in the District. Because the District has no extrajurisdictional power to regulate Nova's degree conferral, Nova contends that the District is necessarily licensing teaching.

We reject this argument at the outset as well as the artificial conduct/speech distinction Nova draws because it has no practical of First Amendment substance. First, § 29-815 does not regulate or license teaching or "pure speech." The "operating" clause of § 29-815 merely subjects out-of-District schools to the same regulations as schools incorporated in the District, e.g. both have unfettered freedom to teach so long as no degree credits or degrees are promised or given. According to the Senate Report, "institutions which do not undertake to confer degrees do not come within the purview of this bill." *S. REP*. No. 611, 70th Cong., 1st Sess., at 4 (1928). The 1929 congressional statute was described in its title as an amendment to the D.C. Code "Relating to Degree-Conferring Institutions." Pub. L. No. 79-949, § 586a, 45 Stat. 1504 (1929). The statute itself states that schools incorporated in the District are required to obtain a license "to confer a degree," and schools incorporated elsewhere "undertaking to confer a degree" must obtain a license to "operate" in the District. The regulations setting forth the criterion for licensing are entitled "Regulations Relating to the Licensing of Institutions which Confer Degrees." The statutory penalties apply to anyone "who shall, directly or indirectly, participate

[3] A facial challenge in this context is an assertion that the statute is unconstitutional not only as applied to Nova, but also in any conceivable application. . . .

in, aid, or assist in the conferring of any degree by any unlicensed...institution. . . ." D.C. Code § 29-819 (1981). And in *Kraft v. Board of Education*, 247 F. Supp. 21, 25 (D.D.C. 1965), cert. denied, 386 U.S. 958, 18 L. Ed. 2d 106, 87 S. Ct. 1026 (1967), the court affirmed revocation of a license to award a degree, observing that the absence of a license did not prevent schools from teaching non-degree subjects or programs in the District. In short, Nova would not have needed to apply to the Commission for a license (an application requesting "a License to Offer Doctorate of Public Administration Degree Courses in the District of Columbia") nor would Nova be before this court if it did nothing in the District of Columbia but teach.

Second, the District's power to regulate Nova is no different than its power to regulate educational institutions incorporated in the District. Nova does not and could not contest the power of the District to regulate degree conferral by its own institutions. Compare *New Jersey Board of Higher Education v. Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982) (*Shelton II*). Educational institutions have no inherent or constitutional right to confer degrees; rather, degree conferral is business conduct, a corporate privilege conferred by the state of incorporation. *Id*. at 990; *National Association of Certified Public Accountants v. United States*, 53 App. D.C. 391, 292 F. 668 (1923); *Townshend v. Gray*, 62 Vt. 373, 19 A. 635, 636 (1980). Schools are not shielded by the First Amendment from governmental regulation of business conduct deemed detrimental to the public merely because they are engaged in First Amendment activities. . . . Although Nova has the power to confer degrees from the state of Florida, as a foreign corporation, Nova has no constitutional right to operate its degree program in the District of Columbia, e.g., *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119, 21 L. Ed. 2d 242, 89 S. Ct. 286 (1968); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181, 19 L. Ed. 357 (1868), and the District may impose the same restrictions upon Nova as it imposes upon its own degree-conferring schools. E.g., *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 51 L. Ed. 168, 27 S. Ct. 126 (1906); *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 43 L. Ed. 552, 19 S. Ct. 281 (1899); *Paul v. Virginia*, *supra; Watergate South, Inc. v. Duty*, 464 A.2d 141, 144 n.5 (D.C. 1983).

Finally, the most serious flaw in the conduct/speech distinction drawn by Nova is that it has no First Amendment relevance and, if accepted, would undermine the very freedoms Nova asserts in this case. As we have already stated, in requiring schools incorporated outside the District to obtain a license to operate degree programs in the District, the District is regulating no more and no less than when it requires schools incorporated in the District to obtain a license to confer a degree. The question in each case is whether the school meets minimal academic standards as set out in the statute and regulations. Yet under the conduct/speech distinction drawn by Nova, Nova may engage in exactly the same activities in the District as a college incorporated in the District, and although D.C. Code § 29-815 would have an identical impact on

both schools, the District is absolutely prohibited by the First Amendment from regulating Nova but not from regulating a District school, merely because Nova is incorporated elsewhere. We cannot accept a theory of the First Amendment that conditions its protection on where a school is incorporated.

Our holding that D.C. Code § 29-815 regulates the business conduct of degree conferral and leaves schools free to teach does not end our First Amendment inquiry, for although degree conferral and the operation of degree programs are "privileges" granted by the District, the District can not place conditions on the receipt of these privileges that themselves violate the Constitution or require the recipient to forego the exercise of fundamental rights. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); *Speiser v. Randall*, 357 U.S. 513, 518, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958). Nor can the District regulate its businesses in ways that impinge on fundamental rights. E.g., *Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 593-99, 70 L. Ed. 1101, 46 S. Ct. 605 (1926).

Educational institutions, as well as individuals, have a First Amendment right to teach and to academic freedom. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)...; *Keyishian, supra*, 385 U.S. at 603; see generally Finkin, "On "Institutional" Academic Freedom," 61 *Tex. L. Rev*. 817 (1983). In his concurring opinion in *Sweezy v. New Hampshire* [354 U.S. 234 (1957)],[4] Justice Frankfurter characterized academic freedom as the right of an educational institution to be free from direct or indirect "governmental intervention in the intellectual life of a university," 354 U.S. at 262, and summarized the "four essential freedoms" that constitute academic freedom as the right of a university "'to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study.'" *Id*. at 263....

It cannot be gainsaid that D.C. Code § 29-815, by requiring educational institutions to obtain a license as a condition to operating a degree program and predicating that license on meeting District criteria, interferes with an educational institution's operation. In particular, Nova was denied a license because the Commission found that its library and faculty resources did not meet District requirements. However, to say that D.C. Code § 29-815 constrains a degree-granting educational institution's freedom to make decisions as to how an educational program will be run, is not to say that the constraints violate the First Amendment. Not every limit on institutional autonomy also implicates academic freedom. See *Kunda v. Muhlenberg*

[4] In Sweezy, the Court reversed the contempt conviction of a professor called before a one-man state investigative "team" to answer questions regarding, *inter alia*, the content of his lectures. Although the court's plurality opinion rested on due process grounds, the Court stressed the threat to academic freedom that the conviction presented. *Sweezy, supra*, U.S. at 250.

College, 621 F.2d 532, 547 (3d Cir. 1980). The Supreme Court has recognized that First Amendment freedoms are not absolute and "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 52 U.S.L.W. 4594, 4598, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (citing *Schenck v. United States*, 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247 (1919)). See also *Shelton II*, *supra*, 448 A.2d at 993-99.

In determining whether § 29-815 violates the First Amendment, we look first to whether the statute is content-neutral, for however valid the government's interest in regulating, it generally cannot be pursued by discriminating between particular viewpoints and information. E.g., *City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, 52 U.S.L.W. at 4598-99. The Supreme Court has consistently recognized that if the constitutional guarantee means anything, it means that, ordinarily at least, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); ...see generally Farber, "Content Regulation and the First Amendment: A Revisionist View," 68 *Geo. L.J.* 727 (1980); Redish, "The Content Distriction in First Amendment Analysis," 34 *Stan. L. Rev.* 113 (1981).

We think it evident that the general rule that forbids the government to regulate speech on the basis of content has no application to this case, for there is not even a hint of bias or censorship in Congress' enactment or the Commission's enforcement of D.C. Code § 29-815. In enacting § 29-815, Congress was not motivated by hostility to particular ideas, opinions, or educational philosophies,[5] nor was Congress concerned with harms that might occur from public exposure to particular information.[6] The sole interest of Congress was to ensure that degree-conferring educational institutions incorporated or operating in the District met minimal academic standards – whatever their message was, and to protect the public against harms arising from the abuse and misuse of degree-conferring powers, harms that arose independently of any message or teaching that might or might not precede degree conferral. On their face, the statutory and regulatory criteria for licensing are content neutral, censoring no subject, opinion, or educational philosophy. And contrary to Nova's suggestion, we do not believe that Commission inquiry into faculty qualifications, library resources, and curriculum content

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[5] Compare *Keyishian v. Board of Regents*, *supra*, and *Sweezy*, *supra*, where government intervention in university life was motivated by hostility to a political philosophy.

[6] Compare *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), where the state invalidly prohibited the teaching of foreign languages because of concern that it prevented immigrant assimilation into American society; and *Linmark Assocs. Inc. v. Township of Willingboro*, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977), where a township invalidly prohibited posting of "For Sale" signs in yards due to its belief that this information promoted "white flight" from neighborhoods.

necessarily makes the statute content-related or amounts to a constraint on academic freedom.[7] This inquiry is limited to neutral, sound, academic criteria, not intended or likely to intrude upon the legitimate intellectual life of a university, but to ensure that when a university confers a degree, it does indeed have an intellectual life and the minimal resources essential to support that life. Nor is there any suggestion that the Commission denied Nova a license because of the particular subjects it teaches, content of books it provides, or views of its teachers. Nova was denied a license because the Commission found that Nova's plans to use Howard University's library facilities rather than providing its own, and Nova's use of field-based teachers with no resident faculty in the District, did not meet the District's requirements for adequate faculty and library resources. Although application of the statute to Nova may be burdensome in a financial and administrative sense, and limits Nova's institutional prerogatives, we do not believe these constraints intrude upon Nova's right to academic freedom or free speech. It cannot be said that requiring a library and teachers is incompatible with the academic endeavor or with intellectual freedom within a university.[8]

When governmental regulation, as in this case, is not aimed at the content of speech but nevertheless has an incidental impact on the exercise of communicative activity, the regulation will not violate the First Amendment so long as it does not unduly restrict the communication of ideas. *Cox v. New Hampshire*, 312 U.S. 569, 574, 85 L. Ed. 1049, 61 S. Ct. 762 (1941); see also *Konigsberg v. State Bar*, 366 U.S. 36, 50-51, 6 L. Ed. 2d 105, 81 S. Ct. 997 (1961).

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[7] See generally Finkin, *supra* at 854, where the author distinguishes institutional autonomy from academic freedom, and concludes that, when the state does not directly regulate teaching or research, the question of whether a restraint on institutional autonomy is also an unconstitutional restraint on academic freedom will depend, in each case, on the purpose and effect of governmental action; "its compatibility with the academic enterprise; whether procedural safeguards for the institution are available; and the likely effect of the inquiry on academic freedom and the conduct of educational affairs." *Id*. at 855. In this regard, the author contrasts the loyalty-security investigations of professors in the 1950's, e.g., *Sweezy, supra*, the purpose and effect of which were "bluntly antithetical" to academic freedom, with state regulation of degree-conferring institutions on the basis of sound academic criteria, which might involve inquiry into faculty quality and content of curriculum, but does not constitute an impermissible invasion of academic freedom.

[8] ....Nova contends that the expert testimony it presented, particularly that of the Chairman of Harvard University's Government Department, compels us to overturn the Commission's decision. By a post-argument submission, Nova calls our attention to a recent decision of the United States Supreme Court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). We find nothing in *Munson* that compels a decision contrary to the one we reach. In the hearing before the Commission, there was conflicting expert testimony. For example, the Dean of the School of Community and Public Affairs at Virginia Commonwealth University was critical of the faculty arrangements provided by Nova, and questioned whether these provisions would meet the national standards of the National Association of Schools of Public Affairs. There was other expert testimony that was similarly critical, both as to faculty arrangements and as to library facilities. The Commission was entitled to choose which expert testimony it credited. *Citizens Association of Georgetown, Inc. v. District of Columbia*, 402 A.2d 36 (D.C. 1979) (en banc).

In *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), the Supreme Court set forth the framework for reviewing a viewpoint neutral regulation of this kind:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

We have already addressed the power of the District to regulate the business activities of its own educational institutions and we have held that the District's interest in this case is not aimed at suppressing speech, but rather in preventing the harms that arise when educational institutions abuse their degree-conferring authority. Thus, the critical inquiries in this case are whether D.C. Code § 29-815 furthers a substantial interest and whether the effect of the statute on speech and academic freedom is no greater than necessary to protect the District's interest.

The interest that the District asserts is that of ensuring minimal educational standards among degree-conferring institutions within its borders. The substantial interest and broad discretion that the state has in regulating its schools and the quality of education provided to its citizens is also well established. *Meyer v. Nebraska, supra* note 8. . . .

The interest the District has in regulating degree conferral was well set out by the New Jersey Supreme Court in *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A.2d 612 (1967) (*Shelton I*), in which the court upheld a licensing scheme similar to our own in the face of a First Amendment freedom of speech challenge. In *Shelton I*, the court began by holding that New Jersey had the constitutional power to and interest in regulating private educational institutions, quoting Chief Justice Marshall's statement in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819): "That education is an object of national concern, and a proper subject of legislation, all admit." *Shelton I, supra*, 226 A.2d at 618. The court further found that regulation of degree conferral was especially appropriate "evidential as it is of academic achievement" and "'intimately related to the public welfare.'" *Id*. (quoting Elliott, *The Colleges and the Courts* at 200 (1936)). Rejecting Shelton College's suggestion that the public needed no protection from non-professional degree programs, the court noted:

> Government and private segments of our society look to the degree for evidence of achievement and capacity. . . . Indeed,...some or all of the study required for a bachelor degree is prerequisite for most professional degrees, and licensing

> authorities,...must depend upon the quality of the instruction given by the colleges, academic as well as professional.

Shelton I, supra, 226 A.2d at 619. As to Shelton's suggestion that private accreditation societies are adequate to deal with the problem, the court responded that as useful as private accreditation societies are in developing standardization with respect to degrees, they "cannot stop the substandard school or close the out-and-out degree mill." *Id*. Finally, the court noted that educators themselves had called for stricter state regulation of academic standards for degrees since the turn of the century and quoted from a proposed model statute prepared in 1961 by the Council of State Governments, as "summing up the public need for regulation" of institutions that confer degrees:

> It is the policy of this state to prevent deception of the public resulting from the conferring and use of fraudulent or substandard degrees. Since degrees, diplomas and similar measures of academic achievement are constantly used by employers in judging the training of prospective employees; by public and private professional groups in determining qualifications for admission to and continuance of practice; and by the general public in assessing the extent of competence of persons engaged in a wide range of activities necessary to the general welfare, regulation by law of such evidences of academic achievement is in the public interest. To the same end, the protection of legitimate institutions and of those holding degrees from them is also in the public interest.

Id. at 620.

These tenets were reiterated by the New Jersey Supreme Court in *Shelton II*.

Like the New Jersey Supreme Court, we find that the District's interest in this case is substantial. Indeed, as already discussed, such regulation is essential if the purposes of the statute are to be met. See discussion, *supra* at 9.

Nova contends that however substantial the District's interests are, they are not being furthered by the licensing statute. First, Nova points out that education in our society occurs in a national marketplace and that the District cannot prevent persons, including its own citizens, from receiving degrees from other jurisdictions with less stringent incorporation and degree conferral laws, and then returning to the District to use the degree. Second, Nova argues that the licensing criteria are not rationally related to determining whether an educational institution is substandard.

We do not agree that the licensing statute is ineffective in or unrelated to accomplishing the District's purposes. We reject at the outset any suggestion that because the District cannot impose its educational standards nationwide, the statute is ineffective and the District must forego all attempts to ensure that educational standards are met by those schools operating in the District. Moreover, Nova's assertion that the licensing criteria are unrelated to determining whether an educational institution is substandard is not only incorrect but flows from the erroneous premise that nothing less than actual proven fraud or lack of quality would justify denying Nova a license. Section 29-815 is a prophylactic regulation – intended to prevent harm before it occurs. The Commission in denying a license is not deciding that an educational institution is in fact "substandard, transient, unethical, deceptive, or fraudulent," D.C. Code § 31-1601(1) (1981), but rather that the applicant's failure to meet District criteria creates the probability that the harms with which the District is concerned will occur. We do not believe it can be accurately said that the licensing criteria in general and as specifically applied to Nova are not generally recognized indicia of legitimate and minimally qualified institutions of higher learning. Moreover, the regulations expressly recognize that the criteria will not apply equally in all situations, thereby providing the flexibility essential to ensure quality and legitimacy without discouraging diversity and innovation in higher education or injuring nascent education institutions. In this case, the Commission's perception of the potential for harm was not unreasonable, and the efficacy of the District's efforts to prevent harm to prospective employers and students would be substantially diminished if the state could act only after injury occurred.

The next question we must ask is whether the effect of § 29-815 on the free speech and academic freedom of educational institutions is no greater than necessary to further the District's interests. Nova contends that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that the District must aim specifically at the fraudulent educational institutions and the out-and-out diploma mill, and leave "quality" determinations to private accrediting associations and the educational consumer. This argument not only ignores the practical difficulties of detecting illegal activities by educational institutions and successfully prosecuting them under criminal fraud laws, but overlooks the fact that the District has a substantial interest in preventing degree conferral by non-fraudulent but nevertheless substandard educational institutions. And although private accrediting institutions serve a valuable role in providing information to the public regarding the academic standards at various schools, these organizations are voluntary and can do nothing to prevent the substandard or fraudulent school from conferring a degree. Requiring full disclosure from schools and letting the educational consumer choose is inadequate. That individuals may choose with full knowledge to spend their money for a degree that has no academic substance does not mean that the District may not act to

foreclose that choice where it is inherently harmful to the integrity of legitimate educational institutions, employers, and the public in general.

Finally, Nova asserts that § 29-815 creates such substantial burdens on the exercise of First Amendment freedoms that it cannot be justified despite the District's substantial interest. Specifically, Nova points to the lengthy and expensive administrative process it went through only to be denied a license in the final analysis "merely" because Nova would provide no library of its own and would utilize national faculty rather than placing any faculty in the District. Although we recognize the burdens this statute places on Nova, we do not believe they amount to a First Amendment violation. There is simply no evidence that the length and complexity of the administrative process in this case arose from a lack of diligence on the Commission's part or of covert hostility toward Nova's educational program, or any particular subject taught or opinion held by Nova's teachers. Nova's application was denied without prejudice, and the record reflects that the Commission is prepared to exercise the flexibility provided for in the *Regulations* to accommodate Nova's external degree program. Requiring Nova to provide some resident faculty and a library for District students does not prevent Nova from implementing its unique field-based program – it merely requires Nova to devote more resources to the program in the District.

In conclusion, Nova has failed to demonstrate that the District's licensing requirement is inherently, or as applied to Nova, an unreasonable limitation of educational institutions' right to free speech and academic freedom. We are reassured in our conclusion by the fact that applicants for a license are entitled to extensive procedural protections, including judicial review, for we are not unmindful that regulation of schools in the name of quality not only poses risks to First Amendment freedoms but could have the effect of discouraging the innovation, diversity, and vitality that we value in a pluralistic society. Nevertheless, we believe that the very importance of these institutions to the citizens of the District and to society at large negate any suggestion that the state does not have a substantial and indeed compelling interest in regulation that advances the quality and integrity of higher education.

Requiring degree-conferring institutions to meet reasonable academic standards is not only in the best interests of the public, but also in the best interests of educational institutions, for in the last analysis, the viability of such institutions depends in large part on public esteem and support. The First Amendment cannot be used as a shield to protect substandard or fraudulent degree conferring educational institutions and the District can insist that schools who operate degree programs in the District provide the minimal resources and education appropriate to the degree conferred.

V.

Nova next contends that the statutory standards for licensure violate the First Amendment because they are impermissibly vague. Having held that § 29-815 is not void on its face and has only an incidental and limited impact on speech, Nova's vagueness challenge can succeed only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) (footnote omitted).

In due process vagueness challenges, we look to see whether the statute provides explicit standards so that the law gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and prevents "arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). E.g., *District of Columbia v. Gueory*, 376 A.2d 834 (D.C. 1977). Whether a statute is sufficiently precise will "depend in [large] part on the nature of the enactment." *Hoffman Estates v. Flipside Hoffman Estates, supra*, 455 U.S. at 498. Business regulations are not subject to a strict vagueness test, not only because the subject matter regulated is often more narrow, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972) (dictum; collecting cases), but also because businesses can be expected to investigate relevant legislation and plan behavior accordingly. E.g., *United States v. National Dairy Products Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). Additionally, the regulated enterprise often has the opportunity to clarify their standards through their own inquiry as well as through the administrative process. See *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 49, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966); *McGowan v. Maryland*, 366 U.S. 420, 428, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). Finally, perhaps the most important factor affecting the clarity that a law must have is whether it threatens to inhibit the exercise of constitutionally protected rights of free speech. E.g., *Grayned v. City of Rockford*, 408 U.S. at 109.

The statute at issue here is a business regulation that Nova has had ample opportunity to clarify. The licensing criteria at issue relate to the number of faculty Nova is required to provide and the type of library resources, implicating First Amendment rights tangentially, if at all. Applying the standard of review appropriate under these circumstances, Nova's facial challenge must fail, for the statute and regulations are sufficiently clear as applied to Nova.

D.C. Code § 29-815 requires Nova to have "faculty...of reasonable number" for the number and nature of courses taught, and the *Regulations* require, in relevant part, "a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational association between students and faculty." *Regulations* § III(4)(b). As to library requirements, § 29-815 requires Nova to "possess...suitable...library equipment" and the *Regulations* require that

the library have a "collection of books...adequate for the needs of the [particular] educational program [offered]; continuous acquisition of current library materials[;]...professionally trained staff [; and adequate]...seat[ing] and work space." *Regulations* § III(8)(a)-(d). We simply cannot agree that Nova was not put upon notice by the language of the statute and regulations as well as the interaction with Commission staff prior to the hearing that using another school's library and relying exclusively on field-based professors in a doctoral program would not satisfy the District's requirements. Moreover, we note that the Commission has offered to meet with Nova to clarify exactly what Nova must do to meet District requirements. We are not persuaded that the standards did not give Nova "fair notice" of what was required.

Nova also contends that the statute and regulations provide insufficient standards for enforcement, permitting ad hoc and discriminatory action by the Commission on invidious and irrelevant grounds. However, Nova presents no evidence that the statute has been enforced in this case in a discriminatory manner or with the aim or effect of inhibiting free speech or academic freedom. Although the terms "adequate", "sufficient" and "reasonable" leave room for discretionary enforcement, the constitutional sufficiency of these terms cannot be judged in a vacuum. The context must be considered, e.g., *American Communications Association v. Douds*, 339 U.S. 382, 412, 94 L. Ed. 925, 70 S. Ct. 674 (1950), because the context not only gives concreteness to what seems abstract, but it also demonstrates that despite its generality, a broad standard is all that sensibly may be expected if the Commission is to be equal to the sundry situations that may arise. Here the regulations acquire content not only from the overall objective of the statute to prevent fraudulent, substandard, transient and unethical degree conferring schools from operating in the District but also from the Commission's use of local reputable institutions offering similar programs as a reference point. Greater specificity would not only be a practical impossibility, given the wide variety of educational programs and institutions the Commission must consider, but would infringe to a greater extent on legitimate educational choices. Finally, the potential for discriminatory or unconstitutional application of these standards is lessened by the procedural protections accorded to applicants under the statute and regulations. "No statute bears an absolute guarantee that it will always be applied within constitutional bounds; consequently, no such guarantee can be demanded." *Secretary of State of Maryland v. Joseph H. Munson Co., supra*, 104 S. Ct. at 2857 (Rehnquist, J., dissenting). At this stage we are not prepared to hold that the imprecision of these terms jeopardizes the entire statute. "Although it is possible that specific applications...may engender concrete problems of constitutional dimension, it will be time enough to consider such problems when they arise." *Joseph E. Seagram & Sons v. Hostetter, supra*, 384 U.S. at 52 (1966).

VI.

The final question we address is whether the Commission's decision to deny Nova a license was error under D.C. law. The Commission's denial was based on its conclusion that Nova did not meet the District's requirements for adequate full-time faculty and adequate library resources as set out in relevant part below:

> That considering the number and character of courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable...library equipment.

D.C. Code § 29-815(4).

> There shall be a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty.

Regulations § III(4)(b).

> The collection of books periodicals, newspapers..., shall be adequate for the needs of the educational programs of the institution, and shall be readily accessible to the faculty and the students. Provisions shall be made for the continuous acquisition of current library materials and for the recording of all library holdings.

Regulations § III(8)(a)(b).

The facts upon which the Commission rested its conclusion that Nova did not meet the District's library and faculty standards are essentially undisputed.[13] As to library facilities, the Commission found that Nova had no library in the District of Columbia and no plans to establish one. Rather, Nova arranged with George Mason and Howard Universities to have their libraries available for Nova's students, and intended to rely on existing public and governmental institutions in the District.

[13] The record suggests that the Commission also concluded that Nova did not meet District standards related to clear delineation of administrative control. We do not address this question in that the Commission's decision is supported by its conclusions regarding library and faculty requirements. We need not consider whether resting our holding on only two of the three prongs relied upon by the Commission should cause us to consider remanding to the Commission because at oral argument Nova specifically rejected any possible remand remedy.

As to faculty resources, the Commission found that Nova's faculty for the DPA program consisted of nine full-time Florida members and 33 part-time national faculty members (preceptors) for a projected 15 clusters, or approximately 380 students. The Florida faculty provides 50% of the DPA instruction as well as teaching in other departments and performing administrative duties. The turnover rate among the Florida faculty was 50% between August 1981 and August 1982. As we have previously stated, the preceptors, who contract with Nova to teach specific courses at the various clusters, are scholars prominent in the public administration field. Each cluster, consisting of 20-25 students, is coordinated by a cluster director, who is a part-time contractor, paid monthly by Nova under a three-year contract, and generally employed in a full-time position elsewhere. Cluster directors administer comprehensive examinations, arrange and assist in cluster sessions, counsel students, and assist the faculty in research and reading of student papers. Other than the contract students have with preceptors and cluster directors during weekend teaching sessions, contact is by special appointment, telephone and written communication.

Based upon these findings, the Commission concluded that Nova did not meet the District's requirements for adequate full-time faculty and library resources. The Commission interpreted the statute and regulations as requiring Nova to satisfy the District's faculty requirements independently of Nova's staff at its principal institution in Florida and as requiring Nova to provide its own library. On the basis of these deficiencies, the license was denied. This denial was without prejudice to Nova renewing its application and the Commission offered to advise Nova as to how Nova could meet these requirements.

Nova does not dispute the factual findings upon which the Commission based its conclusion, but argues that the Commission's conclusion was wrong – that in fact Nova did meet the District's requirements and that the Commission's conclusion that Nova must meet faculty requirements in the District independently of its faculty resources elsewhere and must establish its own library was an unreasonable and erroneous interpretation of the statute and regulations.

This court does not undertake a de novo review of the record in an administrative proceeding. E.g., *Pendleton v. District of Columbia Board of Elections and Ethics*, 449 A.2d 301, 307 (D.C. 1982). Rather, we examine the record to determine whether the conclusion is reasonable, and based on "reliable, probative, and substantial evidence" of record. *Id*. at 304 (citing D.C. Code § 1-1509 (e) (1981)). "Substantial evidence is more than a mere scintilla [of evidence]; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Jameson's Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 384 A.2d 412, 418 (D.C. 1978) (citations omitted) (quoting *The Vestry of Grace Parish v. District of Columbia Alcoholic Beverage Control Board*, 366 A.2d 1110 (D.C. 1976)). Moreover, when an agency's decision is based on an "interpretation of the statute and regulations

it administers, [that interpretation] will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute." *DeLevay v. District of Columbia Rental Accommodations Commission*, 411 A.2d 354, 359 (D.C. 1980) (citations omitted). We hold in this case that the Commission's denial was based on substantial evidence and was reasonable and consistent with the language and purpose of the statute.

The record reflects that the Commission's concern was that none of Nova's faculty, full-time or otherwise, was consistently present in the District of Columbia. Considerable evidence was presented during the hearing regarding the importance in doctoral programs of face-to-face interaction between faculty and students, particularly for supervision and counseling during research projects. Not only was student-faculty interaction significantly reduced by the lack of any Nova faculty in the District, but evidence suggested that Nova's nine DPA faculty members in Florida could not provide adequate supervision and continuity in that they were non-tenured, subject to high turnover rates, and had significant responsibilities outside the DPA program. And despite the recognized excellence of Nova's preceptorial faculty, these teachers had only limited contact with students. Under these circumstances, the Commission's conclusion that Nova must satisfy faculty requirements in the District independently of its faculty in Florida was not unreasonable, and its conclusion that Nova's plans did not provide for sufficient full-time faculty to assure adequate interaction between faculty and student and continuity and stability in the overall program was supported by substantial evidence.

Nor do we believe that the Commission's conclusion that Nova did not meet the District's requirements for adequate library resources was unsupported by substantial evidence or erroneous as a matter of law. D.C. Code § 29-815(4) requires degree-conferring institutions to "possessed of suitable...library equipment." The *Regulations* require, *inter alia*, an adequate "collection of books" and "continuous acquisition of current library materials." *Regulations* § III(8)(a)(b). The Commission reasonably interpreted this language as requiring educational institutions to establish their own libraries, rather than rely on the public or private libraries otherwise available in the District or suburbs of the District. This interpretation is consistent not only with the language but with the purpose of the statute in that it ensures that an educational institution has materials appropriate to the degree program as well as library hours that meet student needs and assures some degree of stability and continuity due to the substantial investment it requires from an institution. Of course, the Commission has the discretion to waive this as well as other requirements when it believes the requirement is inapplicable or unnecessary in particular cases. However, we cannot say that the Commission's failure to do so in this case was irrational or not based on substantial evidence. Not only were Nova's arrangements with Howard and George Mason Universities contrary to the express mandate of the statute and regulations, Nova's arrangements did not ensure that the purposes of this requirement would be

met. As the Commission points out, George Mason and Howard University do not have doctoral programs in public administration and Nova would have no control over their acquisitions; the arrangements have no guaranty of permanence because any of the schools could revoke the agreements; and Nova is not committed to an investment that would encourage stability and permanence of their program in the District.

Finally, we cannot say that the Commission erred in its conclusion that the library and faculty deficiencies in Nova's program justified denying Nova a license. In this regard, we note that in denying Nova a license the Commission is not holding that Nova's program is in fact substandard, but rather that certain deficiencies present an unacceptable risk that the program will be "substandard" or "transient" or will result in the conferral of "false or misleading" degrees. D.C. Code § 31-1601 (1), (2) (1981). Given the complete lack of faculty and library resources in the District, who hold that the Commission's decision was justified by the evidence and in accord with the law.

Affirmed.

Notes and Questions

1. For background on state licensure of postsecondary institutions, see the Text Section 11.2.3.

2. In an earlier case involving Nova's external degree program, Nova emerged victorious. See *Nova University v. Board of Governors of University of North Carolina*, 267 S.E. 2d 596 (N.C. Ct. App. 1980, *aff'd*, 287 S.E.2d 872 (N.C. 1982). The University of North Carolina had challenged Nova's right to offer "cluster programs" in North Carolina that counted toward a degree awarded in Florida. The state court said that Nova was only teaching, not awarding degrees, in North Carolina. What is the difference between the two cases?

3. If you had been an educational consultant to the D.C. Licensure Commission, would you have advised that Nova should be denied a license to operate in D.C.? Why or why not? In this capacity, how would your reasoning process and the factors you would consider differ from the court's reasoning process and the factors it considered?

4. Were the decisions of the D.C. Commission or the court influenced by a narrow or traditional view of appropriate educational practices or delivery systems? Might the court's decision have an undue inhibiting effect on innovation in higher education?

SEC. 11.2.4 Other State Regulatory Laws Affecting Postsecondary Eduction Programs

DiGiacinto v. The Rector and Visitors of George Mason University
704 S.E. 2d 365 (Va. 2011)

OPINION BY: JUSTICE. BERNARD GOODWYN

In this appeal, we consider whether 8 VAC § 35-60-20, a George Mason University regulation governing the possession of weapons on its campus, violates the Constitution of Virginia or the United States Constitution.

I. Background

Rudolph DiGiacinto filed a complaint seeking declaratory judgment and injunctive relief against the Rector and Visitors of George Mason University (collectively GMU) in the Circuit Court of Fairfax County. DiGiacinto petitioned the circuit court to enjoin GMU from enforcing 8 VAC § 35-60-20 against him. The regulation provides as follows:

> Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.

8 VAC § 35-60-20.

DiGiacinto is not a student or employee of GMU, but he visits and utilizes the university's resources, including its libraries. He desires to exercise his right to carry a firearm not only onto the GMU campus but also into the buildings and at the events enumerated in 8 VAC § 35-60-20. DiGiacinto argued in his complaint that 8 VAC § 35-60-20 violates his constitutional right to carry a firearm, that GMU lacks statutory authority to regulate firearms, and that the regulation conflicts with state law.

GMU filed a demurrer and plea of sovereign immunity in response to DiGiacinto's complaint. GMU contended that while DiGiacinto could properly pursue constitutional claims to openly carry a firearm on campus, sovereign immunity barred all claims based on Virginia's concealed firearms statute, Code § 18.2-308, and claims challenging GMU's regulatory authority. The circuit court granted the plea of sovereign immunity regarding the statutory concealed firearms claims, but ruled that DiGiacinto could proceed on the open carry of firearms claims. The parties stipulated to the facts asserted in their trial briefs and, after hearing the legal arguments, the circuit court took the matter under advisement.

The circuit court held that sovereign immunity barred a declaratory judgment proceeding concerning the scope of GMU's regulatory authority, but even if sovereign immunity did not bar such a claim, GMU had the requisite authority to adopt 8 VAC § 35-60-20. The circuit court also held that 8 VAC § 35-60-20 was constitutional under both the Constitution of Virginia and the United States Constitution. The circuit court referred to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the facts, as stipulated by the parties, in explaining its decision:

> *Heller* does not define what constitutes a sensitive place, but the Supreme Court lists as examples schools, [and] government buildings, "[p]resumably because possessing firearms in such places risks harm to great numbers of defenseless people; that is, children," [and] the buildings are important to government functioning.
>
> George Mason University notes there are 5,000 employees and 30,000 students enrolled, ranging from age 16 to even senior citizen age. Three-hundred fifty-two in the incoming Freshman class will be under the age of 18 beginning this semester. Approximately 50,000 elementary and high school students attend summer camps at the University. They use these academic buildings, which are part of the regulation. There is also a child development center in which approximately 130 student/employee children are enrolled [in the] preschool and . . . both the libraries and the Johnson Center . . . are regularly frequented by children ages two to five years old.
>
> High school graduations, athletic games, concerts and circus performances are just a few of the family activities occurring on campus. The individuals who are part of this large community of interests clearly are the type of individuals whose safety concerns on a public university campus constitute a compelling State interest. The buildings and activities described in the regulations are those

> wherein the individuals gather: therefore, [they] are sensitive places as contemplated by [*Heller*] . . . .
>
> I find the regulation is constitutional.

The circuit court dismissed DiGiacinto's complaint with prejudice and ordered that GMU's regulation be sustained. DiGiacinto appeals.

II. Analysis

DiGiacinto argues that the circuit court erred in holding that GMU's regulation does not violate Article I, § 13 of the Constitution of Virginia and the Second and Fourteenth Amendments of the United States Constitution. He also contends that the circuit court erred in sustaining GMU's plea of sovereign immunity because Article I, § 14 of the Constitution of Virginia is a self-executing constitutional provision, and GMU did not have the authority to promulgate 8 VAC § 35-60-20.

DiGiacinto's argument that 8 VAC § 35-60-20 violates Article I, § 13 of the Constitution of Virginia and the Second and Fourteenth Amendments of the United States Constitution relies upon a primarily historical analysis. Describing 8 VAC § 35-60-20 as "effectually a total ban" on the right to bear arms on GMU's campus, DiGiacinto argues that the regulation is not narrowly tailored and violates the historic understanding of the right to bear arms.

GMU responds that the right to keep and bear arms is not an absolute right. It contends that, as recognized in *Heller*, the Second Amendment does not prevent the government from prohibiting firearms in sensitive places, which includes GMU's university buildings and widely attended university events. GMU further argues that 8 VAC § 35-60-20 is narrowly tailored because it allows individuals to lawfully carry firearms on the open grounds of GMU's campus.

Arguments challenging the constitutionality of a statute or regulation are questions of law that this Court reviews de novo on appeal. See *Shivaee v. Commonwealth*, 613 S.E.2d 570, 574 (2005). The Second Amendment of the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

Like the United States Constitution, the Constitution of Virginia also protects the right to bear arms. It states:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time

> of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Va. Const. art. I, § 13. The interpretation of Article I, § 13 of the Constitution of Virginia is an issue of first impression. Whereas DiGiacinto contends that Article I, § 13 contains greater protections than afforded by the Second Amendment of the United States Constitution, GMU argues that, as relevant to this matter, the rights are co-extensive. We agree with GMU.

As noted by Professor Howard, the Virginia General Assembly incorporated the specific language of the Second Amendment – "the right of the people to keep and bear arms shall not be infringed" – into the existing framework of Article I, § 13 of the Constitution of Virginia. 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 273 (1974). As a result, the language in Article I, § 13 concerning the right to bear arms is "substantially identical to the rights founded in the Second Amendment." Id. at 274.

This Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning. See, e.g., *Shivaee*, 613 S.E.2d at 574 ("due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution"); *Habel v. Industrial Development Authority*, 400 S.E.2d 516, 518, 7 Va. Law Rep. 1334 (1991) (federal construction of the Establishment Clause in the First Amendment "helpful and persuasive" in construing the analogous state constitutional provision). We hold that the protection of the right to bear arms expressed in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the instant case. Thus, for the purposes of this opinion, we analyze DiGiacinto's state constitutional rights and his federal constitutional rights concurrently.

The Supreme Court of the United States has held that the Second Amendment protects the right to carry and possess handguns in the home for self-defense. *Heller*, 554 U.S. at 634-635; see also *McDonald v. City of Chicago*, 130 S.Ct. at 3020, 3050 (2010) (plurality opinion), 3059 (Thomas, J., concurring). Individual self-defense is "the central component of the right itself." *Heller*, 554 U.S. at 598. In *McDonald*, the Court further held that the Second Amendment applies to the states by way of the Fourteenth Amendment, 130 S.Ct. at 3050 (plurality opinion), or the Privileges and Immunities Clause, id. at 3059 (Thomas, J., concurring).

The Supreme Court clearly stated in *Heller*, and a plurality of the Court reiterated in *McDonald*, that the right to carry a firearm is not unlimited. In *Heller*, the Supreme Court specifically recognized that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 625-626. The Supreme Court further explained its assertion by noting, "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."Id. at 627, n.26.

The Supreme Court stated in *McDonald*:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those assurances here.

130 S.Ct. at 3047 (plurality opinion) (internal citations omitted) (quoting *Heller*, 554 U.S. at 625-626).

Neither *Heller* nor *McDonald* casts doubt on laws or regulations restricting the carrying of firearms in sensitive places, such as schools and government buildings. Indeed, such restrictions are presumptively legal. *Heller*, 554 U.S. at 627 n.26. In the instant case, GMU is a public educational institution and an agency of the Commonwealth. *George Mason University v. Floyd*, 654 S.E.2d 556, 558 (2008); see also Code § 23-14 (classifying GMU as an educational institution, public body and "governmental instrumentalit[y] for the dissemination of education"). The Commonwealth owns GMU's real estate and personal property. Code § 23-91.25.

It was stipulated at trial that GMU has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU's buildings and attend events on campus. The fact that GMU is a

school and that its buildings are owned by the government indicates that GMU is a "sensitive place."

Further, the statutory structure establishing GMU is indicative of the General Assembly's recognition that it is a sensitive place, and it is also consistent with the traditional understanding of a university. Unlike a public street or park, a university traditionally has not been open to the general public, "but instead is an institute of higher learning that is devoted to its mission of public education." *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005). Moreover, parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm. See *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 606-10 (W.D. Va. 2002); *Hartman v. Bethany College*, 778 F. Supp. 286, 291 (N.D. W. Va. 1991).

Recognizing the sensitivity of the university environment, the General Assembly established "a corporate body composed of the board of visitors of George Mason University" for the purpose of entrusting to that board the power to direct GMU's affairs. Code §§ 23-91.24,-91.29. Although the real estate and personal property comprising GMU is property of the Commonwealth, the General Assembly has provided that this property "shall be transferred to and be known and taken as standing in the name and under the control of the rector and visitors of George Mason University." Code § 23-91.25. Among the board of visitors' powers is to control and expend the university funds. Code § 23-91.29(a). The board of visitors is also tasked with safeguarding the university's property and the people who use it by making "all needful rules and regulations concerning the University." Id. Such necessary rules and regulations include policies that promote safety on GMU's campus.

GMU promulgated 8 VAC § 35-60-20 to restrict the possession or carrying of weapons in its facilities or at university events by individuals other than police officers. The regulation does not impose a total ban of weapons on campus. Rather, the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable – inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation. We hold that GMU is a sensitive place and that 8 VAC § 35-60-20 is constitutional and does not violate Article I, § 13 of the Constitution of Virginia or the Second Amendment of the federal Constitution.

DiGiacinto also argues that the circuit court erred in sustaining GMU's plea of sovereign immunity regarding his claim that GMU did not have authority to promulgate 8 VAC § 35-60-20 and that the regulation is inconsistent with state laws. He claims that GMU's promulgation of the regulation violates the uniform government provision contained in Article I, § 14 of the Constitution of Virginia and that Article I, § 14 is a self-executing provision of the Constitution of Virginia not subject to the defense of sovereign immunity.

> "[Sovereign immunity] is an established principle of sovereignty . . . that a sovereign State cannot be sued in its own courts . . . without its consent and permission." *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 70 (2008) (citation and quotation marks omitted). "As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action . . . . Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth," *Afzall v. Commonwealth*, 639 S.E.2d 279, 282 (2007) (citations and quotation marks omitted), and does so for merely statutory claims.[1]

However, sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia or claims based on federal law. *Gray*, 662 S.E.2d at 71-73; see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 317 (1997) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). Thus, a plea of sovereign immunity cannot bar a claim by DiGiacinto for declaratory and injunctive relief, challenging GMU's authority to promulgate the regulation, based upon a self-executing provision of the Constitution of Virginia. GMU claims that Article I, § 14 is not a self-executing provision of the Constitution of Virginia. We disagree.

Article I, § 14 provides, "That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This Court has articulated the following characteristics of a self-executing provision:

> A constitutional provision is self-executing when it expressly so declares. See, e.g., Va. Const. art. I, § 8. Even without benefit of such a declaration, constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing.
> . . . .
> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected,

[1] As an agency of the Commonwealth, GMU is entitled to the protection of sovereign immunity afforded to the state. See *Rector & Visitors of the Univ. of Va. v. Carter*, 591 S.E.2d 76, 78 (2004); *James v. Jane*, 282 S.E.2d 864, 868 (1980).

> or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

Gray, 662 S.E.2d at 71-72 (internal quotation marks omitted) . . . Moreover, "[i]f a constitutional provision is self-executing, no further legislation is required to make it operative." 662 S.E.2d at 71 (citations omitted).

Article I, § 14 is within the Bill of Rights of the Constitution of Virginia. Further, the second portion of Article I, § 14 is stated in the negative, prohibiting any government "separate from, or independent of, the government of Virginia." This prohibition does not require further legislation to make it operative. Therefore, under the test articulated in *Gray*, we hold that Article I, § 14 is self-executing and therefore GMU does not have sovereign immunity as to claims arising under that provision.[2]

Despite our conclusion that Article I, § 14 is self-executing, in order for DiGiacinto to prove a violation of that constitutional provision, he must establish that GMU, in promulgating 8 VAC § 35-60-20, functioned as a separate or independent government. The history of Article I, § 14 indicates that its origin related to the boundary problems that the Commonwealth faced during its inception: "Virginians were concerned that some of the land companies might attempt to create a new state within the boundaries of Virginia in order to enhance their chances of successfully defending claims to vast amounts of unsettled and sparsely settled land." 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 279 (1974). In the instant case, the argument that GMU, in promulgating 8 VAC § 35-60-20, was attempting to function as a separate government is without merit. GMU had statutory authority under Code § 23-91.29 to make regulations concerning the university. Therefore, GMU did not violate Article I, § 14.

Lastly, DiGiacinto argues that the General Assembly cannot acquiesce or delegate its powers away to GMU. Code § 23-91.24 makes clear that GMU is "subject at all times to the control of the General Assembly." The General Assembly did not improperly give or delegate its powers to GMU. Therefore, we hold that this argument likewise lacks merit.

III. Conclusion

Accordingly, for the reasons stated, we will affirm the circuit court's judgment.

Affirmed.

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[2] However, GMU's sovereign immunity has not been waived to the extent that DiGiacinto's declaratory judgment proceeding is premised on statutory and non-constitutional claims, and DiGiacinto has not challenged the propriety of the dismissal of all such claims by the circuit court, based upon GMU's plea of sovereign immunity.

Notes and Questions

1. The issue of guns on campus is very controversial because there does not seem to be a middle ground. Proponents of bans on guns on campus, and proponents of permitting guns on campus, both cite safety as the public policy reason for their positions.

2. State courts in Utah and Colorado have struck the attempts of public universities in their states to prohibit guns on campus, while, as seen in *DiGiacinto* (above), a public university in Virginia survived a challenge to its partial prohibition of guns on campus. An Idaho court also rejected a challenge to a ban on guns in the residence halls of the University of Idaho.

3. Given the discussion in *DeGiacinto*, what approach would you advise institutional leaders to take with respect to either allowing guns or prohibiting them on campus? State laws differ, so any policy of a public college or university would need to comply with relevant state law.

4. Do private colleges and universities have more latitude to prohibit students, employees, or guests from carrying guns on campus? Would it make a difference if the state has a "concealed carry" law?

SEC. 11.2. State Provision of Public Postsecondary Education and State Regulation of Out-of-State Institutions

Problem 21

TVU is a newly created academic unit of Adams State University, a public four-year university located in a state with a coordinating board for public institutions that is empowered to approve new academic programs offered by both public and private institutions. Adams State offers baccalaureate degrees and graduate degrees. Through TVU, Adams has begun offering baccalaureate- and master's-level courses at the locations of several large corporations in the state, and has designed some new programs at the request of these corporations to more closely fit the needs of their employees. Furthermore, Adams is offering courses leading to degrees in neighboring states through two-way interactive video. Students from these states may travel to one of several hotels where Adams has set up the interactive video equipment.

The legislature in the state in which Adams is located has learned of its distance learning activities, and has demanded an accounting of the funds spent, income received, and whether any out-of-state students have been educated at the cost of in-state taxpayers. It also wants to know if Adams is charging out-of-state tuition to the students involved in interactive video, and whether any public funds are being spent to provide courses for the corporations' employees. Officials in the states where Adams conducts interactive video programs also have begun to ask questions about these programs

What governance and control issues are pertinent here? Would your answer depend on knowing whether Adams State is constitutionally or statutorily based? Do the states in which the students are receiving the interactive video have the authority to require Adams to seek approval to offer courses in their states? What legal sources would you need to consult to begin answering these questions?

SEC. 11.5.3.2. Title IX and Peer Sexual Harassment

Doe v. Baum
903 F.3d 575 (6th Cir. 2018)

OPINION BY: THAPAR, Circuit Judge.

Thirteen years ago, this court suggested that cross-examination may be required in school disciplinary proceedings where the case hinged on a question of credibility. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005). Just last year, we encountered the credibility contest that we contemplated in *Flaim* and confirmed that when credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017). Today, we reiterate that holding once again: if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. Because the University of Michigan failed to comply with this rule, we reverse.

I.

John Doe and Jane Roe were students at the University of Michigan. Halfway through Roe's freshman and Doe's junior year, the two crossed paths at a "Risky Business" themed fraternity party. While there, they had a drink, danced, and eventually had sex. Two days later, Roe filed a sexual misconduct complaint with the university claiming that she was too drunk to consent. And since having sex with an incapacitated person (unsurprisingly) violates university policy, the administration immediately launched an investigation. Over the course of three months, the school's investigator collected evidence and interviewed Roe, Doe, and twenty-three other witnesses. Two stories emerged.

First, Doe told the investigator that Roe did not appear drunk and that she was an active participant in their sexual encounter. According to him, the night went something like this: after he and Roe had a drink, danced, and kissed at the party, the two decided to go upstairs to his bedroom. Once there, they kissed "vigorous[ly]" and eventually made their way onto his bed. R. 16, Pg. ID 332. After they jointly removed their clothing, he asked Roe if she wanted to have sex. She said, "Yeah," and the two proceeded to have intercourse followed by oral sex. *Id.* at Pg. ID 333–34. When they were done, they cuddled until Roe became sick and vomited into a trash

can by Doe's bed. Doe rubbed her back for five or so minutes and then left to use the bathroom and talk with friends. By the time he returned, Roe was crying and another female student was helping her gather her things. He asked Roe if she was okay, but Roe's new companion told him to "[g]o away" and the two women walked out of the room. *Id.* at Pg. ID 335. At the time, he assumed that Roe was upset because he had left her alone after they had sex. He asserted that he had no reason to believe that she was drunk or that Roe thought any of his sexual advances were unwelcome.

Roe remembered the night differently. According to her, she was drunk and unaware of her surroundings when she and Doe went to his room. While kissing near the doorway, she told Doe "no sex" before she "flopped" onto his bed. *Id.* at Pg. ID 325–26. Without asking, Doe undressed her and had intercourse with her while she "laid there in a hazy state of black out." *Id.* at Pg. ID 326. And at some point, she passed out and woke up to Doe having oral sex with her. Afterwards, she felt a "spinning sensation" and fell back onto the bed. *Id.* at Pg. ID 327. Doe asked her if she was okay, and she told him that she was not. So Doe placed a trash can by the side of his bed and left the room. She proceeded to vomit into the trash can. Afterward, she attempted to find her clothes but could not get her bearings. Feeling a sense of "desperation and defeat," she tried to catch another female student's attention by making "vomit sounds." *Id.* It worked, and the female student ("Witness 2") helped Roe find her clothes, put them on, and get back to her dorm.

If Doe's and Roe's stories seem at odds, the twenty-three other witnesses did not offer much clarification. Almost all of the male witnesses corroborated Doe's story, and all of the female witnesses corroborated Roe's. For example, Doe's roommate said that Roe "didn't seem like she was hammered or that drunk," although he stated that he did not "want to speculate" about whether she had had some alcohol because he did not talk to her directly or "really interact with [her]" much. *Id.* at Pg. ID 339. Yet he mentioned that in his two interactions with her, he did not smell alcohol on her. *Id.* Doe's roommate further alleged that Roe and Witness 2 were just "rallying against a fraternity guy." *Id.* at Pg. ID 339–41. Another member of Doe's fraternity told the investigator that he saw Doe and Roe "making out" on the dance floor and there was no reason to suspect that either of them had too much to drink. *Id.* at Pg. ID 347. And two others stated that Roe did not appear drunk when she left Doe's room at the end of the night, although they indicated they had limited observations of Roe.

Roe's sorority sisters, on the other hand, reported that Roe seemed "more than a little buzzed" at the party because her eyes were "open but unfocused" and she "trail[ed] off at the end of sentences." *Id.* at Pg. ID 345–46. The female student who helped Roe leave the party told the investigator that she found Roe crying and "very drunk" in Doe's bed. *Id.* at Pg. ID 342–43. And two other friends provided that when Roe returned to her dorm that night, she sobbed on the

floor of her room and said "she thought she'd been raped." *Id.* at Pg. ID 352.

Given the students' conflicting statements, the investigator concluded that the evidence supporting a finding of sexual misconduct was not more convincing than the evidence offered in opposition to it. The investigator did note, however, that Witness 2 might have been a more credible witness because she had no prior connection to Doe, Roe, or their respective Greek organizations. But because Witness 2 only observed Roe after the sexual encounter had ended, the investigator concluded that she could not address the relevant question—Roe's level of intoxication *during* the encounter or what signs of intoxication she manifested at that time. So after three months of thorough fact-finding, the investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case.

Roe appealed. She argued that the evidence did not support the investigator's findings and asked the university to reconsider. The case went up to the university's Appeals Board, and a three-member panel reviewed the investigator's report. After two closed sessions (without considering new evidence or interviewing any students), the Board reversed. Although the Board found that the investigation was fair and thorough, it thought the investigator was wrong to conclude that the evidence was in equipoise. According to the Board, Roe's description of events was "more credible" than Doe's, and Roe's witnesses were more persuasive. R. 6-5, Pg. ID 274–75. As a result, the university set the investigator's recommendation aside and proceeded to the sanction phase. Facing the possibility of expulsion, Doe agreed to withdraw from the university. He was 13.5 credits short of graduating.

Since then, Doe filed a lawsuit claiming that the university's disciplinary proceedings violated the Due Process Clause and Title IX. He argues that because the university's decision turned on a credibility finding, the school was required to give him a hearing with an opportunity to cross-examine Roe and adverse witnesses. He also maintains that the Board violated Title IX by discriminating against him on account of his gender. The university filed a motion to dismiss, which the district court granted in full. Doe now appeals, and we review de novo. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006).

* * * *

III.

Doe first argues that the university violated his due process rights during his disciplinary proceedings. He claims that because the university's decision ultimately turned on a credibility

determination, the school was required to give him a hearing with an opportunity to cross-examine Roe and other adverse witnesses. The district court dismissed this claim, finding that even if credibility was at issue, the university's failure to allow for cross-examination was "immaterial" in Doe's case. R. 74, Pg. ID 2871. We disagree.

When it comes to due process, the "opportunity to be heard" is the constitutional minimum. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). But determining what being "heard" looks like in each particular case is a harder question. The Supreme Court has declined to set out a universal rule and instead instructs lower courts to consider the parties' competing interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). So, consistent with this command, our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination. *Univ. of Cincinnati*, 872 F.3d at 399–402; *Flaim*, 418 F.3d at 641.

Due process requires cross-examination in circumstances like these because it is "the greatest legal engine ever invented" for uncovering the truth. *Univ. of Cincinnati*, 872 F.3d at 401–02 (citation omitted). Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. *Id.* So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process. *Id.* at 402.

Doe claims that the university ran afoul of this well-established rule in his disciplinary proceedings. And the pleadings in his case suggest that he is right. The university's decision rested on a credibility determination: the Board found Doe responsible after concluding that Roe and her witnesses were "more credible" than Doe and his. R. 6-5, Pg. ID 274–75. Nevertheless, Doe never received an opportunity to cross-examine Roe or her witnesses—not before the investigator, and not before the Board. As a result, there is a significant risk that the university erroneously deprived Doe of his protected interests. *See Mathews*, 424 U.S. at 335, 96 S.Ct. 893.

This risk is all the more troubling considering the significance of Doe's interests and the minimal burden that the university would bear by allowing cross-examination in Doe's case. *See id.* at 334–35, 96 S.Ct. 893. Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct. *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018); *Univ. of Cincinnati*, 872 F.3d at 400; *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016). Being labeled a sex offender by a

university has both an immediate and lasting impact on a student's life. *Miami Univ.*, 882 F.3d at 600. The student may be forced to withdraw from his classes and move out of his university housing. *Id.* His personal relationships might suffer. *See id.* And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. *Id.*

In contrast, providing Doe a hearing with the opportunity for cross-examination would have cost the university very little. As it turns out, the university already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault. So the administration already has all the resources it needs to facilitate cross-examination and knows how to oversee the process. *See Univ. of Cincinnati*, 872 F.3d at 406 (noting that a university does not bear a significant administrative burden when it already has procedures in place to accommodate cross-examination). And, importantly, the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross-examination in this context.

Still, the university offers four reasons why Doe's claim is not as plausible as it seems. None do the trick. First, the university contends that even if Doe did not have a formal opportunity to question Roe, he was permitted to review her statement and submit a response identifying inconsistencies for the investigator. As such, the university claims that there would have been no added benefit to cross-examination. But this circuit has already flatly rejected that argument. In *University of Cincinnati*, we explained that an accused's ability "to draw attention to alleged inconsistencies" in the accuser's statements does not render cross-examination futile. *Id.* at 401–02. That conclusion applies equally here, and we see no reason to doubt its wisdom. Cross-examination is essential in cases like Doe's because it does *more* than uncover inconsistencies—it "takes aim at credibility like no other procedural device." *Id.* Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. *Id.* at 402. Nor can the fact-finder observe the witness's demeanor under that questioning. *Id.* For that reason, written statements cannot substitute for cross-examination. *See* Brutus Essay XIII, in *The Anti-Federalist* 180 (Herbert J. Storing ed., 1985) ("It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing ...."). Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder. *See Univ. of Cincinnati*, 872 F.3d at 402–03, 406 (noting that this requirement can be facilitated through modern technology, including, for example, by allowing a

witness to be questioned via Skype "without physical presence").

That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses. *See Miami Univ.*, 882 F.3d at 600 (noting that "even in the face of a sexual-assault accusation," the protections afforded to an accused "need not reach the same level ... that would be present in a criminal prosecution" (quoting *Univ. of Cincinnati*, 872 F.3d at 400)). Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. *See Univ. of Cincinnati*, 872 F.3d at 403. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker. *Cf. Maryland v. Craig*, 497 U.S. 836, 857, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (holding that where forcing the alleged victim to testify in the physical presence of the defendant may result in trauma, the court could use an alternative procedure that "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing" through "full cross-examination" and ensuring that the alleged victim could be "observed by the judge, jury, and defendant as they testified"). The university's first argument is therefore unavailing.

Second, the university contends that Doe is not entitled to cross-examination because the university's decision did not depend *entirely* on a credibility contest between Roe and Doe. For support, the university brings our attention back to *University of Cincinnati*, where we emphasized the exclusively "he said/she said" nature of the investigation at issue in that case. 872 F.3d at 395, 402. But the university reads far too much into that point. When we emphasized the exclusively "he said/she said" nature of the *University of Cincinnati* dispute, we were not implying that cross-examination would be less important in cases where the school's finding rested on the credibility of several witnesses instead of one or two. Rather, we merely distinguished that case from others holding that cross-examination was unnecessary when the university's decision did not rely on *any testimonial evidence at all*. *Id.* at 401, 405 (distinguishing *Plummer v. Houston*, 860 F.3d 767, 775–76 (5th Cir. 2017), which held that cross-examination was unnecessary when conduct depicted in videos and photos was sufficient to sustain a finding of misconduct without resorting to testimonial evidence); *see also Flaim*, 418 F.3d at 641. Accordingly, *University of Cincinnati* does not stand for the proposition that cross-examination is required only if the university's decision depends solely on the accuser's statement. Instead, *University of Cincinnati* is consistent with our conclusion today: if credibility is in dispute and material to the outcome, due process requires cross-examination. *See* 872 F.3d

at 406 (recognizing that credibility disputes might be more common in sexual misconduct proceedings than other university disciplinary investigations).

Third, the university claims that cross-examination was unnecessary in Doe's case because he admitted to the misconduct in a police interview the day after the incident in question. Here, the university is right about the law but wrong about the facts. This court has long held that cross-examination is unnecessary if a student admits to engaging in misconduct. *Flaim*, 418 F.3d at 641. After all, there is little to be gained by subjecting witnesses to adversarial questioning when the accused student has already confessed. But at the motion-to-dismiss stage, we cannot conclude that Doe confessed to the misconduct in this case. . . .

* * * *

The university offers one last ditch effort to avoid reversal. It points out that although Doe did not have an opportunity to cross-examine Roe in the university disciplinary process, he recently deposed her in state civil proceedings. According to the university, because Roe's deposition is consistent with what she told the investigator, Doe's inability to cross-examine her during the disciplinary proceedings did not cause any prejudice. To start, Doe disputes whether Roe's deposition is, in fact, consistent with her earlier statements in the disciplinary process. But more importantly, Roe's later deposition has no bearing on this case. As discussed above, the value of cross-examination is tied to the fact-finder's ability to assess the witness's demeanor. *Univ. of Cincinnati*, 872 F.3d at 402. So just as a written response insufficiently substitutes for cross-examination, so too does a written deposition transcript. And, critically, cross-examination for the sake of cross-examination is not what Doe seeks. Rather, Doe seeks cross-examination as part of the credibility assessment *by the university*. That a state court later allowed for cross-examination as a part of *its* fact-finding after the university had already made its decision is beside the point. If anything, the fact that the state court allowed cross-examination only goes to show just how far removed the university's fact-finding procedures are from the tried and true methods invoked by courts. *See id.* at 404–05 (noting that while classrooms are not courtrooms, at the very least a circumscribed version of cross-examination is required (citing *Cummins*, 662 F. App'x at 448)).

In sum, accepting all of Doe's factual allegations as true and drawing all reasonable inferences in his favor, he has raised a plausible claim for relief under the Due Process Clause. We thus reverse the district court's decision to dismiss his claim.

IV.

Doe also sued under Title IX, which prohibits federally-funded universities from discriminating against students on the basis of sex. 20 U.S.C. § 1681(a); *Cannon v. Univ. of Chi.*,

441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (recognizing an implied private right of action under Title IX). He advances three theories of liability, claiming that the university (1) reached an erroneous outcome in his case because of his sex, (2) relied on archaic assumptions about the sexes when rendering a decision, and (3) exhibited deliberate indifference to sex discrimination in his disciplinary proceedings.

Erroneous Outcome. A university violates Title IX when it reaches an erroneous outcome in a student's disciplinary proceeding because of the student's sex. *See Miami Univ.*, 882 F.3d at 592. To survive a motion to dismiss under the erroneous-outcome theory, a plaintiff must plead facts sufficient to (1) "cast some articulable doubt" on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a "particularized ... causal connection between the flawed outcome and gender bias." *Id.* (alteration in original) (quoting *Cummins*, 662 F. App'x at 452). The district court held that Doe's complaint failed to meet either element and dismissed his claim. We reverse.

First, because Doe alleged that the university did not provide an opportunity for cross-examination even though credibility was at stake in his case, he has pled facts sufficient to cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome. *See Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994) (noting the "pleading burden in this regard is not heavy" and can be met by alleging "particular procedural flaws affecting the proof"); *see also Univ. of Cincinnati*, 872 F.3d at 401 ("Few procedures safeguard accuracy better than adversarial questioning."). Second, Doe has pointed to circumstances surrounding his disciplinary proceedings that, accepting all of his factual allegations as true and drawing all reasonable inferences in his favor, plausibly suggest the university acted with bias based on his sex. *See Iqbal*, 556 U.S. at 681–82, 129 S.Ct. 1937.

Around two years before Doe's disciplinary proceeding, the federal government launched an investigation to determine whether the university's process for responding to allegations of sexual misconduct discriminated against women. When news of the investigation broke, student groups and local media outlets sharply criticized the administration. The federal government's investigation and the negative media reports continued for years, throughout the Board's consideration of Doe's case.

This public attention and the ongoing investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously. The university stood to lose millions in federal aid if the Department found it non-compliant with Title IX. The university also knew that a female student had triggered the federal investigation and that the news media consistently highlighted the university's poor response to female complainants. Of course, all of this external pressure alone is not enough to state a claim that the university acted with bias in this particular case. Rather, it provides a backdrop that, when combined with other circumstantial

evidence of bias in Doe's specific proceeding, gives rise to a plausible claim. *See Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.

Specifically, the Board credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses). In doing so, the Board explained that Doe's witnesses lacked credibility because "many of them were fraternity brothers of [Doe]." But the Board did not similarly note that several of Roe's witnesses were her sorority sisters, nor did it note that they were female. This is all the more telling in that the initial investigator who actually interviewed all of these witnesses found in favor of Doe. The Board, by contrast, made all of these credibility findings on a cold record.

When viewing this evidence in the light most favorable to Doe, as we must, one plausible explanation is that the Board discredited all males, including Doe, and credited all females, including Roe, because of gender bias. And so this specific allegation of adjudicator bias, combined with the external pressure facing the university, makes Doe's claim plausible. Indeed, other courts facing similar allegations have reached the same result. *See, e.g.*, *Miami Univ.*, 882 F.3d at 594 (plaintiff's complaint was sufficient where allegations included that the university faced "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply"); *Doe v. Columbia Univ.*, 831 F.3d 46, 56–57 (2d Cir. 2016) (plaintiff's complaint pointing to student group criticism and university statements was sufficient to raise a plausible inference of bias under a "minimal plausible inference" standard); *Doe v. Amherst Coll.*, 238 F.Supp.3d 195, 223 (D. Mass. 2017) (plaintiff's complaint was sufficient where allegations suggested that university was trying to "appease" a biased, student-led movement); *Doe v. Lynn Univ., Inc.*, 235 F.Supp.3d 1336, 1340–42 (S.D. Fla. 2017) (plaintiff's complaint was sufficient where allegations suggested that university was reacting to "pressure from the public and the parents of female students" to punish males accused of sexual misconduct); *Wells v. Xavier Univ.*, 7 F.Supp.3d 746, 751 (S.D. Ohio 2014) (plaintiff's complaint was sufficient where, taken together, his allegations suggested that university was "reacting against him[ ] as a male" in response to a Department of Education investigation).

The dissent disagrees, taking a deep and thoughtful dive into the factual record to conclude that there is "no basis to reasonably infer" that Doe was a victim of gender discrimination. But when viewed against the backdrop of external pressure, the Board's decision to discredit Doe's fraternity brothers in part because they were fraternity brothers, while not holding Roe's witnesses to the same standard, is basis enough at the motion-to-dismiss stage. Of course, anti-male bias is not the only plausible explanation for the university's conduct, or even the most plausible. The university might have been unaffected by the federal investigation or the media's criticism, and the significance of the Board's decision to disregard Doe's witnesses'

statements might be overblown. And as the dissent points out, the Board might have ruled the way it did because it believed Witness 2's testimony was more credible. But alternative explanations are not fatal to Doe's ability to survive a Rule 12(b)(6) motion to dismiss. *See 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[T]he mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal."); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) (noting that there are often several plausible explanations for a defendant's conduct, but "[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage"). Doe's allegations do not have to give rise to the *most* plausible explanation—they just have to give rise to one of them. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (stating that there is no "probability requirement" at the pleading stage (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955)).

As this case proceeds and a record is developed, evidence might very well come to show that today's inference is the least plausible of the bunch. Certain allegations that we must assume are true might be proven false. And with the benefit of exhibits, testimony, and cross-examination, a fact-finder may conclude that the inferences we were required to draw in Doe's favor are simply untenable. But these possibilities cannot affect this court's evaluation of Doe's complaint. Our job is simply to ensure that Doe is not deprived of an opportunity to prove what he has alleged unless he would lose regardless. Because Doe has alleged facts that state a plausible claim for relief, we reverse the district court's decision to dismiss his complaint. Whether he will ultimately succeed is a question for another day.

Archaic Assumptions and Deliberate Indifference. Doe advances two more theories of Title IX liability. First, he maintains that the university relied on archaic assumptions about the sexes when resolving his case. And second, he claims that the university was deliberately indifferent to the Board's sex discrimination. The problem for Doe, however, is that neither of these theories applies in the context of university disciplinary proceedings.

Title IX plaintiffs use the archaic-assumptions theory to show that a school denied a student an equal opportunity to participate in an athletic program because of historical assumptions about boys' and girls' physical capabilities. *See Mallory v. Ohio Univ.*, 76 F. App'x 634, 638–39 (6th Cir. 2003). This court has never applied the theory outside of the athletic context, and, indeed, we have repeatedly refused litigants' requests to do so. *See Cummins*, 662 F. App'x at 451 n.9. Since Doe has not offered any reason why we should change course and take that step today, we affirm the district court's decision to dismiss on this ground.

The same problem dooms Doe's deliberate-indifference theory. The deliberate-indifference theory was designed for plaintiffs alleging *sexual harassment*. *See Horner v. Ky.*

High Sch. Athletic Ass'n, 206 F.3d 685, 693 (6th Cir. 2000) (explaining that the deliberate-indifference test arose from Supreme Court cases that "all address deliberate indifference to sexual harassment"). And though sexual harassment is a form of discrimination for purposes of Title IX, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649–50, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), we have held that to plead a Title IX deliberate-indifference claim, "the misconduct alleged must be sexual harassment," not just a biased disciplinary process. *Miami Univ.*, 882 F.3d at 591. Because Doe did not allege that actionable sexual harassment occurred during his disciplinary proceedings, he failed to state a claim under Title IX by way of deliberate indifference.

V.

Accordingly, we **REVERSE** the district court's dismissal of John Doe's procedural due process claim insofar as it is based on the university's failure to provide a hearing with the opportunity for cross-examination, we **REVERSE** the district court's dismissal of John Doe's Title IX claim insofar as it is based on erroneous outcome, and we **REMAND** for further proceedings consistent with this opinion.

* * * *

Notes and Questions

1. Not all federal appellate courts have come to the same conclusion as the U.S. Court of Appeals for the Sixth Circuit on the issue of cross-examination in student conduct proceedings. See, for example, *Plummmer v. University of Houston*, 860 F.3d 767 (5th Cir. 2017).

2. According to the court in *Doe v. Baum*, under what circumstances is cross-examination required in a student disciplinary hearing? Do you agree that such cross-examination should also be applied to institutional sexual misconduct proceedings? Or, do reasons exist not to require cross-examination in such instances?

3. What form must the cross-examination take according to the court? Do accused students have a right to directly question a student making an accusation?

4. At this stage of litigation, the majority accepted one theory of a Title IX violation asserted by the student, which was based, at least in part, on arguments that the university had been influenced by general pressure to address issues of peer sexual misconduct. In contrast, in an opinion concurring and dissenting in part, Judge Gilman contended that the student had failed to state a plausible Title IX claim, stating that the student

> "crucially fails to link general pressure on the University of Michigan to the particular proceedings that he faced. . . . Nor does Doe allege any facts suggesting a pattern of discriminatory behavior by the University in its response to sexual-assault allegations, or that he made any sexual-misconduct complaints himself that the University ignored, in contrast to the plaintiff's allegations in *Miami University*, 882 F.3d at 590–91, 593. There is also no allegation here that the investigator faced individualized criticism for her handling of previous sexual-assault claims and subsequently manifested hostility toward Doe, in contrast to the plaintiff's contentions in *Columbia University*, 831 F.3d at 49, 51–52, 58. In fact, the investigator here found in favor of Doe, and Doe acknowledged that her investigation was "thorough." *Doe v. Baum*, 903 F.3d at 591-92.

Do you agree with the majority that the student's Title IX claim should have been allowed to proceed?

5. As of September 2024, the Title IX regulations, first released in 2020 and then revised in 2024, faced legal challenges in a number of states. The 2024 regulations are discussed briefly on pp. 916 and 917 of the text. As of September 2024, the 2024 Title IX regulations had been enjoined in over half of the states, and have been limited in other ways at certain colleges and universities. Students and instructors will need to research the current legal status of Title IX regulations in the state in which their institution is located.

SECS. 11.5.3. and *7.1.5. Title IX*

Problem 22

Sam is a first-year student at State University. Early Sunday morning he notified his resident assistant that he had been sexually assaulted by two men at an off-campus party. He believes that at least one of his assailants is a student at State University; he is not sure about the second. He does not want to file a complaint against the student, nor does he want to file a police report.

Sam's roommate later told the resident assistant that Sam had told him the name of the assailant, but that he doesn't want to disclose it because that will make Sam angry. The roommate is concerned because he has heard rumors that this individual has assaulted other students – both male and female, but the student is an athlete and no one wants to have to confront him. Furthermore, that assailant has many friends who will very likely retaliate against anyone who complains.

What should the resident assistant do? What should the institution's response be? How best can the institution avoid potential Title IX liability?

SECS. 11.5.4. and *7.7.2. Americans with Disabilities Act* and *Section 504*

Problem 25

A public university, which receives federal financial assistance under various programs, is reviewing a new policy proposal relating to students who are deaf or hearing impaired. The proposal states that the university will provide hearing-impaired students with auxiliary aids such as note-takers or transcriptions of tape recordings of classes, but will not pay for "more costly" auxiliary aids such as sign-language interpreters unless the student demonstrates financial need. Under this policy, upon request, the university would provide hearing-impaired students with a list of potential resources, agencies, and charities that may assist the student in meeting the cost of an interpreter. If the student is unable to acquire alternative financial assistance and qualifies for student financial aid, the university will provide the sign-language interpreter.

1. What steps might hearing-impaired students take in order to challenge the university's policy once it is instituted? How might the concerns of a university support group that represents all hearing-impaired students differ from that of a single student who needs interpreter services?

2. Does the university's proposal satisfy the requirements of Section 504? What arguments could you make in support of, and in opposition to, the university's proposal?

3. May the university legally require students to initially seek alternative funding from non-university sources for interpreters?

4. An incoming first-year student who is hearing impaired seeks to enter the university's nursing program. What factors may affect whether the university must provide a sign-language interpreter during the student's classes?

5. Would your answer to any of these questions be different if you were analyzing them under the Americans With Disabilities Act?

L.

CHAPTER XII: THE COLLEGE AND EXTERNAL PRIVATE ENTITIES

SEC. 12.1.3. Athletic Associations and Conferences.

California State University v. NCAA
Court of Appeals of California, First Appellate District,
Division Two
47 Cal. App. 3d 533; 121 Cal. Rptr. 85 (1975)

OPINION BY: BRAY

Defendant National Collegiate Athletic Association appeals from the order of the Alameda County Superior Court granting a preliminary injunction.

* * * *

California State University at Hayward and Ellis McCune, in his official capacity as President of CSUH, filed a complaint in the Alameda County Superior Court against the NCAA.[3] The complaint sought injunctive relief enjoining the NCAA from enforcing its decision[4] that the entire intercollegiate athletic program at CSUH was indefinitely ineligible for post-season play.

The court issued a temporary restraining order against enforcement of the NCAA decision, and an order to show cause why a preliminary injunction should not be issued. Prior to the hearing on the order to show cause, the NCAA filed a demurrer to the complaint. Following the hearing and an examination of the complaint, affidavits in support of and opposing the preliminary injunction, and the memoranda of points and authorities, the court granted a preliminary injunction enjoining the NCAA from enforcing its order declaring CSUH indefinitely ineligible from participating in NCAA championship athletic events, pending trial of the matter.

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[3] The complaint was subsequently amended to include the trustees of the state colleges and universities and Glenn S. Dumke, chancellor, as plaintiffs.

[4] Under the decision, CSUH was ineligible indefinitely to enter teams or athletes in national collegiate championship competition, and in all other post-season meets and tournaments, and was not eligible to participate in any national television series or programs administered or controlled by the NCAA.

FACTS

CSUH is a campus of the California State Colleges and University System. The NCAA is an unincorporated association organized to supervise and coordinate intercollegiate athletic programs and events among public and private colleges and universities. It is the largest voluntary association of intercollegiate athletics in the country.

An "active" member of the NCAA is a four-year college or university. CSUH became an active member in 1962. An "allied" member is an athletic conference or association composed of active members. The Far Western Conference (hereinafter FWC) is an unincorporated California association organized to sponsor and coordinate intercollegiate athletics on a regional basis. The FWC is an allied member of the NCAA. CSUH is also a member of the FWC.

Upon becoming an active member of the NCAA, CSUH agreed to comply with all the requirements of the NCAA constitution and bylaws. Upon becoming an allied member the FWC agreed to abide by and enforce the NCAA constitution and bylaws. And, under article 3, section 2, of the NCAA constitution, the FWC was charged with the responsibility and control of intercollegiate athletics in the conference.

In 1966 the NCAA adopted bylaw 4-6(b)(1), also known as the "1.6 rule" as follows: "(b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: [para.] (1) limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have a predicted minimum grade point average of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables,..." The rule caused confusion among NCAA members and, between 1966 and 1973, the NCAA issued several official interpretations in order to clarify the rule. In 1973 the rule was abolished, but it was in effect during the period under consideration here. The FWC was responsible for interpreting the NCAA constitution and bylaws for conference members. It interpreted the 1.6 rule as follows in its constitution, article VI, section 3(e): "...Entering freshman students who, upon graduation from high school predict, less than 1.600 grade point average at a member institution according to NCAA procedures, shall not be eligible to compete in intercollegiate athletics until after they have earned at least a 2.0 (C) average for at least 10 units for any term."

On or about October 30, 1969, Arthur J. Bergstrom, acting in his official capacity as assistant executive director of the NCAA, sent a letter to the FWC explaining the difference between in-season conference and post-season championship eligibility requirements. This

distinction would permit a conference to apply its own eligibility rules for in-season conference activity as long as athletes who were not in strict compliance with NCAA eligibility requirements were not eligible for post-conference championship competition. CSUH knew of this letter and relied on the interpretation of the NCAA requirements stated therein as approval of the FWC eligibility requirements set forth in article VI, section 3(e), of the FWC constitution.

In the fall of 1969 one Ronald McFadden was admitted to CSUH under a special admittance program, the Equal Opportunity Program. In the fall of 1970 one Melvin Yearby was admitted under the same program. At the time of admission neither predicted a 1.6 grade point average according to NCAA procedures, and neither participated in intercollegiate athletics his first term at CSUH. At the end of their respective first terms, each had earned better than a 2.0 grade point average for more than 10 units of college work. Each was thereafter permitted to participate in intercollegiate athletics, but was not considered by CSUH to be eligible for post-season competition in the freshman year. Article VI, section 3(e) of the FWC constitution was in effect at the time of the admission of McFadden and Yearby to CSUH.

On or about November 27, 1972, the NCAA informed CSUH that McFadden and Yearby had been ineligible to compete in their freshman years because they had failed to comply with the 1.6 rule. The NCAA ordered CSUH to declare the two ineligible to participate in any intercollegiate athletics for a one-year period, 1972-1973. At that time McFadden was a senior and Yearby was a junior. CSUH did not declare the two ineligible and appealed the decision to the NCAA. The NCAA declared the entire intercollegiate program at CSUH to be indefinitely ineligible for post-season play. The CSUH appeal to the NCAA to reverse its decision was refused.

1) Jurisdiction.

Defendant NCAA contends that the trial court erred in failing to follow the doctrine of judicial abstention from interference in the affairs of a private voluntary association. However, courts will intervene in the internal affairs of associations where the action by the association is in violation of its own bylaws or constitution. "It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But *if the decision of the tribunal is contrary to its laws or rules, or it is not authorized by the by-laws of the association, a court may review the ruling of the board and direct the reinstatement of the member*...." [Emphasis added.] (*Smetherham v. Laundry Workers' Union* (1941) 44 Cal.App.2d 131, 135-136 [111 P.2d 948].)

And in *Smith v. Kern County Medical Assn.* (1942), 19 Cal.2d 263[120 P.2d 874], concerning expulsion from an association, a situation which is analogous to suspension, the court

stated: “In any proper case involving the expulsion of a member from a voluntary unincorporated association, *the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land*....” (Emphasis added.) (*Smith v. Kern County Medical Assn., supra,* at p. 265.)

* * * *

In the instant case, plaintiffs’ complaint alleges that the NCAA decision, that the entire intercollegiate program at CSUH is indefinitely ineligible for post-season competition, is contrary to the NCAA constitution and bylaws, and that the decision is void as against public policy because it would force CSUH to violate constitutional rights of its students guaranteed by the Fourteenth Amendment. The trial court has not yet finally adjudicated these claims but plaintiffs are entitled to have the matter determined.

Defendant NCAA asserts that as a matter of law no interest of any member of the NCAA is sufficiently substantial to justify judicial intervention because the interest affected by the sanction in question is the school’s potential participation in NCAA championship events, an interest which is a mere expectancy as it is contingent upon performance during the season. The NCAA claims that California courts have only intervened when a vital interest was affected, such as where a member was expelled from a union, where a professional or trade organization’s actions threatened disastrous economic consequences to a member, where substantial property interests were threatened by expulsion from an association, or where someone was totally excluded from becoming a member of a group.

As to the latter point, the court took a position contrary to appellant’s in *Bernstein v. Alameda etc. Med. Assn., supra,* 139 Cal.App.2d 241 at page 253, when it found that the California Supreme Court had implied: “...that in relation to this subject there is no fundamental distinction between a medical association, a labor union and a fraternal or beneficial association. In each type of organization the relationship between the members and the group is determined by contract, the terms of which find expression in the constitution and by-laws.” Likewise there can be no fundamental distinction between an athletic association and the above associations where, as here, the claim is that the association failed to abide by its own rules or the laws of the land.

As to the claim that CSUH’s interest is not sufficiently substantial to justify judicial intervention due to a mere expectancy of participation in championship events, it has already been discussed that a violation by an association of its own bylaws and constitution or of the laws of the land justifies judicial intervention. Further, that CSUH had, and has, more than a mere expectancy that some of its athletes would earn the opportunity to participate in NCAA

championship events but for the suspension is evidenced by the fact that at the time of both the hearing on the temporary restraining order and the hearing on the preliminary injunction, there were upcoming NCAA championship events in which CSUH students, without the imposed suspension, were eligible to compete. Additionally, the decision of the NCAA necessarily affects more than just the possibility of being precluded from championship events. The sanction of indefinite probation affects the reputation of CSUH and its entire athletic program, and thereby also affects CSUH's ability to recruit athletes. Judicial notice may be taken that state schools such as CSUH are deeply involved in fielding and promoting athletic teams with concurrent expenditures of time, energy and resources. The school provides and pays for the coaches, supplies and equipment. It finances, equips, trains and fields the teams. And, its funds pay the NCAA membership dues. . . . The contention that CSUH has no substantial interest to justify judicial intervention lacks merit.

In a case concerning students suspended from the University of Minnesota basketball team by that school, the court commented on whether those students had a substantial interest:

> Likewise, the Big Ten has not disputed that the plaintiffs' interest – an opportunity to participate in intercollegiate athletic competition at one of its member institutions – is substantial. Indeed, it would be hard to so dispute in light of analogous cases which indicate the direction in which this area of the law is evolving. *Kelley v. Metropolitan County Board of Education of Nashville*, 293 F. Supp. 485 (M.D.Tenn. 1968). . . . While 'big time' college athletics may not be a 'total part of the educational process,' as are athletics in high school, *Kelley, supra*, nonetheless the opportunity to participate in intercollegiate athletics is of substantial economic value to many students. In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education. . . .

(*Behagen v. Intercollegiate Conference of Faculty Rep*. (D. Minn. 1972) 346 F. Supp. 602, 604.) While that case differs from the instant case in that it concerned students directly, and their suspension from all competition, the language offers guidance here.

The NCAA also claims that plaintiffs do not contend that the procedural process followed by the NCAA in imposing sanctions on CSUH was not full and fair, and asserts: "While insisting that voluntary non-profit associations follow their own procedures in disciplining their members,

courts have refused to disturb the association's decision when there was no procedural unfairness and the proceedings conformed to the requirements established by the group."

As already discussed, the courts will intervene where the action by the association is in violation of its own bylaws and constitution. That this rule applies to substantive as well as procedural questions is supported by cases which appellant itself cites. In *Smetherham v. Laundry Workers' Union, supra,* 44 Cal.App.2d 131, the court reviewed a bylaw that the petitioner had allegedly violated and found that there was no basis in that bylaw for petitioner's expulsion from the union. In *Smith v. Kern County Medical Assn., supra,* 19 Cal.2d 263, the court reviewed whether the association had followed the procedure provided by the rules of the society in expelling the plaintiff, but also reviewed whether there had been sufficient showing to support a finding that the charge against plaintiff was one which constituted a violation of the rules of the society.

NCAA also asserts that judicial intervention in this type of case is undesirable and raises a number of policy arguments to that effect. Because it is clear that courts will intervene if an association violates its own rules or the laws of the land, these arguments have no weight.

Plaintiffs have raised sufficient questions as to whether the NCAA has violated its own rules or the laws of the land by its action to justify intervention by the trial court to determine these questions.

2) The trial court did not abuse its discretion in issuing the preliminary injunction.

The NCAA contends that the trial court abused its discretion in issuing the preliminary injunction because plaintiffs failed to show irreparable injury and there is no likelihood that plaintiffs will succeed in any of their claims.

* * * *

The NCAA has failed to show an abuse of discretion in this instance.

Both the NCAA and CSUH also raise in great detail arguments as to the merits of their respective positions in the question of whether a permanent injunction should issue. These questions will be determined by the trial court and are not suitably addressed to this court on this appeal from the granting of a preliminary injunction.

* * * *

Judgment affirmed.

Notes and Questions

1. Under the principles in the court's opinion, is there any basis for challenging an athletic association's decision that technically is in accordance with its own constitution and bylaws? Note the references in the opinion to actions that are "taken in good faith" and actions that are "against public policy." Do these references suggest any arguments for challengers beyond the argument that an association action inconsistent with its own rules is invalid?

2. Who can sue an athletic association under the principles of this case? Could an *applicant* for membership sue? A student-athlete? A coach?

3. According to the court in the *California State University* case, the NCAA raised "a number of policy arguments" to the effect that "judicial intervention" into its affairs is "undesirable." What are the policy arguments that might be made to support this position? Do you agree with the court that "these [policy] arguments have no weight" in situations where the athletic association has violated its own rules?

4. Subsequent to the California appellate court's affirmation of the preliminary injunction in the *California State University* case, the case went to trial, at the conclusion of which the trial judge issued a permanent injunction. In *Trustees of State College and Universities v. NCAA*, 147 Cal. Rptr. 187 (1978), the appellate court again affirmed the trial court.

SEC. 12.1.3. Athletic Associations and Conferences

National Collegiate Athletic Association
v.
R.M. Smith
*525 U.S. 459 (*1999)

Justice GINSBURG delivered the opinion of the Court. This case concerns the amenability of the National Collegiate Athletic Association (NCAA or Association) to a private action under Title IX of the Education Amendments of 1972. The NCAA is an unincorporated association of approximately 1,200 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States; the Association serves to maintain intercollegiate athletics as an integral part of its members' educational programs. Title IX proscribes sex discrimination in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The complainant in this case, Renee M. Smith, sued the NCAA under Title IX alleging that the Association discriminated against her on the basis of her sex by denying her permission to play intercollegiate volleyball at federally assisted institutions. Reversing the District Court's refusal to allow Smith to amend her pro se complaint, the Court of Appeals for the Third Circuit held that the NCAA's receipt of dues from federally funded member institutions would suffice to bring the Association within the scope of Title IX. We reject that determination as inconsistent with the governing statute, regulation, and this Court's decisions.

Dues payments from recipients of federal funds, we hold, do not suffice to render the dues recipient subject to Title IX. We do not address alternative grounds, urged by respondent and the United States as amicus curiae, in support of Title IX's application to the NCAA in this litigation, and leave resolution of those grounds to the courts below on remand.

I.

Rules adopted by the NCAA govern the intercollegiate athletics programs of its member colleges and universities; "[b]y joining the NCAA, each member agrees to abide by and enforce [the Association's] rules." *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 183 (1988); see 1993-94 NCAA Manual, NCAA Const., Arts. 1.2(h), 1.3.2, p. 1. Among these rules is the Post-baccalaureate Bylaw, which allows a postgraduate student-athlete to participate in intercollegiate athletics only at the institution that awarded her undergraduate degree. See 1993-94 *NCAA Manual*, Bylaw 14.1.8.2, at 123.

Respondent Smith enrolled as an undergraduate at St. Bonaventure University, an NCAA member, in 1991. Smith joined the St. Bonaventure intercollegiate volleyball team in the fall of 1991 and remained on the team throughout the 1991-1992 and 1992-1993 athletic seasons. She elected not to play the following year.

Smith graduated from St. Bonaventure in 2-1/2 years. During the 1994-1995 athletic year, she was enrolled in a postgraduate program at Hofstra University; for the 1995-1996 athletic year, she enrolled in a different postgraduate program at the University of Pittsburgh. Smith sought to play intercollegiate volleyball during these athletic years, but the NCAA denied her eligibility on the basis of its post-baccalaureate restrictions. At Smith's request, Hofstra and the University of Pittsburgh petitioned the NCAA to waive the restrictions. Each time, the NCAA refused to grant a waiver.

In August 1996, Smith filed this lawsuit pro se, alleging, among other things, that the NCAA's refusal to waive the Post-baccalaureate Bylaw excluded her from participating in intercollegiate athletics at Hofstra and the University of Pittsburgh on the basis of her sex, in violation of Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. s 1681 et seq. The complaint did not attack the Bylaw on its face, but instead alleged that the NCAA discriminates on the basis of sex by granting more waivers from eligibility restrictions to male than female postgraduate student-athletes.

The NCAA moved to dismiss Smith's Title IX claim on the ground that the complaint failed to allege that the NCAA is a recipient of federal financial assistance. In opposition, Smith argued that the NCAA governs the federally funded intercollegiate athletics programs of its members, that these programs are educational, and that the NCAA benefited economically from its members' receipt of federal funds.

Concluding that the alleged connections between the NCAA and federal financial assistance to member institutions were "too far attenuated" to sustain a Title IX claim, the District Court dismissed the suit. 978 F. Supp. 213, 219, 220 (W.D.Pa.1997). Smith then moved the District Court for leave to amend her complaint to add Hofstra and the University of Pittsburgh as defendants, and to allege that the NCAA "receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." The District Court denied the motion "as moot, the court having granted [the NCAA's] motion to dismiss."

The Court of Appeals for the Third Circuit reversed the District Court's refusal to grant leave to amend the complaint. 139 F.3d 180, 190 (1998). The Third Circuit agreed with the District Court that Smith's original complaint failed to state a Title IX claim. But Smith's proposed amended complaint, the Court of Appeals said, "plainly alleges that the NCAA receives dues from member institutions, which receive federal funds." That allegation, the Third

Circuit held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." Under the Third Circuit's ruling, all Smith would need to prove on remand to proceed is that the NCAA receives members' dues, a fact not in dispute.

The NCAA petitioned for this Court's review, alleging that the Court of Appeals' decision conflicted with *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). We granted certiorari, 524 U.S. 982 (1998), to decide whether a private organization that does not receive federal financial assistance is subject to Title IX because it receives payments from entities that do.

II.

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Under the Civil Rights Restoration Act of 1987 (CRRA), 102 Stat. 28, 20 U.S.C. sec. 1687, a "program or activity" includes "all of the operations of ... a college, university, or other postsecondary institution, or a public system of higher education...any part of which is extended Federal financial assistance." s 1687(2)(A). The CRRA also provides institution-wide coverage for entities "principally engaged in the business of providing education" services, sec. 1687(3)(A)(ii), and for entities created by two or more covered entities, sec. 1687(4). Thus, if any part of the NCAA received federal assistance, all NCAA operations would be subject to Title IX.

We have twice before considered when an entity qualifies as a recipient of federal financial assistance. In *Grove City College v. Bell*, 465 U.S. 555, 563-570 (1984), we held that a college receives federal financial assistance when it enrolls students who receive federal funds earmarked for educational expenses. Finding "no hint" that Title IX distinguishes "between direct institutional assistance and aid received by a school through its students," we concluded that Title IX "encompass[es] all forms of federal aid to education, direct or indirect." *Id*., at 564 (internal quotation marks omitted).

In *Paralyzed Veterans*, 477 U.S., at 603-612, we considered the scope of sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, which prohibits discrimination on the basis of disability in substantially the same terms that Title IX uses to prohibit sex discrimination. In that case, a group representing disabled veterans contended that the Department of Transportation had authority to enforce sec. 504 against commercial air carriers by virtue of the Government's extensive program of financial assistance to airports. We held that airlines are not recipients of

federal funds received by airport operators for airport construction projects, even when the funds are used for projects especially beneficial to the airlines. Application of sec. 504 to all who benefited economically from federal assistance, we observed, would yield almost "limitless coverage." 477 U.S., at 608. We concluded that "[t]he statute covers those who receive the aid, but does not extend as far as those who benefit from it." *Id*., at 607.

* * * *

Section 106.2(h) [of the Department of Education's Title IX regulations, 34 C.F.R. sec. 106.2(h)] defines "recipient" to include any entity "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance." The first part of this definition makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding. Thus, the regulation accords with the teaching of *Grove City* and *Paralyzed Veterans*: Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.

The Third Circuit's conclusion that the NCAA would be subject to the requirements of Title IX if it received dues from its federally funded members is inconsistent with this precedent. Unlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose. At most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.

* * * *

III.

Smith, joined by the United States as amicus curiae, presses two alternative theories for bringing the NCAA under the prescriptions of Title IX. First, she asserts that the NCAA directly and indirectly receives federal financial assistance through the National Youth Sports Program NCAA administers. See Brief for Respondent 35-37, 39-41. Second, Smith argues that when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. See Brief for Respondent 41-46; Brief for United States as Amicus Curiae 20-27.

As in *Roberts v. Galen of Va., Inc.*, 525 U.S. 249 (1999), and *United States v. Bestfoods*, 524 U.S. 51 (1998), we do not decide in the first instance issues not decided below.

* * * *

For the reasons stated, we conclude that the Court of Appeals erroneously held that dues payments from recipients of federal funds suffice to subject the NCAA to suit under Title IX. Accordingly, we vacate the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion. It is so ordered.

Notes and Questions

1. The concepts of "program or activity" and "recipient" are two key determinants of coverage under the Title IX statute and regulations. How do these two concepts apply to the *Smith* case and, in particular, how do they interrelate with one another?

2. In Part III of its opinion, the U.S. Supreme Court declined to consider two alternative theories for subjecting the NCAA to the non-discrimination requirements of Title IX. These precedents apply to Title VI and Section 504 as well as Title IX.

3. Issues also have arisen concerning the applicability to the NCAA of Title III of the Americans With Disabilities Act. The analysis differs from that under Title IX, Title VI, and Section 504, and turns on whether the NCAA is, or whether it operates, a "place of public accommodation."

4. In the lower courts, the *Smith* case also included a federal antitrust claim.

Sec. 12.1.3

Athletic Associations and Conferences

NCAA v. Alston

594 U.S. 69 (2021)

OPINION BY: Gorsuch

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852-1924, pp.

15-16 (1993). He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the " 'junket' " as an experience " 'as unique and irreproducible as the Rhodian colossus,' " Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree of Doctor of Laws, but it was football that really caused college sports to take off

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. The absence of academic residency requirements gave rise to " 'tramp athletes' " who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." The next week, he "was back at West Virginia's law school." College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that " 'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.' "

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable."

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." One coach estimated that a rival team "spent over $200,000 a year on players." In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.' " He reportedly said: " '[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.' " In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself."

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." The code reiterated the NCAA's opposition to "promised pay in any form." But for the first time the code also authorized colleges and universities to pay athletes' tuition. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')."

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for

incidental expenses such as laundry." In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon* v. *National Collegiate Athletic Assn.*, 802 F. 3d 1049, 1054-1055 (CA9 2015). The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance.

The NCAA has also allowed payments " 'incidental to athletics participation,' " including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events."

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I

includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules."

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year." All these amounts have "increased consistently over the years."

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year. Commissioners of the top conferences take home between $2 to $5 million. College athletic directors average more than $1 million annually. And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services."

Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce."

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce."

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. This Court has "long recognized that in view of the common law and the law in this country when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.' " Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition. Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."

In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance."

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." In a market without the challenged restraints, the district

court found, “competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result.” “Student-athletes would receive offers that would more closely match the value of their athletic services.” And notably, the court observed, the NCAA “did not meaningfully dispute” any of this evidence

The district court next considered the NCAA’s procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, and the NCAA does not pursue them here. The NCAA ’s only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA ’s seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so.

Turning to that task, the court observed that the NCAA’s conception of amateurism has changed steadily over the years. The court noted that the NCAA “nowhere define[s] the nature of the amateurism they claim consumers insist upon.” And, given all this, the court struggled to ascertain for itself “any coherent definition” of the term, noting the testimony of a former SEC commissioner that he’s “ ‘never been clear on . . . what is really meant by amateurism.’ ”

Nor did the district court find much evidence to support the NCAA’s contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed “to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand.” The court observed, for example, that the NCAA’s “only economics expert on the issue of consumer demand” did not “study any standard measures of consumer demand” but instead simply “interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel.” Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. The plaintiffs presented economic and other evidence suggesting as well that further increases in

student-athlete compensation would "not negatively affect consumer demand." At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the challenged set of rules." The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand."

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." If anything, they "emphasize that the recipients are students." Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. The court's injunction

further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). The court added that the NCAA and its members were free to propose a definition of compensation or benefits " 'related to education.' " And the court explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports."

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA 's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the

NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market.

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off " sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury.But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review" before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of

intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively.

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price.

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes,this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling of an eye.' " That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

* * * * *

None of this helps the NCAA. The NCAA. *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the

very competitions that consumers value would not be possible. Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the " 'twinkling of an eye.' "

But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are." While a quick look will often be enough to approve the restraints "necessary to produce a game," a fuller review may be appropriate for others.

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as " 'illegal *per se*.' " The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated

antitrust review as a path to condemnation, not salvation. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." .

On the NCAA 's telling, these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in ***Board of Regents***. And the Court made clear it was only assuming the reasonableness of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive . . . ." Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. It has increased the size of permissible benefits "incidental to athletics participation." And it has developed the

Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. By 2016, NCAA Division I schools raised more than $13.5 billion. From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. In 2016, those annual television rights brought in closer to $1.1 billion.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because we are final," but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education."

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to maximize revenues." Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its

restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for " 'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful.

As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion.

We agree with the NCAA's premise tha antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition."

Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." After all, even "[u]nder the best of circumstances," applying the antitrust laws " 'can be difficult' "—and mistaken condemnations of legitimate business arrangements " 'are especially costly, because they chill the very' " procompetitive conduct " 'the antitrust laws are designed to protect.' " Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to " '[m]ete[r]' small deviations is not an appropriate antitrust function

While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand."

[W]e see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because,however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints " 'patently and inexplicably stricter than is necessary' " to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. . . .

While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," and that some were "not necessary to preserve consumer demand. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court " 'impose a duty . . . that it cannot explain or adequately and reasonably supervise.' " In short, judges make for poor "central planners" and should never aspire to the role.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. And the court emphasized that its injunction applies only to the NCAA and multi-conference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. .

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

***

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: " 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.' " That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

Concur by: KAVANAUGH

The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined."

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA 's remaining compensation rules should be subject to ordinary rule of reason scrutiny.

Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA , is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA 's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that

asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA 's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

Notes and Questions

1. Note that the NCAA has justified its prohibitions on payments for student athletes on the status of them as amateurs. What is the NCAA's definition of amateur, and does the Court agree?

2. The majority opinion does not address the issue of wheter or not student athletes should be considered employees for legal purposes, and thus enjoy the protections of federal and state employment laws. But Justice Kavanaugh's concurring opinion uses the term "employees" to refer to the student athletes, although he does not discuss how or why he used that term. Are student athletes emplyees? If you say "yes," does that apply only to student athletes in revenue sports, or to all student athletes?

3. If student athletes are classified as employees, what challenges would colleges and universities face?

4. Recent litigation has discussed payment to student athletes for the use of their name, image and likeness to endorse specific products (NIL). Several states have enacted NIL laws in order not only to permit NIL payments, but to regulate how and for what student athletes may be compensated. How will NIL availability change intercollegiate sports?

5. What Title IX issues may arise when athletes involved in revenue sports may be paid? How should an institution address these issues?

SEC. 12.2. Business Partners

Grimes v. Kennedy Krieger Institute, Inc.
Higgins v. Kennedy Krieger Institute, Inc.
782 A.2d 807 (Md. 2001)
Reconsideration Denied Oct. 11, 2001

CATHELL, Judge.

Prologue

We initially note that these are cases of first impression for this Court. For that matter, precious few courts in the United States have addressed the issues presented in the cases at bar.[1] In respect to nontherapeutic research using minors, it has been noted that "consent to research has been virtually unanalyzed by courts and legislatures." Robert J. Katerberg, *Institutional Review Boards, Research on Children, and Informed Consent of Parents: Walking the Tightrope Between Encouraging Vital Experimentation and Protecting Subjects' Rights*, 24 J.C. & U.L. 545, 562, quoting National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Report and Recommendations [National Commission]: Research Involving Children 79-80 (1977). Our research reveals this statement remains as accurate now as it was in 1977.

In these present cases, a prestigious research institute, associated with Johns Hopkins University, *based on this record,* created a nontherapeutic research program[2] whereby it required certain classes of homes to have only partial lead paint abatement modifications performed, and in at least some instances, including at least one of the cases at bar, arranged for the landlords to receive public funding by way of grants or loans to aid in the modifications. The research institute then encouraged, and in at least one of the cases at bar, required, the landlords to rent the premises to families with young children. In the event young children already resided in one

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[1] We note that we have found only one case fairly close on one point we address later; that being a New York case that we discuss in the main body of our opinion.

[2] At least to the extent that commercial profit motives are not implicated, therapeutic research's purpose is to directly help or aid a patient who is suffering from a health condition the objectives of the research are designed to address – hopefully by the alleviation, or potential alleviation, of the health condition.

Nontherapeutic research generally utilizes subjects who are not known to have the condition the objectives of the research are designed to address, and/or is not designed to directly benefit the subjects utilized in the research, but, rather, is designed to achieve beneficial results for the public at large (or, under some circumstances, for profit).

of the study houses, it was contemplated that a child would remain in the premises, and the child was encouraged to remain, in order for his or her blood to be periodically analyzed. In other words, the continuing presence of the children that were the subjects of the study was required in order for the study to be complete. Apparently, the children and their parents involved in the cases [under review] were from a lower economic strata and were, at least in one case, minorities.

The purpose of the research was to determine how effective varying degrees of lead paint abatement procedures were. Success was to be determined by periodically, over a two-year period of time, measuring the extent to which lead dust remained in, or returned to, the premises after the varying levels of abatement modifications, and, as most important to our decision, by measuring the extent to which the theretofore healthy children's blood became contaminated with lead, and comparing that contamination with levels of lead dust in the houses over the same periods of time. In respect to one of the protocols presented to the Environmental Protection Agency and/or the Johns Hopkins Joint Committee on Clinical Investigation, the Johns Hopkins Institutional Review Board (IRB), the researchers stated: "To help insure that study dwellings are occupied by families with young children, City Homes[3] will give priority to families with young children when renting the vacant units following R & M [Repair and Maintenance] interventions."

The same researchers had completed a prior study on abatement and partial abatement methods that indicated that lead dust remained and/or returned to abated houses over a period of time. In an article reporting on that study, the very same researchers said: "Exposure to lead-bearing dust is particularly hazardous for children because hand-to-mouth activity is recognized as a major route of entry of lead into the body and because absorption of lead is inversely related to particule size." Mark R. Farfel & J. Julian Chisolm, *Health and Environmental Outcomes of Traditional and Modified Practices for Abatement of Residential Lead-Based Paint*, 80 American Journal of Public Health 1240, 1243 (1990). After publishing this report, the researchers began the present research project in which children were encouraged to reside in households where the possibility of lead dust was known to the researcher to be likely, so that the lead dust content of their blood could be compared with the level of lead dust in the houses at periodic intervals over a two-year period.

Apparently, it was anticipated that the children, who were the human subjects in the program, would, or at least might, accumulate lead in their blood from the dust, thus helping the researchers to determine the extent to which the various partial abatement methods worked. There was no complete and clear explanation in the consent agreements signed by the parents of

[3] City Homes apparently was a nonprofit entity affiliated with the Enterprise Foundation, that owned and/or managed low-income housing in Baltimore City.

the children that the research to be conducted was designed, at least in significant part, to measure the success of the abatement procedures by measuring the extent to which the children's blood was being contaminated. It can be argued that the researchers intended that the children be the canaries in the mines but never clearly told the parents. (It was a practice in earlier years, and perhaps even now, for subsurface miners to rely on canaries to determine whether dangerous levels of toxic gasses were accumulating in the mines. Canaries were particularly susceptible to such gasses. When the canaries began to die, the miners knew that dangerous levels of gasses were accumulating.)

The researchers and their Institutional Review Board apparently saw nothing wrong with the search protocols that anticipated the possible accumulation of lead in the blood of otherwise healthy children as a result of the experiment, or they believed that the consents of the parents of the children made the research appropriate. Institutional Review Boards (IRB) are oversight entities within the institutional family to which an entity conducting research belongs. In research experiments, an IRB can be required in some instances by either federal or state regulation, or sometimes by the conditions attached to governmental grants that are used to fund research projects. Generally, their primary functions are to assess the protocols of the project to determine whether the project itself is appropriate, whether the consent procedures are adequate, whether the methods to be employed meet proper standards, whether reporting requirements are sufficient, and the assessment of various other aspects of a research project. One of the most important objectives of such review is the review of the potential safety and the health hazard impact of a research project on the human subjects of the experiment, especially on vulnerable subjects such as children. Their function is *not* to help researchers seek funding for research projects.

In the instant case, as is suggested by some commentators as being endemic to the research community as a whole, *infra,* the IRB involved here, the Johns Hopkins University Joint Committee on Clinical Investigation, in part, abdicated that responsibility, instead suggesting to the researchers a way to miscast the characteristics of the study in order to avoid the responsibility inherent in nontherapeutic research involving children. In a letter dated May 11, 1992, the Johns Hopkins University Joint Committee on Clinical Investigation (the IRB for the University), charged with insuring the safety of the subjects and compliance with federal regulations, wrote to Dr. Farfel, the person in charge of the research:

> "A number of questions came up . . . . Please respond to the following points[:]....
>
> 2. The next issue has to do with drawing blood from the control population, namely children growing up in modern urban housing. *Federal guidelines are really quite specific regarding using children as controls in projects in which there is no*

> *potential benefit* [to the particular children]. To call a subject a normal control is to indicate that there is no real benefit to be received [by the particular children] . . . . So we think it would be much more acceptable to indicate that the 'control group' is being studied to determine what exposure outside the home may play in a total lead exposure; thereby, indicating that these control individuals are gaining some benefit, namely learning whether safe housing alone is sufficient to keep the blood-lead levels in acceptable bounds. We suggest that you modify . . . consent form[s] . . . accordingly." [Emphasis added.]

While the suggestion of the IRB would not make this experiment any less nontherapeutic or, thus, less regulated, this statement shows two things: (1) that the IRB had a partial misperception of the difference between therapeutic and nontherapeutic research and the IRB's role in the process and (2) that the IRB was willing to aid researchers in getting around federal regulations designed to protect children used as subjects in nontherapeutic research. An IRB's primary role is to assure the safety of human research subjects – not help researchers avoid safety or health-related requirements. The IRB, in this case, misconceived, at least partially, its own role.

The provisions or conditions imposed by the federal funding entities, pursuant to federal regulations, are conditions attached to funding. As far as we are aware, or have been informed, there are no federal or state (Maryland) statutes that mandate that all research be subject to certain conditions. Certain international "codes" or "declarations" exist (one of which is supposedly binding but has never been so held) that, at least in theory, establish standards. We shall describe them, *infra*. Accordingly, we write on a clean slate in this case. We are guided, as we determine what is appropriate, by those international "codes" or "declarations," as well as by studies conducted by various governmental entities, by the treatises and other writings on the ethics of using children as research subjects, and by the duties, if any, arising out of the use of children as subjects of research.

Otherwise healthy children, in our view, should not be enticed into living in, or remaining in, potentially lead-tainted housing and intentionally subjected to a research program, which contemplates the probability, or even the possibility, of lead poisoning or even the accumulation of lower levels of lead in blood, in order for the extent of the contamination of the children's blood to be used by scientific researchers to assess the success of lead paint or lead dust abatement measures. Moreover, in our view, parents, whether improperly enticed by trinkets, food stamps, money or other items, have no more right to intentionally and unnecessarily place children in potentially hazardous nontherapeutic research surroundings, than do researchers. In such cases, parental consent, no matter how informed, is insufficient.

While the validity of the consent agreement and its nature as a contract, the existence or nonexistence of a special relationship, and whether the researchers performed their functions under that agreement pursuant to any special relationships are important issues in these cases that we will address, the very inappropriateness of the research itself cannot be overlooked. It is apparent that the protocols of research are even more important than the method of obtaining parental consent and the extent to which the parents were, or were not, informed. If the research methods, the protocols, are inappropriate then, especially when the IRB is willing to help researchers avoid compliance with applicable safety requirements for using children in nontherapeutic research, the consent of the parents, or of any consent surrogates, in our view, cannot make the research appropriate or the actions of the researchers and the Institutional Review Board proper.

The research relationship proffered to the parents of the children the researchers wanted to use as measuring tools should never have been presented in a nontherapeutic context in the first instance. Nothing about the research was designed for treatment of the subject children. They were presumed to be healthy at the commencement of the project. As to them, the research was clearly nontherapeutic in nature. The experiment was simply a "for the greater good" project.[6] The specific children's health was put at risk, in order to develop low-cost abatement measures that would help all children, the landlords, and the general public as well.

The tenants involved, presumably, would be from a lower rent-urban class. At least one of the consenting parents in one of these cases was on public assistance, and was described by her counsel as being a minority. The children of middle class or rich parents apparently were not involved.

"Indeed, the literature on the law and ethics of human experimentation is replete with warnings that all subjects, but especially vulnerable subjects, are at risk of abuse by inclusion [as research subjects]. Those vulnerable subjects included prisoners, who are subject to coercion, [see The Prisoner's Cases: *Clay v. Martin*, 509 F.2d 109 (1975); *Bailey, Dingee, Neuser & Munney v. Lally*, 481 F. Supp. 203 (1979); *Valenti v. Prudden,* 58 A.D.2d 956, 397 N.Y.S.2d 181 (1977)]; children and the elderly . . . and racial minorities, ethnic minorities, and women [see the silicone injections/informed consent case of *Retkwa v. Orentreich*, 154 Misc.2d 164, 584

[6] The ultimate goal was to find the cost of the minimal level of effective lead paint or lead dust abatement costs so as to help landlords assess, hopefully positively, the commercial feasibility of attempting to abate lead dust in marginally profitable, lower rent-urban housing, in order to help preserve such housing in the Baltimore housing market. One of the aims was to evaluate low-cost methods of abatement so that some landlords would not abandon their rental units. For those landlords, complete abatement was not deemed economically feasible. The project would be able to assess whether a particular level of partial abatement caused a child's blood lead content to be elevated beyond a level deemed hazardous to the health of children.

N.Y.S.2d 710 (1992)], whom history shows to be the most frequent victims of abuses in human experimentation." R. Alta Charo, *Protecting us to Death: Women, Pregnancy and Clinical Research Trials*, 38 St. Louis U.L.J. 135, 135 (Fall, 1993); *see also* Lainie Ross, *Children as Research Subjects: A Proposal to Revise the Current Federal Regulations Using a Moral Framework*, 8 Stan. L. & Policy Rev. 159, 164 (Winter 1997) ("The failures in the informed consent process lead to serious inequities in research, specifically for the poor and less educated who bear most of the research burden. Studies show that the process of informed consent serves as a social filter: Better-educated and wealthier individuals are more likely to refuse to participate and are underrepresented in most research. The problem is perpetuated in pediatrics, where parents who volunteer their children were found to be significantly less educated and underrepresented in the professional and managerial occupations compared to their non-volunteering counterparts." (footnote omitted)).

* * * *

It is clear to this Court that the scientific and medical communities cannot be permitted to assume sole authority to determine ultimately what is right and appropriate in respect to research projects involving young children free of the limitations and consequences of the application of Maryland law. The Institutional Review Boards, IRBs, are, primarily, in-house organs. In our view, they are not designed, generally, to be sufficiently objective in the sense that they are as sufficiently concerned with the ethicality of the experiments they review as they are with the success of the experiments. This has been the subject of comment in a constitutional context, in dissent, in a case involving the use of psychiatric medication on mental patients without their consent. In *Washington v. Harper,* 494 U.S. 210, 237 (1990), Justice Stevens said: "The Court has undervalued respondent's liberty interest; has misread the Washington involuntary medication Policy . . ., and has concluded that a mock trial before an institutionally biased tribunal constitutes 'due process of law.' " [Citation omitted.]

In footnote two of his dissent, Justice Stevens noted: "([T]he Constitution's promise of due process of law guarantees at least compensation for violations of the principle stated by the Nuremberg Military Tribunals 'that the "voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts[.']"); ([T]he Fourteenth Amendment protects the 'freedom to care for one's health and person[.]')" 494 U.S. at 238.

As can be seen from the letter from the Johns Hopkins University Joint Committee on Clinical Investigation, *supra*, to the researchers in this case, Justice Steven's doubts as to the effectiveness of such in-house review to assess the ethics of research were warranted. Here, the IRB, whose primary function was to insure safety and compliance with applicable regulations,

encouraged the researchers to misrepresent the purpose of the research in order to bring the study under the label of "therapeutic" and thus under a lower safety standard of regulation. The IRB's purpose was ethically wrong, and its understanding of the experiment's benefit incorrect.

The conflicts are inherent. This would be especially so when science and private industry collaborate in search of material gains. Moreover, the special relationship between research entities and human subjects used in the research will almost always impose duties.

In respect to examining that special relationship, we are obliged to further examine its nature and its ethical constraints. In that regard, when contested cases arise, the assessment of the legal effect of research on human subjects must always be subject to judicial evaluation. One method of making such evaluations is the initiation of appropriate actions bringing such matters to the attention of the courts, as has been done in the cases at bar. It may well be that in the end, the trial courts will determine that no damages have been incurred in the instant cases and thus the actions will fail for that reason. In that regard, we note that there are substantial factual differences in the Higgins and in the Grimes cases. But the actions, themselves, are not defective on the ground that no legal duty can, according to the trial courts, possibly exist. For the reasons discussed at length in the main body of the opinion, a legal duty normally exists between researcher and subject and in all probability exists in the cases at bar. Moreover, as we shall discuss, the consents of the parents in these cases under Maryland law constituted contracts creating duties. Additionally, under Maryland law, to the extent parental consent can ever be effective in research projects of this nature, the parents may not have been sufficiently informed and, therefore, the consents ineffective and, based on the information contained in the sparse records before this court, the research project, may have invaded the legal rights of the children subjected to it.

I. The Cases

We now discuss more specifically the two cases before us, and the relevant law.

Two separate negligence actions involving children who allegedly developed elevated levels of lead dust in their blood while participating in a research study with respondent, Kennedy Krieger Institute, Inc., (KKI) are before this Court. Both cases allege that the children were poisoned, or at least exposed to the risk of being poisoned, by lead dust due to negligence on the part of KKI. Specifically, they allege that KKI discovered lead hazards in their respective homes and, having a duty to notify them, failed to warn in a timely manner or otherwise act to prevent the children's exposure to the known presence of lead. Additionally, plaintiffs alleged that they were not fully informed of the risks of the research.

In the first case, Number 128, appellant, Ericka Grimes, by her mother Viola Hughes, appeals from a ruling of the Circuit Court for Baltimore City granting KKI's motion for summary judgment based on the sole ground that as a matter of law there was no legal duty, under the circumstances here present, on the part of KKI, owed to the appellants. In the second case, Number 129, appellant, Myron Higgins, by his mother Catina Higgins, and Catina Higgins, individually, appeal from a ruling of the Circuit Court for Baltimore City granting KKI's motion for summary judgment based on the ground that KKI had no legal duty to warn them of the presence of lead dust. The parties, in their respective appeals, presented almost identical issues to the Court of Special Appeals. Prior to consideration by that court, we granted certiorari to address these similar issues. We rephrase the issues in both cases in the language presented by appellants in Case Number 129: "Was the trial court incorrect in ruling on a motion for summary judgment that as a matter of law a research entity conducting an ongoing non-therapeutic scientific study does not have a duty to warn a minor volunteer participant and/or his legal guardian regarding dangers present when the researcher has knowledge of the potential for harm to the subject and the subject is unaware of the danger?"

We resolve these issues in the context of the trial court's granting of the appellee's motions for summary judgment.

We answer in the affirmative. The trial court was incorrect. Such research programs normally create special relationships and/or can be of a contractual nature that creates duties. The breaches of such duties may ultimately result in viable negligence actions. Because, at the very least, there are viable and genuine disputes of material fact concerning whether a special relationship, or other relationships arising out of agreements, giving rise to duties existed between KKI and both sets of appellants, we hold that the Circuit Court erred in granting KKI's motions for summary judgment in both cases before this Court. Accordingly, we vacate the rulings of the Circuit Court for Baltimore City and remand these cases to that court for further proceedings consistent with this opinion.

II. Facts & Procedural Background

A. The Research Study

In 1993, The Environmental Protection Agency (EPA) awarded Contract 68-D4-0001, entitled "Evaluation of Efficacy of Residential Lead Based Paint Repair and Maintenance Interventions" to KKI. KKI was to receive $200,000 for performing its responsibilities under the contract. It was thus a compensated researcher. The purpose of this research study was "to characterize and compare the short and long-term efficacy of comprehensive lead-paint

abatement and less costly and potentially more cost-effective Repair and Maintenance interventions for reducing levels of lead in residential house dust which in turn should reduce lead in children's blood." As KKI acknowledged in its Clinical Investigation Consent Form, "[L]ead poisoning in children is a problem in Baltimore City and other communities across the country. Lead in paint, house dust and outside soil are major sources of lead exposure for children. Children can also be exposed to lead in drinking water and other sources." Lead poisoning poses a distinct danger to young children. It adversely effects cognitive development, growth, and behavior. Extremely high levels have been known to result in seizures, coma, and even death. *See* Centers for Disease Control and Prevention. *Recommendations for Blood Lead Screening of Young Children Enrolled in Medicaid: Targeting a Group at High Risk,* 49 Morbidity and Mortality Weekly Report 1 (Dec. 8, 2000).

* * * *

The research study was sponsored jointly by the EPA and the Maryland Department of Housing and Community Development (DHCD). It was thus a joint federal and state project. The Baltimore City Health Department and Maryland Department of the Environment also collaborated in the study. It appears that, because the study was funded and sponsored in part by a federal entity, certain federal conditions were attached to the funding grants and approvals. There are certain uniform standards required in respect to federally funded or approved projects. We, however, are unaware of, and have not been directed to, any federal or state statute or regulation that imposes limits on this Court's powers to conduct its review of the issues presented. None of the parties have questioned this Court's jurisdiction in these cases. Moreover, 45 Code Federal Regulations (C.F.R.) 46.116(e) specifically provides: "The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective." Those various federal or state conditions, recommendations, etc., may well be relevant at a trial on the merits as to whether any breach of a contractual or other duty occurred, or whether negligence did, in fact, occur; but have no limiting effect on the issue of whether, at law, legal duties, via contract or "special relationships" are created in Maryland in experimental nontherapeutic research involving Maryland children.

* * * *

One way the study was designed to measure the effectiveness of [partial lead paint] abatement measures was to measure the lead dust levels in the houses at intervals and to compare

them with the levels of lead found, at roughly the same intervals, in the blood of the children living in the respective houses. The project required that small children be present in the houses. To facilitate that purpose, the landlords agreeing to permit their properties to be included in the studies were encouraged, if not required, to rent the properties to tenants who had young children.

In return for permitting the properties to be used and in return for limiting their tenants to families with young children, KKI assisted the landlords in applying for and receiving grants or loans of money to be used to perform the levels of abatement required by KKI for each class of home.

The research study was to be composed of two main components and a total of five groups of study houses. The first component of the study concerned the first three groups of houses. Houses in each group received different amounts of repair and maintenance.[15]

* * * *

In summary, KKI conducted a study of five test groups of twenty-five houses each. The first three groups consisted of houses known to have lead present. The amount of repair and maintenance conducted increased from Group 1 to Group 2 to Group 3. The fourth group consisted of houses, which had at one time lead present but had since allegedly received a complete abatement of lead dust. The fifth group consisted of modern houses, which had never had the presence of lead dust. The twenty-five homes in each of the first three testing levels were then to be compared to the two control groups: the twenty-five homes in Group 4 that had previously been abated and the 25 modern homes in Group 5. The research study was specifically designed to do less than full lead dust abatement in some of the categories of houses in order to study the potential effectiveness, if any, of lesser levels of repair and maintenance.

If the children were to leave the houses upon the first manifestation of lead dust, it would be difficult, if not impossible, to test, over time, the rate of the level of lead accumulation in the blood of the children attributable to the manifestation. In other words, if the children were removed from the houses before the lead dust levels in their blood became elevated, the tests would probably fail, or at least the data that would establish the success of the test-or of the abatement results, would be of questionable use. Thus, it would benefit the accuracy of the test,

[15] Although the EPA funded and co-sponsored the cost of the actual research, the funds provided for maintenance and repair of the houses were provided by loans made by DHCD through the Lead Paint Abatement Program established by the General Assembly. Maryland Code (1957, 1988 Repl.Vol., 1990 Cum.Supp.), Art. 83B §§ 2-301 through 2-313. On July 1, 1995, these loans were made through the Lead Hazard Reduction Loan Program as enacted by 1995 Maryland Laws, Chapter 335. *See* Maryland Code (1957, 1998 Repl.Vol.), Art. 83B §§ 2-1401 through 2-1411.

and thus KKI, the compensated researcher, if children remained in the houses over the period of the study even after the presence of lead dust in the houses became evident.

B. Case No. 128

Appellant, Ericka Grimes, resided at 1713 N. Monroe Street in Baltimore, Maryland (the Monroe Street property) . . . . In March 1993, representatives of KKI came to [the] home and successfully recruited [Ericka's mother, Viola Hughes] to participate in the research study. After a discussion regarding the nature, purpose, scope, and benefits of the study, Ms. Hughes agreed to participate and signed a Consent Form dated March 10, 1993. Nowhere in the consent form was it clearly disclosed to the mother that the researchers contemplated that, as a result of the experiment, the child might accumulate lead in her blood, and that in order for the experiment to succeed it was necessary that the child remain in the house as the lead in the child's blood increased or decreased, so that it could be measured. The Consent Form states in relevant part:

> PURPOSE OF STUDY:
>
> As you may know, lead poisoning in children is a problem in Baltimore City and other communities across the country. Lead in paint, house dust and outside soil are major sources of lead exposure for children. Children can also be exposed to lead in drinking water and other sources. We understand that your house is going to have special repairs [21] done in order to reduce exposure to lead in paint and dust. On a random basis, homes will receive one of two levels of repair. We are interested in finding out how well the two levels of repair work. The repairs are not intended, or expected, to completely remove exposure to lead.
>
> We are now doing a study to learn about how well different practices work for reducing exposure to lead in paint and dust. We are asking you and over one hundred other families to allow us to test for lead in and around your homes up to 8 to 9 times over the next two years provided that your house qualifies for the full two years of study. Final eligibility will be determined after the initial testing of your home. We are also doing free blood lead testing of children aged 6 months to 7 years, up to 8 to 9 times over the next two years. We would also like you to

[21] This Consent Form refers to repairs that were to be made to the Monroe Street property. KKI contends in its briefs to this Court that appellant's residence had already been completely abated as of October 15, 1990, and was not to be subjected to repairs and maintenance . . . .

respond to a short questionnaire every 6 months. This study is intended to monitor the effects of the repairs and is not intended to replace the regular medical care your family obtains.

BENEFITS

To compensate you for your time answering questions and allowing us to sketch your home we will mail you a check in the amount of $5.00. In the future we would mail you a check in the amount of $15 each time the full questionnaire is completed. The dust, soil, water, and blood samples would be tested for lead at the Kennedy Krieger Institute at no charge to you. *We would provide you with specific blood-lead results. We would contact you to discuss a summary of house test results and steps that you could take to reduce any risks of exposure.*" [Emphasis added.]

Pursuant to the plans of the research study, KKI collected dust samples in the Monroe Street property on March 9, 1993, August 23, 1993, March 9, 1994, September 19, 1994, April 18, 1995, and November 13, 1995. The March 9, 1993 dust testing revealed what the researchers referred to as "hot spots" where the level of lead was "higher than might be found in a completely renovated [abated] house." This information about the "hot spots" was not furnished to Ms. Hughes until December 16, 1993, more than nine months after the samples had been collected and, as we discuss, *infra*, not until after Ericka Grimes's blood was found to contain elevated levels of lead.

KKI drew blood from Ericka Grimes for lead content analysis on April 9, 1993, September 15, 1993, and March 25, 1994. Unlike the lead concentration analysis in dust testing, the results of the blood testing were typically available to KKI in a matter of days. KKI notified Ms. Hughes of the results of the blood tests by letters dated April 9, 1993, September 29, 1993, and March 28, 1994, respectively. The results of the April 9, 1993 test found Ericka Grimes blood to be less than 9 μg /dL, which placed her results in the "normal" range according to classifications established by the Centers for Disease Control (CDC). However, on two subsequent retests, long after KKI had identified "hot spots," but before KKI informed Ms. Hughes of the "hot spots," Ericka Grimes's blood lead level registered Class III-32 μg /dL [highly elevated] on September 15, 1993 and 22 μg/dL on March 25, 1994. Ms. Hughes and her daughter vacated the Monroe Street property in the Summer of 1994, and, therefore, no further blood samples were obtained by KKI after March 25, 1994.

* * * *

On appeal, appellant seeks review of the Circuit Court's decision granting KKI summary judgment. She contends that KKI owed a duty of care to appellant based on the nature of its relationship with appellant and her mother arising out of: (1) a contract between the parties; (2) a voluntary assumption by KKI; (3) a "special relationship" between the parties; and (4) a Federal regulation. She argues that KKI's failure to notify her of the lead dust hazards in the Monroe Street property until after more than nine months had passed since the samples had been collected, and until after Ericka Grimes's blood was found to be lead poisoned, constituted negligence on the part of KKI in the performance of its duties to Ericka arising out of the nature of the relationship between the parties.

C. Case No. 129

In 1993, Mr. Polakoff, a professional owner and operator of rental properties, had been recruited as a landlord by KKI through the Property Owners Association, to volunteer the Federal Street property to the research study . . . . Once accepted into the program, Mr. Polakoff's property was randomly assigned a Repair & Maintenance Level II intervention and subsequently underwent the repairs associated with Level II intervention . . . . Mr. Polakoff applied for a $3,500 loan from the Maryland Department of the Environment to pay for the repairs, which was granted . . . .

Appellant, Myron Higgins, was born on December 23, 1989 . . . . [Ms. Catina Higgins] located the property known as 1906 East Federal Street (the Federal Street property) in an advertisement in the local newspaper . . . . She signed a lease for the property on May 13, 1994 and moved in shortly thereafter.

* * * *

After the Higgins family moved into the partially abated, vacant Federal Street property, KKI approached Ms. Higgins and requested that she and her son participate in the research study . . . . On May 24, 1994, Ms. Higgins agreed to participate and signed a Consent Form regarding her and her child's participation in the study. As in Case No. 128 the consent form did not contain a clear disclosure that the researchers contemplated that, as a result of the experiment, the child subjects might, and perhaps were anticipated to, accumulate some level of lead contamination of their blood, and that the lead content of the children's blood would be one of

the methods by which the study would determine the effectiveness of the various abatement procedures.

* * * *

Ms. Higgins contends that KKI knew of the presence of high levels of lead-based paint and dust in the Federal Street property as early as December of 1993, that even after Level II intervention it still had high levels as of June 24, 1994, and that it was not until she received a letter dated September 14, 1994 that KKI specifically informed Ms. Higgins of the fact that her house had elevated lead levels.

KKI drew blood from Myron Higgins for lead content analysis on June 8, 1994, July 29, 1994, and November 9, 1994. KKI notified Ms. Higgins of the results of the blood tests by letters dated July 18, 1994, August 2, 1994, and December 6, 1994, respectively. The results of the tests were 17.5 μg/dL, 21 μg/dL [highly elevated], and 11 μg/dL, respectively . . . . KKI told Ms. Higgins that it had informed the BCHD of the second result and that she "should provide the test result to [her] child's primary health care provider right away."

In her Complaint filed in the Circuit Court for Baltimore City, Ms. Higgins sought to hold KKI liable for negligence on several different grounds. Specifically, she alleged:

> "8. Both [KKI] and Environmental were negligent in undertaking to abate, paint and repair the premises prior to and/or during the children's occupancy and doing so in an unreasonable, incomplete, unworkmanlike and/or illegal manner.
>
> 9. Both [KKI] and Environmental were negligent in performing the lead abatement in such a fashion as to increase, rather than decrease, the children's exposure to lead, including, but not limited to, performing the abatement using methods, which foreseeably increased the lead dust in the premises, performing improper or inadequate cleanup, leaving lead debris on the premises or in the vicinity of the premises accessible to the child.
>
> 10. Both [KKI] and Environmental failed to warn [appellants] or the adult caretaker of the lead hazard, which [KKI] and Environmental or their agents knew or should have known or had reason to know existed in the premises."

* * * *

III. Discussion

A. Standard of Review

We resolve these disputes in the context of the trial court's granting of the appellee's motions for summary judgment in the two distinct cases. The threshold issues before this Court are whether, in the two cases presented, appellee, KKI, was entitled to summary judgment as a matter of law on the basis that no contract existed and that there is inherently no duty owed to a research subject by a researcher. Perhaps even more important is the ancillary issue of whether a parent in Maryland, under the law of this State, can legally consent to placing a child in a nontherapeutic research study that carries with it any risk of harm to the health of the child. We shall resolve all of these primary issues.

"In reviewing a grant of a summary judgment, we are first concerned with whether a genuine dispute of material fact exists" and then whether the movant is entitled to summary judgment as a matter of law. *Williams v. Mayor & City Council of Baltimore,* 359 Md. 101, 113, 753 A.2d 41, 47 (2000) . . . .

* * * *

The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried. *See Goodwich,* 343 Md. at 205-06, 680 A.2d at 1077. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, the nonmoving party must produce sufficient evidence to the trial court that a genuine dispute to a material fact exists. *See, e.g., Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank,* 297 Md. 691, 712, 467 A.2d 758, 769 (1983). With these considerations in mind, we turn to the instant cases.

B. General Discussion

Initially, we note that we know of no law, nor have we been directed to any applicable in Maryland courts, that provides that the parties to a scientific study, because it is a scientific, health-related study, cannot be held to have entered into special relationships with the subjects of the study that can create duties, including duties, the breach of which may give rise to negligence claims. We also are not aware of any general legal precept that immunizes nongovernmental "institutional volunteers" or scientific researchers from the responsibility for the breaches of duties arising in "special relationships." Moreover, we, at the very least, hold that, under the

particular circumstances testified to by the parties, there are genuine disputes of material fact concerning whether a special relationship existed between KKI and Ericka Grimes, as well as between KKI and Ms. Higgins and Myron Higgins. Concerning this issue, the granting of the summary judgment motions was clearly inappropriate. When a "special relationship" can exist as a matter of law, the issue of whether, given certain facts, a special relationship does exist, when there is a dispute of material fact in that respect, is a decision for the finder of fact, not the trial judge. We shall hold initially that the very nature of nontherapeutic scientific research on human subjects can, and normally will, create special relationships out of which duties arise. Since World War II the specialness or nature of such relationships has been frequently of concern in and outside of the research community.

As a result of the atrocities performed in the name of science during the Holocaust, and other happenings in the World War II era, what is now known as The Nuremberg Code evolved. Of special interest to this Court, the Nuremberg Code, at least in significant part, was the result of legal thought and legal principles, as opposed to medical or scientific principles, and thus should be the preferred standard for assessing the legality of scientific research on human subjects. Under it, duties to research subjects arise.

> Following the Doctors' Trial (the 'Medical Case') . . . the court issued 'The Nuremberg Code' *as a summary of the legal requirements for experimentation on humans.* The Code requires that the informed, voluntary, competent, and understanding consent of the research subject be obtained. Although this principle is placed first in the Code's ten points, the other nine points must be satisfied before it is even appropriate to ask the subject to consent.
>
> The Nuremberg Code is the 'most complete and authoritative statement of the law of informed consent to human experimentation.' It is also 'part of international common law and may be applied, in both civil and criminal cases, by state, federal and municipal courts in the United States.' However, even though the courts in the United States may use the Nuremberg Code to set criminal and civil standards of conduct, none have used it in a criminal case and only a handful have even cited it in the civil context. Even where the Nuremberg Code has been cited as authoritative, it has usually been in dissent, and no United States court has ever awarded damages to an injured experimental subject, or punished an experimenter, on the basis of a violation of the Nuremberg Code. There have, however, been very few court decisions involving human experimentation. It is therefore very difficult for a 'common law' of human

> experimentation to develop. This absence of judicial precedent makes codes, especially judicially-crafted codes like the Nuremberg Code, all the more important." [Footnotes omitted.] [Emphasis added.] George J. Annas, *Mengele's Birthmark: The Nuremberg Code in United States Courts,* 7 Journal of Contemporary Health Law & Policy 17, 19-21 (Spring, 1991) (citing [various sources]).

Because of the way the cases [under review] have arrived, as appeals from the granting of summary judgments, there is no complete record of the specific compensation of the researchers involved. Although the project was funded by the EPA, at the request of KKI the EPA has declined to furnish such information to the attorney for one of the parties, who requested it under the federal Freedom of Information Act. Whether the research's character as a co-sponsored state project opens the records under the Maryland Public Information Act has apparently not been considered. Neither is there in the record any development of what pressures, if any, were exerted in respect to the researchers obtaining the consents of the parents and conducting the experiment. Nor, for the same reason, is there a sufficient indication as to the extent to which the Institute has joined with commercial interests, if it has, for the purposes of profit, that might potentially impact upon the researcher's motivations and potential conflicts of interest – motivations that generally are assumed, in the cases of prestigious entities such as John Hopkins University, to be for the public good rather then a search for profit.

We do note that the institution involved, the respondent here . . ., is a highly respected entity, considered to be a leader in the development of treatments, and treatment itself, for children infected with lead poisoning. With reasonable assurance, we can note that its reputation alone might normally suggest that there was no realization or understanding on the Institute's part that the protocols of the experiment were questionable, except for the letter from the IRB requesting that the researchers mischaracterize the study.

We shall further address both the factual and legal bases for the findings of the trial courts, holding, ultimately, that the respective courts erred in both respects.

C. Negligence

It is important for us to remember that appellants allege that KKI was negligent. Specifically, they allege that KKI, as a medical researcher, owed a duty of care to them, as subjects in the research study, based on the nature of the agreements between them and also based on the nature of the relationship between the parties. They contend specifically that KKI was negligent because KKI breached its duty to: (1) design a study that did not involve placing

children at unnecessary risk; (2) inform participants in the study of results in a timely manner; and (3) to completely and accurately inform participants in the research study of all the hazards and risks involved in the study.

In order to establish a claim for negligence under Maryland law, a party must prove four elements: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) *that the plaintiff suffered actual injury or loss*[33] and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." (Emphasis added.) *Rosenblatt v. Exxon*, 335 Md. 58, 76, 642 A.2d 180, 188 (1994) (citing *Faya v. Almaraz,* 329 Md. 435, 448, 620 A.2d 327, 333 (1993) and *Lamb v. Hopkins*, 303 Md. 236, 241, 492 A.2d 1297, 1300 (1985). Because this is a review of the granting of the two summary judgments based solely on the grounds that there was no legal duty to protect the children, we are primarily concerned with the first prong – whether KKI was under a duty to protect appellants from injury.

* * * *

In *Ashburn v. Anne Arundel County,* 306 Md. 617, 627-28, 510 A.2d 1078, 1083 (1986), we also analyzed this first element of whether a duty existed: "'Duty' in negligence has been defined as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' *Prosser and Keeton* [*on Torts*] § 53 [(W. Keeton 5th ed.1984)] . . . . *Id.* As one court suggested, there are a number of variables to be considered in determining if a duty exists to another, such as: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved. *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 434, 551 P.2d 334, 342 (1976). Perhaps among these the factor deemed most important is foreseeability. *See id.* However, 'foreseeability' must not be confused with 'duty.' The fact that a result may be foreseeable does not itself impose a duty in negligence terms." [Some alterations in original.]

* * * *

[33] We note that there was little suggestion of actual permanent injury to the children involved with these two cases. Our opinion is not directed to the matter of whether damages can be proven in the present cases.

The relationship that existed between KKI and both sets of appellants in the case at bar was that of medical researcher and research study subject. Though not expressly recognized in the Maryland Code or in our prior cases as a type of relationship which creates a duty of care, evidence in the record suggests that such a relationship involving a duty or duties would ordinarily exist, and certainly could exist, based on the facts and circumstances of each of these individual cases. Once we have determined that the facts and circumstances of the present cases, considered in a light most favorable to the nonmoving parties, are susceptible to inferences supporting the position of the party opposing summary judgment, we are mandated to hold that the granting of summary judgment in the lower court was improper. In addition to the trial courts' erroneous conclusions on the law, the facts and circumstances of both of these cases are susceptible to inferences that a special relationship imposing a duty or duties was created in the arrangements in the cases *sub judice*, and, ordinarily, could be created in similar research programs involving human subjects.

IV. The Special Relationships

A. The Consent Agreement

Contract

Both sets of appellants signed a similar Consent Form prepared by KKI in which KKI expressly promised to: (1) financially compensate (however minimally) appellants for their participation in the study;[34] (2) collect lead dust samples from appellants' homes, analyze the samples, discuss the results with appellants, and discuss steps that could be taken, which could reduce exposure to lead; and (3) collect blood samples from children in the household and provide appellants with the results of the blood tests. In return, appellants agreed to participate

[34] The record reflects that in addition to the $5.00 and $15.00 sums mentioned in the consent form as periodic payments for participation in stages of the study, there was a stream of compensation flowing to the research subjects and the parents. Gifts, trinkets, coupons for food, etc., would be given to the subjects or their parents periodically. Moreover, the researchers informed the E.P.A., when seeking funding approval, that:

> "A number of incentives are planned both in the clinic and in the home of the type that were well received in the recently completed Maryland Lead in Soil Project, i.e. (1) coupons for things ranging from skating trips to groceries; (2) gifts for the children such as T-shirts in the summer, and hats and gloves during winter clinic appointments and (3) ongoing incentives for parents such as $10.00-$20.00 food coupons provided at each clinic visit for blood collection. Lastly, respondents will be reimbursed $15.00 each time they provide questionnaire information."

in the study, by: (1) allowing KKI into appellants' homes to collect dust samples; (2) periodically filling out questionnaires; and (3) allowing the children's blood to be drawn, tested, and utilized in the study. If consent agreements contain such provisions, and the trial court did not find otherwise, and we hold from our own examination of the record that such provisions were so contained, mutual assent, offer, acceptance, and consideration existed, all of which created contractual relationships imposing duties by reason of the consent agreement themselves (as well, as we discuss elsewhere, by the very nature of such relationships).

By having appellants sign this Consent Form, both KKI and appellants expressly made representations, which, in our view, created a bilateral contract between the parties. At the very least, it suggests that appellants were agreeing with KKI to participate in the research study with the expectation that they would be compensated, albeit, more or less, minimally, be informed of all the information necessary for the subject to freely choose whether to participate, and continue to participate, and receive promptly any information that might bear on their willingness to continue to participate in the study. This includes full, detailed, prompt, and continuing warnings as to all the potential risks and hazards inherent in the research or that arise during the research. KKI, in return, was getting the children to move into the houses and/or to remain there over time, and was given the right to test the children's blood for lead. As consideration to KKI, it got access to the houses and to the blood of children that had been encouraged to live in a "risk" environment. In other words, KKI received a measuring tool – the children's blood. Considerations existed, mainly money, food coupons, trinkets, bilateral promises, blood to be tested in order to measure success. "Informed consent" of the type used here, which imposes obligation and confers consideration on both researcher and subject (in these cases, the parents of the subjects), may differ from the more one-sided "informed consent" normally used in actual medical practice. Researcher/subject consent in nontherapeutic research can, and in this case did, create a contract.

B. The Sufficiency of the Consent Form

The consent form did not directly inform the parents of the fact that it was contemplated that some of the children might ingest lead dust particles, and that one of the reasons the blood of the children was to be tested was to evaluate how effective the various abatement measures were. A reasonable parent would expect to be clearly informed that it was at least contemplated that her child would ingest lead dust particles, and that the degree to which lead dust contaminated the child's blood would be used as one of the ways in which the success of the experiment would be measured. The fact that if such information was furnished, it might be difficult to obtain human subjects for the research, does not affect the need to supply the information, or alter the

ethics of failing to provide such information. A human subject is entitled to *all* material information. The respective parent should also have been clearly informed that in order for the measurements to be most helpful, the child needed to stay in the house until the conclusion of the study. Whether assessed by a subjective or an objective standard, the children, or their surrogates, should have been additionally informed that the researchers anticipated that, as a result of the experiment, it was possible that there might be some accumulation of lead in the blood of the children. The "informed" consent was not valid because full material information was not furnished to the subjects or their parents.

C. Special Relationship

In Case Number 128, Ms. Hughes signed a Consent Form in which KKI agreed to provide her with "specific blood-lead results" and discuss with her "a summary of house test results and steps that [she] could take to reduce any risks of exposure." She contends that this agreement between the parties gave rise to a duty owed by KKI to provide her with that information in a timely manner. She signed the Consent Form on March 10, 1993. The project began almost simultaneously. KKI collected dust samples in the Monroe Street property on March 9, 1993, August 23, 1993, March 9, 1994, September 19, 1994, April 18, 1995, and November 13, 1995. The March 9, 1993 dust testing revealed what the researchers referred to as "hot spots," where the level of lead was "higher than might be found in a completely renovated house." As we indicated, *supra*, this information was not furnished to Ms. Hughes until December 16, 1993, more than nine months after the samples had been collected and not until after Ericka Grimes's blood was found to contain elevated levels of lead. She contends that not only did KKI have a duty to report such information in a timely manner but that it breached this duty by delaying to such a time that her daughter was allowed to contract lead poisoning. Looking at the relevant facts of Case Number 128, they are susceptible to inferences supporting the position of appellant, Ericka Grimes, and, moreover, that, if true, would create a "special relationship" out of which duties would be created. Therefore, for this reason alone, the grant of summary judgment was improper. In Case Number 129, Ms. Higgins also signed a Consent Form in which KKI agreed to provide her with "specific blood-lead results" in respect to her child and to discuss with her "a summary of house test results and steps that [she] could take to reduce any risks of exposure." She contends that this agreement between the parties gave rise to a duty owed by KKI to provide her with complete and accurate information. Pursuant to the plans of the research study, KKI collected dust samples in the Federal Street property on May 17, 1994, July 25, 1994, and November 3, 1994. KKI informed Ms. Higgins of the dust sample results by letters dated June 24, 1994, September 14, 1994, and February 7, 1995, respectively.

Although KKI had recorded high levels of lead concentration in the dust samples collected by the Cyclone vacuum during the May 17, 1994 visit, KKI failed to disclose this information to Ms. Higgins in the letter dated June 24, 1994. Instead, KKI relied on the results obtained from the dust wipe samples collected and informed her that there was no area in her house where the lead level was higher than what might have been found in a completely renovated house.

Ms. Higgins contends that KKI knew of the presence of high levels of lead-based paint and dust in the Federal Street property as early as December of 1993, that even after Level II intervention such high levels still existed as of June of 1994, and that it was not until she received a letter dated September 14, 1994 that KKI specifically informed Ms. Higgins of the fact that her house had elevated lead levels. This was after her child, Myron, was diagnosed with elevated levels of lead in his blood.

. . . . Looking at the relevant facts of Case Number 129, they are susceptible to inferences supporting the position of appellant, Ms. Higgins. Accordingly, for this reason alone, the grant of summary judgment was improper.

As we indicated earlier, the trial courts appear to have held that special relationships out of which duties arise cannot be created by the relationship between researchers and the subjects of the research. While in some rare cases that may be correct, it is not correct when researchers recruit people, especially children whose consent is furnished indirectly, to participate in nontherapeutic procedures that are potentially hazardous, dangerous, or deleterious to their health. As opposed to compilation of already extant statistics for purposes of studying human health matters, the creation of study conditions or protocols or participation in the recruitment of otherwise healthy subjects to interact with already existing, or potentially existing, hazardous conditions, or both, for the purpose of creating statistics from which scientific hypotheses can be supported, would normally warrant or create such special relationships as a matter of law.

It is of little moment that an entity is an institutional volunteer in a community. If otherwise, the legitimacy of the claim to noble purpose would always depend upon the particular institution and the particular community it is serving in a given case. As we have indicated, history is replete with claims of noble purpose for institutions and institutional volunteers in a wide variety of communities. Institutional volunteers may intend to do good or, as history has proven, even to do evil and may do evil or good depending on the institution and the community they serve. Whether an institutional volunteer[36] in a particular community should be granted

[36] Moreover, it is not clear that KKI was a mere volunteer in any event. It received funding for developing and conducting the research. Whether it recognized a profit is unknown from the record. The "for profit" nature of some research may well increase the duties of researchers to insure the safety of research subjects, and may well increase researchers' or an institution's susceptibility for damages in respect to any injuries incurred by research subjects.

exceptions from the application of law is a matter that should be scrutinized closely by an appropriate public policy maker. Generally, but not always, the legislative branch is appropriately the best first forum to consider exceptions to the tort laws of this State – even then it should consider all ramifications of the policy – especially considering the general vulnerability of subjects of such studies – in this case, small children. In the absence of the exercise of legislative policymaking, we hold that special relationships, out of which duties arise, the breach of which can constitute negligence, can result from the relationships between researcher and research subjects.

D. The Federal Regulations

A duty may be prescribed by a statute, or a special relationship creating duties may arise from the requirement for compliance with statutory provisions. Although there is no duty of which we are aware prescribed by the Maryland Code in respect to scientific research of the nature here present, federal regulations have been enacted that impose standards of care that attach to federally funded or sponsored research projects that use human subjects. See 45 C.F.R. Part 46 (2000). 45 C.F.R. Part 46, Subpart A, is entitled "Basic HHS[37] Policy for Protection of Human Research Subjects" and Subpart D of the regulation is entitled "Additional Protections for Children Involved as Subjects in Research." 45 C.F.R. Section 46.101(a) (2000) provides:

> Sec. 46.101(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency *which takes appropriate administrative action to make the policy applicable to such research.* This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States. [Emphasis added.]

As we discussed, *supra*, this study was funded, and co-sponsored, by the EPA and presumably was therefore subject to these federal conditions. These conditions, if appropriate administrative action has been taken, require fully informed consent in any research using human

[37] HHS refers to the Department of Health and Human Services.

subjects conducted, supported, or otherwise subject to any level of control or funding by any federal department or agency. 45 C.F.R. section 46.116 provides in relevant part:

> Sec. 46.116
> General requirements for informed consent.
> Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the *legally effective* informed consent of the subject or the subject's legally authorized representative. *An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence.* The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.
>
> * * * *

Subpart D of the regulation concerns children involved as subjects in research. 45 C.F.R. Section 46.407 therefore additionally provides:

> Sec. 46.407. Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of children. HHS will conduct or fund research that the IRB does not believe meets the requirements of Sec. 46.404, Sec. 46.405, or Sec. 46.406 only if:
>
> > (a) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; *and*
> >
> > (b) *The Secretary, after consultation with a panel of experts in pertinent disciplines (for example: science, medicine, education,*

ethics, law) and following opportunity for public review and comment, has determined either:
(1) That the research in fact satisfies the conditions of Sec. 46.404, Sec. 46.405, or Sec. 46.406, as applicable, or
(2) The following:
(i) The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children;
(ii) *The research will be conducted in accordance with sound ethical principles;*
(iii) Adequate provisions are made for soliciting the assent of children and the permission of their parents or guardians, as set forth in Sec. 46.408." [Emphasis added.]

These federal regulations, especially the requirement for adherence to sound ethical principles, strike right at the heart of KKI's defense of the granting of the Motions for Summary Judgment. *Fully informed* consent is lacking in these cases. The research did not comply with the regulations. There clearly was more than a minimal risk involved. Under the regulations, children should not have been used for the purpose of measuring how much lead they would accumulate in their blood while living in partially abated houses to which they were recruited initially or encouraged to remain, because of the study.

* * * *

Clearly, KKI, as a research institution, is required to obtain a human participant's fully informed consent, using sound ethical principles. It is clear from the wording of the applicable federal regulations that this requirement of informed consent continues during the duration of the research study and applies to new or changing risks. In this case, a special relationship out of which duties might arise might be created by reason of the federally imposed regulations. The question becomes whether this duty of informed consent created by federal regulation, as a matter of state law, translates into a duty of care arising out of the unique relationship that is researcher-subject, as opposed to doctor-patient. We answer that question in the affirmative. In this State, it may, depending on the facts, create such a duty.

Additionally, the Nuremberg Code, intended to be applied internationally, and never expressly rejected in this country, inherently and implicitly, speaks strongly to the existence of special relationships imposing ethical duties on researchers who conduct nontherapeutic

experiments on human subjects. The Nuremberg Code specifically requires researches to make known to human subjects of research "all inconveniences and hazards reasonably to be expected, and the effects upon his health or person which may *possibly* come from his participation in the experiment." (Emphasis added.) The breach of obligations imposed on researchers by the Nuremberg Code, might well support actions sounding in negligence in cases such as those at issue here. We reiterate as well that, given the facts and circumstances of both of these cases, there were, at the very least, genuine disputes of material facts concerning the relationship and duties of the parties, and compliance with the regulations.

V. The Ethical Appropriateness of the Research

The World Medical Association in its Declaration of Helsinki included a code of ethics for investigative researchers and was an attempt by the medical community to establish its own set of rules for conducting research on human subjects. The Declaration states in relevant part:

> "III. Non-therapeutic biomedical research involving human subjects
> (Non-clinical biomedical research)
> 1. *In the purely scientific application of medical research carried out on a human being, it is the duty of the physician to remain the protector of the life and health of that person on whom biomedical research is being carried out.*
>
> 2. The subjects should be volunteers – either healthy persons or patients for whom the experimental design is not related to the patient's illness.
>
> 3. The investigator or the investigating team should *discontinue the research if in his/her or their judgment it may, if continued, be harmful to the individual.*
>
> 4. *In research on man, the interest of science and society should never take precedence over considerations related to the well being of the subject.*"
> [Emphasis added.]

Adopted in Declaration of Helsinki, World Medical Assembly (WMA) 18th Assembly (June 1964), amended by 29th WMA Tokyo, Japan (October, 1975), 35th WMA Venice, Italy (October 1983), and the 41st WMA Hong Kong (September 1989).

The determination of whether a duty exists under Maryland law is the ultimate function of various policy considerations as adopted by either the Legislature, or, if it has not spoken, as it has not in respect to this situation, by Maryland courts. In our view, otherwise healthy children should not be the subjects of nontherapeutic experimentation or research that has the potential to

be harmful to the child. It is, first and foremost, the responsibility of the researcher and the research entity to see to the harmlessness of such nontherapeutic research. Consent of parents can never relieve the researcher of this duty. We do not feel that it serves proper public policy concerns to permit children to be placed in situations of potential harm, during nontherapeutic procedures, even if parents, or other surrogates, consent. Under these types of circumstances, even where consent is given, *albeit* inappropriately, policy considerations suggest that there remains a special relationship between researchers and participants to the research study, which imposes a duty of care. This is entirely consistent with the principles found in the Nuremberg Code.

Researchers cannot ever be permitted to completely immunize themselves by reliance on consents, especially when the information furnished to the subject, or the party consenting, is incomplete in a material respect. A researcher's duty is not created by, or extinguished by, the consent of a research subject or by IRB approval. The duty to a vulnerable research subject is independent of consent, although the obtaining of consent is one of the duties a researcher must perform. All of this is especially so when the subjects of research are children. Such legal duties, and legal protections, might additionally be warranted because of the likely conflict of interest between the goal of the research experimenter and the health of the human subject, especially, but not exclusively, when such research is commercialized. There is always a potential substantial conflict of interest on the part of researchers as between them and the human subjects used in their research. If participants in the study withdraw from the research study prior to its completion, then the results of the study could be rendered meaningless. There is thus an inherent reason for not conveying information to subjects as it arises, that might cause the subjects to leave the research project. That conflict dictates a stronger reason for full and continuous disclosure.

In research, the study participants' "well-being is subordinated to the dictates of a research protocol designed to advance knowledge for the sake of future patients." Jay Katz, *Human Experimentation and Human Rights*, 38 St. Louis U. L.J. 7, 8 (1993). In a recent report, the National Bioethics Advisory Commission recognized that this conflict between pursuit of scientific knowledge and the well being of research participants requires some oversight of scientific investigators:

> "However noble the investigator's intentions, when research involves human participants, the uncertainties inherent in any research study raise the prospect of unanticipated harm. In designing a research study an investigator must focus on finding or creating situations in which one can test important scientific hypotheses. *At the same time, no matter how important the research*

> *questions, it is not ethical to use human participants without appropriate protections.* Thus, there can be a conflict between the need to test hypotheses and the requirement to respect and protect individuals who participate in research. This conflict and the resulting tension that can arise within the research enterprise suggest a need for guidance and oversight."

National Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants*, 2-3 (Dec. 19, 2000) (emphasis added).

When human subjects are used in scientific research, the rights of the human subjects are afforded the protection of the courts when such subjects seek redress for any wrongs committed. A special relationship giving rise to duties, the breach of which might constitute negligence, might also arise because, generally, the investigators are in a better position to anticipate, discover, and understand the potential risks to the health of their subjects. Practical inequalities exist between researchers, who have superior knowledge, and participants "who are often poorly placed to protect themselves from risk." *Id.* at 3. "[G]iven the gap in knowledge between investigators and participants and the inherent conflict of interest faced by investigators, participants cannot and should not be solely responsible for their own protection." *Id.* at 3-4.

* * * *

VI. Parental Consent for Children to Be Subjects of Potentially Hazardous Nontherapeutic Research

The issue of whether a parent can consent to the participation of her or his child in a nontherapeutic health-related study that is known to be potentially hazardous to the health of the child raises serious questions with profound moral and ethical implications. What right does a parent have to knowingly expose a child not in need of therapy to health risks or otherwise knowingly place a child in danger, even if it can be argued it is for the greater good? The issue in these specific contested cases does not relate primarily to the authority of the parent, but to the procedures of KKI and similar entities that may be involved in such health-related studies. The issue of the parents' right to consent on behalf of the children has not been fully presented in either of these cases, but should be of concern not only to lawyers and judges, but to moralists, ethicists, and others. The consenting parents in the contested cases at bar were not the subjects of the experiment; the children were. Additionally, this practice presents the potential problems of children initiating actions in their own names upon reaching majority, if indeed, they have

been damaged as a result of being used as guinea pigs in nontherapeutic scientific research. Children, it should be noted, are not in our society the equivalent of rats, hamsters, monkeys, and the like. Because of the overriding importance of this matter and this Court's interest in the welfare of children – we shall address the issue.

Most of the relatively few cases in the area of the ethics of protocols of various research projects involving children have merely assumed that a parent can give informed consent for the participation of their children in nontherapeutic research. The single case in which the issue has been addressed, and resolved, a case with which we agree, will be discussed further, *infra.*

* * * *

When it comes to children involved in nontherapeutic research, with the potential for health risks to the subject children in Maryland, we will not defer to science to be the sole determinant of the ethicality or legality of such experiments. The reason, in our view, is apparent from the research protocols at issue in the case at bar. Moreover, in nontherapeutic research using children, we hold that the consent of a parent alone cannot make appropriate that which is innately inappropriate.

In *T.D. v. New York State Office of Mental Health,* 165 Misc.2d 62, 626 N.Y.S.2d 1015 (1995), that court was presented with a dispute as between which state agency had control over the approval of experiments using persons generally incapable of giving consent. Most were mental patients and included both adult and minor subjects. The trial court agreed with the representatives of the subjects, granting a partial summary judgement to that effect. In its opinion, it stated:

* * * *

> What is most objected to are the provisions for substituted . . . decision makers. Courts tread cautiously when third parties are relied on to make decisions for an incapable patient. When the proposed medical course does not involve an emergency and is not for the purpose of bettering the patient's condition, or ending suffering, it may be doubtful if a surrogate decision maker – -a guardian, a committee, a health-care proxy holder, a relative, *or even a parent* could properly give consent to permitting a ward to be used in experimental research with no prospect of direct therapeutic benefit to the patient himself . . . . *Id.* at 65-71, 626 N.Y.S.2d at 1017-21 (citations omitted) (some emphasis added).

The intermediate appellate court of New York affirmed and modified the trial court's declaration, finding additional sections of the statute at issue inappropriate. In respect to the reasonableness of accepting parental consent for minors to participate in potentially harmful, nontherapeutic research, that court stated: "We also find unacceptable the provisions that allow for consent to be obtained on behalf of minors for participation in greater than minimal risk nontherapeutic research from the minor's parent or legal guardian, or, where no parent or guardian is available, from an adult family member involved in making treatment decisions for the child . . . . We are not dealing here with parental choice among reasonable treatment alternatives, but with a decision to subject the child to nontherapeutic treatments and procedures that may cause harmful permanent or fatal side effects. It follows therefore that a parent or guardian, . . . may not consent to have a child submit to painful and/or potentially life-threatening research procedures that hold no prospect of benefit for the child . . . . We do not limit a parent or legal guardian's right to consent to a child's participation in therapeutic research that represents a valid alternative and may be the functional equivalent of treatment." *T.D. v. New York State Office of Mental Health*, 228 A.D.2d 95, 123-24, 650 N.Y.S.2d 173, 191-92 (1996).

We concur with that assessment.

* * * *

Based on the record before us, no degree of parental consent, and no degree of furnished information to the parents could make the experiment at issue here, ethically or legally permissible. It was wrong in the first instance.

VII. Conclusion

We hold that in Maryland a parent, appropriate relative, or other applicable surrogate, cannot consent to the participation of a child or other person under legal disability in nontherapeutic research or studies in which there is any risk of injury or damage to the health of the subject.

We hold that informed consent agreements in nontherapeutic research projects, under certain circumstances can constitute contracts; and that, under certain circumstances, such research agreements can, as a matter of law, constitute "special relationships" giving rise to duties, out of the breach of which negligence actions may arise. We also hold that, normally, such special relationships are created between researchers and the human subjects used by the researchers. Additionally, we hold that governmental regulations can create duties on the part of

researchers towards human subjects out of which "special relationships" can arise. Likewise, such duties and relationships are consistent with the provisions of the Nuremberg Code.

The determination as to whether a "special relationship" actually exists is to be done on a case by case basis. *See Williams*, 359 Md. at 150, 753 A.2d at 68. The determination as to whether a special relationship exists, if properly pled, lies with the trier of fact. We hold that there was ample evidence in the cases at bar to support a fact finder's determination of the existence of duties arising out of contract, or out of a special relationship, or out of regulations and codes, or out of all of them, in each of the cases.

We hold that on the present record, the Circuit Courts erred in their assessment of the law and of the facts as pled in granting KKI's motions for summary judgment in both cases before this Court. Accordingly, we vacate the rulings of the Circuit Court for Baltimore City and remand these cases to that court for further proceedings consistent with this opinion.

RAKER, Judge, concurring in result only:

These appeals present the narrow question of whether the Circuit Courts erred in granting summary judgments to appellee, the Kennedy Krieger Institute, a research entity, on the ground that, as a matter of law, it owed no duty to warn appellants, Ericka Grimes and Myron Higgins, et al., human subjects participating in its research study. I concur in the judgment of the Court only and join in the Court's judgment that the Circuit Courts erred in granting summary judgments to appellee. These cases should be remanded for further proceedings.

I concur in the Court's judgment because I find that appellants have alleged sufficient facts to establish that there existed a special relationship between the parties in these cases, which created a duty of care that, if breached, gives rise to an action in negligence. *See Ashburn v. Anne Arundel County*, 306 Md. 617, 630-31, 510 A.2d 1078, 1083 (1986). I would hold that a special relationship giving rise to a duty of care, the breach of which would be the basis for an action in negligence, existed in these cases and would remand the cases at bar to the Circuit Courts for further proceedings. I agree with the majority that this duty includes the protection of research subjects from unreasonable harm and requires the researcher to inform research subjects completely and promptly of potential hazards resulting from participation in the study. As a result of the existence of this tort duty, I find it unnecessary to reach the thorny question, not even raised by any of the parties, of whether the informed consent agreements in these cases constitute legally binding contracts . . . .

* * * *

[T]the majority appears to have decided the issue of whether such duty of care was, in fact, breached as a matter of law, without a hearing or a trial on the merits. I cannot join in the majority's sweeping factual determinations that the risks associated with exposing children to lead-based paint were foreseeable and well known to appellees and that appellees contemplated lead contamination in participants' blood; that the children's health was put at risk; that there was no complete and clear explanation in the consent agreements that the research to be conducted was designed to measure the success of the abatement procedures by measuring the extent to which the children's blood was being contaminated and that a certain level of lead accumulation was anticipated; that the parental consent was ineffective; that the consent form was insufficient because it lacked certain specific warnings; that the consent agreements did not provide that appellees would provide repairs in the event of lead dust contamination subsequent to the original abatement measures; that the Institutional Review Board involved in these cases abdicated its responsibility to protect the safety of the research subjects by misconstruing the difference between therapeutic and nontherapeutic research and aiding researchers in circumventing federal regulations; that Institutional Review Boards are not sufficiently objective to regulate the ethics of experimental research; that it is never in the best interest of any child to be placed in a nontherapeutic research study that might be hazardous to the child's health; that there was no therapeutic value in the research for the child subjects involved; that the research did not comply with applicable regulations; or that there was more than a minimal risk involved in this study. I do not here condone the conduct of appellee, and it may well be that the majority's conclusions are warranted by the facts of these cases, but the record before us is limited. Indeed, the majority recognizes that the record is "sparse." The critical point is that these are questions for the jury on remand and are not properly before this Court at this time.

I emphasize that we are deciding the propriety of granting summary judgment . . . .

I cannot join the majority in holding that, in Maryland, a parent or guardian cannot consent to the participation of a minor child in a nontherapeutic research study in which there is *any* risk of injury or damage to the health of the child without prior judicial approval and oversight. Nor can I join in the majority's holding that the research conducted in these cases was *per se* inappropriate, unethical, and illegal. Such sweeping holdings are far beyond the question presented in these appeals, and their resolution by the Court, at this time, is inappropriate. I also do not join in what I perceive as the majority's wholesale adoption of the Nuremberg Code into Maryland state tort law . . . .

Accordingly, I join the majority only in the judgment to reverse the Circuit Courts' granting of summary judgments to appellees.

ON MOTION FOR RECONSIDERATION

PER CURIAM.

The Court has considered the motion for reconsideration and the submissions by the various amici curiae. The motion is denied, with this explanation. Some of the issues raised in this case, in the briefs and at oral argument, were important ones of first impression in this State, and the Court therefore attempted to address those issues in a full and exhaustive manner. The case reached us in the context of summary judgments entered by the Circuit Court, which entailed rulings that the evidence presented by the plaintiffs, for purposes of the motions, even when taken in a light most favorable to them, was insufficient as a matter of law to establish the prospect of liability. We disagreed with that determination. Although we discussed the various issues and arguments in considerable detail, the only conclusion that we reached as a matter of law was that, on the record currently before us, summary judgment was improperly granted – that sufficient evidence was presented in both cases which, if taken in a light most favorable to the plaintiffs and believed by a jury, would suffice to justify verdicts in favor of the plaintiffs. Thus, the cases were remanded for further proceedings in the Circuit Court. Every issue bearing on liability or damages remains open for further factual development, and any relevant evidence not otherwise precluded under our rules of evidence is admissible.

Much of the argument in support of and in opposition to the motion for reconsideration centered on the question of what limitations should govern a parent's authority to provide informed consent for the participation of his or her minor child in a medical study. In the Opinion, we said at one point that a parent "cannot consent to the participation of a child . . . in nontherapeutic research or studies in which there is any risk of injury or damage to the health of the subject." As we think is clear from Section VI of the Opinion, by "any risk," we meant any articulable risk beyond the minimal kind of risk that is inherent in any endeavor. The context of the statement was a non-therapeutic study that promises no medical benefit to the child whatever, so that any balance between risk and benefit is necessarily negative. As we indicated, the determination of whether the study in question offered some benefit, and therefore could be regarded as therapeutic in nature, or involved more than that minimal risk is open for further factual development on remand.

RAKER, Judge, dissenting [from denial of motion for reconsideration].

I respectfully dissent from the order denying the motions for reconsideration. I adhere to the views previously expressed in my concurring opinion filed herein on August 16, 2001. The majority's discussion of the ability of a parent or guardian to consent to the participation of a minor child in a nontherapeutic research study and the discussion regarding the ethics of the research conducted in these cases involve serious public policy considerations. The statements

are a declaration of public policy that, in the posture of this case, are best left to the General Assembly. *See Gaver v. Harrant,* 316 Md. 17, 28-29, 557 A.2d 210, 217 (1989); *Harrison v. Mont. Co. Bd. of Educ.*, 295 Md. 442, 460, 456 A.2d 894, 903 (1983). Inasmuch as these issues were never raised by the pleadings or the parties below, this Court had no basis to address these very complex issues; if a change is to be made in the State's policy of regulating research studies, unless clearly presented to the court, it should be made by legislative enactment. *See Md. Nat'l Bk. v. United Jewish App.*, 286 Md. 274, 407 A.2d 1130 (1979). This matter merits the close scrutiny of the General Assembly. *See Cotham and Maldonado v. Board,* 260 Md. 556, 273 A.2d 115 (1971).

Notes and Questions

1. At the threshold, it is important to identify the various organizations that are involved in the research project and their roles, and then to understand the overall structural organization of the research project. What is the role of Johns Hopkins University? Of the Johns Hopkins Institutional Review Board? Of the Kennedy Krieger Institute (KKI)? Of the federal Environmental Protection Agency? Of the Maryland Department of Housing and Community Development? Of City Homes and the Enterprise Foundation? For a general discussion of research agreements, see the Text Section 12.2.2.

2. Early in its opinion, the court makes a distinction between "therapeutic" and "nontherapeutic" human subject research. How would you describe this distinction? Why is it an important distinction to make in applying the law? Is it also an important ethical distinction?

3. The plaintiffs' claims in the *Grimes* and *Higgins* cases are apparently based in part on tort law, specifically negligence, and in part on contract law. Negligence law – and the concept of "duty" that is critical to the court's analysis – are discussed generally in the text Sections 3.2.2 and 4.4.2.2

4. What are the issues concernin*g parents' consent* to their child's participation in the research project? How does the court resolve these issues? Do you agree?

5. The court discusses federal agency regulations on human subject research, the Nuremberg Code, and ethi*cal* statemen*ts about medical* experimentation. Of what, if any, relevance are these sources to the negligence law and con*trac*t law analysis? If you were the director of the office of research for a large research university, would you seek guidance from these sources? If so, should it follow that a court should do likewise?

6. Are there any conflicts of interest that may be created by the research project? If so, how might that affect the legal analysis? What policy issues might arise?

7. Suppose KKI had in fact "joined with commercial interests . . . for the purposes of profit," as the court speculates. What effect, if any, would (or should) such commercial arrangements have upon the legal analysis of the *Grimes* and *Higgins* cases? What policy issues would such commercial arrangements present?

8. In a later court case involving the same KKI research study, *Partlow v. Kennedy Krieger Institute, Inc.*, 191 A.3d 425 (Md. 2018), the Maryland Court of Appeals held that a special relationship also existed between KKI and the sibling of a participant in the study who lived in the same residence as the study participant (see Text, p. 903).

PART II

LARGE-SCALE PROBLEM-SOLVING EXERCISES

Introductory Note

This section of *CPM* contains large-scale problems, each covering interrelated sets of issues and each probing professional roles and problem-solving skills as well as substantive law. As the *Preface* suggests, there are various ways in which the instructor or workshop leader may choose to use these problems. Immediately below are a set of "problem-solving directions" and a set of "problem review questions." One or the other of these (or perhaps both) should be suitable for most uses that instructors may make of these problems. (These directions and questions do not fit particularly well with Problem G, however, so separate directions and questions are contained in the problem itself.) These directions and questions make the problems adaptable to groups composed exclusively of education students or educators and groups composed exclusively of law students or lawyers, as well as to mixed groups. They should also be transferable to other problems that instructors or participants may devise themselves.

The General Introduction to the Study of Higher Education Law in the Text contains useful background and suggestions for approaching large-scale problems such as those below.

Problem-Solving Directions

It usually will be helpful for students or workshop participants to work through these problems in role. Education students or educators can fill policy-maker and other non-legal roles; law students or lawyers can fill legal roles. For instance, if a provost or other college official is involved in the problem, education students or educators may work through the problem in that role. Law students or lawyers may work through the problem as if they were counsel to the college involved, or as if they were counsel to the person(s) who may have legal claims to assert against the college.

For each problem, assume that the institution has regular legal counsel whom administrators may consult directly. Counsel does not routinely review every action of the institution, however, nor are administrators expected to routinely consult counsel before making any decision. Since legal counsel's time is a limited resource, the practice is to consult counsel only in selected instances as the administrator's judgment dictates.

For education students or educators playing administrator roles, these questions should fit all problems (except Problem G) in this Part:

A. What concerns would you have about the law's potential effect on your ability to deal effectively with the problem presented to you?

B. Would you consult legal counsel? Why or why not?

C. What further steps, if any, would you need to take before consulting counsel or deciding whether or not to do so?

D. If you would consult counsel, what specific questions would you ask and what specific advice or service would you request?

For law students or lawyers filling roles of legal counsel for the institution, these questions should fit all problems (except Problem G) in this Part:

A. Would you advise the administrator(s) that there are substantial legal aspects to the problem, and, therefore, you should be involved in the solution to the problem?

B. What specific questions would you ask the administrator, and what further information would you need?

C. What would you advise the administrator regarding how the law constrains his/her decision making on this matter? In light of these legal constraints, what steps would you recommend that the administrator take?

D. What preventive law measures would you suggest to prevent this type of problem from arising again or to make its resolution easier if this type of problem does arise again?

For law students or lawyers representing the person(s) who has been or will be adversely affected by the institution's action, these questions should fit all problems (except Problem G) in this Part:

A. Would you advise your client(s) that he/she has a viable legal claim to assert against the institution?

B. What further information would you need in order to evaluate this claim fully?

C. How would you proceed to raise and press your client's claim? What forum(s) for dispute resolution would you suggest to your client?

Problem Review Questions

Whether or not one uses role playing as suggested above, the following questions should provide a useful guide for the class' or workshop's review, or individual participants' independent review, of the problems in this Part.

1. What are the legal issues presented by this problem? In what order should these issues be addressed? Which issues are most critical to the resolution of the problem, and why?

2. What are the policy issues (*i.e.*, issues of educational policy, administrative policy, or public policy) presented by this problem? In what ways are these policy issues interrelated with the legal issues?

3. What are the professional responsibility or ethical issues presented by this problem -- for legal counsel? for administrators and educators?

4. Will full resolution of this problem require that the institution involved proceed in a treatment law mode? A preventive law mode? Both? (See the Text Section 2.1.7.) What are the forums for dispute resolution to which the parties in this problem may resort? (See the Text Section 1.1, Section 2.2.1, and Section 2.2.3.) What should be the forum of first resort? What would be the preferred forum for each of the parties?

5. How might the legal, policy, or professional responsibility issues in this problem have differed had the institution involved been public [or private] rather than private [or public]? (See generally the Text Section 1.5.) If a private institution, how might these issues have differed had the institution involved been religiously affiliated [or secular] rather than secular [or religiously affiliated]? (See generally the Text Section 1.6.) Would the forums for dispute resolution have differed depending on whether the institution involved is public, private secular, or private religious?

6. How might the issues, or the forums for dispute resolution, have differed in this problem had it involved a secondary school rather than an institution of higher education?

PROBLEM-SOLVING EXERCISE A

(The Student Suicide Problem)*

Monday, 4:15 p.m.

In mid-November a counseling center therapist, Dr. Chin, receives a call from a faculty advisor who is also an assistant academic dean in one of the colleges. The advisor, Professor I.M. Caring, expresses concern about a student advisee from whom he has received several emails and phone calls over the weekend. The student, Ms. Axis Tu, is a 21-year-old international student who is attending the university on a government scholarship from her home country. Professor Caring describes Ms. Tu's email communications as agitated, reporting appetite and sleep difficulties, and expressing self-destructive thoughts. She reports a history of suicidal ideation but no past attempts. Her agitation appears to be centered on decisions related to staying in the U.S. for graduate school or returning to her home country.

Monday, 5:00 p.m.

After speaking with the counseling center therapist, Professor Caring calls Ms. Tu. He tells her that he has consulted with the counseling center and asks her to call Dr. Chin. Ms. Tu contacts Dr. Chin who speaks with her directly. The student is agitated and describes feeling increasingly so until she wants to "explode." She describes decreased appetite, troubles sleeping, and over use of caffeine. She reports that academic pressures and worries about the future contribute to her agitation. She describes a long distance relationship crisis related to her decision about whether to remain in the U.S. or go home. She reports a history of suicidal ideation. She denies a history of suicidal attempts or current intent. She denies using alcohol. She reports isolation with the single exception of her advisor, Professor Caring, but she reports anger about his contact with the counseling center and feels that he has betrayed her trust. Her speech is loud and fast but Dr. Chin enlists her agreement in decreasing her caffeine intake for the rest of the night and to come to the counseling center in the morning for a walk-in appointment. The student is adamant about confidentiality.

Tuesday, 11:00 a.m.

Ms. Tu walks into the center as promised the next morning. She sees the on-call therapist, Dr. Potter. In addition to the information already known, Ms. Tu tells Dr. Potter that she has stomach ulcers. She is a straight "A" student with a double major in extremely

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* Prepared by Kathy R. Hollingsworth, Director, Counseling and Psychological Services, Duke University, and Ann Franke, President, WiseResults, Inc., and reprinted, in somewhat adapted form, with their permission.

demanding disciplines. She believes she is in current academic risk of losing her scholarship due to the GPA requirement because she fears she will not be able to take exams at the end of the month. She is fearful about the reaction of her parents and the government if they find out about her distress. She remains enraged with her advisor for contacting our center. She denies being suicidal. Dr. Potter calms her and assures her that we will work out a treatment plan with her within two days that will help with the situation.

Wednesday, 8:30 a.m.

Ms. Tu re-contacts Dr. Chin with whom she first conversed by phone. She is highly agitated and tearful. She continues to experience herself in crisis. Academic pressures are mounting. She can't identify triggers for her panic. She tells the therapist she is superficially cutting herself, and has scratched and cut herself in the past. She reports a history of panic attacks. She responds well to structure offered by Dr. Chin who helps her plan her day and self-care.

Wednesday, 11:00 a.m.

The Associate Director of the counseling center receives a phone call from Professor Caring who is very concerned about emails and phone calls he continues to receive from Ms. Tu, and asks what he should do. The Associate Director coaches him in how to maintain appropriate boundaries with Ms. Tu in a supportive way, and to continue re-directing her to the counseling center. Professor Caring admits that he has given Ms. Tu his home phone number, and that now he receives calls at home, as well as emails.

Thursday, 8:30 a.m., 2:00 p.m., 5:00 p.m., 8:00 p.m., 10:00 p.m.

Dr. Chin maintains contact throughout the day and evening on Thursday with Ms. Tu, providing reassurance and structure. Ms. Tu knows she will most likely be referred to an intensive day treatment program nearby. Internal staffing at the center provides a plan for referral to a partial hospital program where Ms. Tu can receive daily therapeutic support, including a structured group treatment designed to increase her daily coping skills. If she responds to treatment, she will remain in school. The center will assist her in these referrals and remain her consultant.

Friday, 3:30 p.m.

Dr. Potter, her intake therapist, meets with Ms. Tu to recommend a plan for immediate therapy. The recommendations should not be a surprise to Ms. Tu, as they have been reviewed by Dr. Chin with her on several occasions. The recommendations include a transfer to the partial

hospital program for daily intensive treatment and outpatient psychiatry. Arrangements have been made for immediate referral. It is an excellent plan, but Ms. Tu refuses. She becomes enraged with the recommendations and walks out. It is Friday afternoon. Four days have passed since Ms. Tu's original contact with the center. She has been seen twice and has had several phone contacts. The center also has had several contacts with Professor Caring.

Friday, 5:00 p.m.

Professor Caring calls the clinical coordinator. Ms. Tu called him when she left the center. She tells him that the counseling center will not help her and that she feels increasingly desperate. She tells him that she has been looking at trees and thinking of hanging herself, and she is cutting herself.

Friday, 6:00 p.m.

Dr. Chin contacts Ms. Tu, who denies suicidal intent or plan. She responds to calming. Ms. Tu and Dr. Chin develop a weekend plan including plans for telephone contact. Dr. Chin also arranges for the center psychiatrist to meet with Ms. Tu on Saturday for an assessment. The center hopes that the psychiatrist can find reasons to persuade Ms. Tu to enter the hospital, or find reasons to commit her.

Saturday, 9:00 a.m.

Dr. Chin contacts Ms. Tu, who describes a restless night. Ms. Tu sees no way out of her current desperate situation. She cannot study and believes she will lose her scholarship. She sees no reason to live, but denies immediate plans to harm herself.

Saturday and Sunday

Ms. Tu continues to email the advisor. Professor Caring contacts the clinical coordinator at home three times over the weekend. Ms. Tu cannot decide whether to take the sedative. It sits on her shelf. Ms. Tu contacts Dr. Chin as planned in the afternoon and evening of each day. With Professor Caring, Ms. Tu speaks of self-destructive thoughts and plans. With Dr. Chin, she reconstitutes and denies suicidal intent and plan. Her actual behavior in the residence hall continues to be non-problematic.

Monday, Tuesday: Thanksgiving Break approaches

The situation described above continues. Professor Caring is increasingly distraught. By now Ms. Tu calls Dr. Chin so often that Dr. Chin becomes frustrated and angry. Ms. Tu continues to deny suicidality to one person but imply it to another. Ten days have passed.

Students will leave campus on Wednesday afternoon. Ms. Tu has no Thanksgiving plans. She will remain in her single room alone over the holiday. Ms. Tu continues to adamantly deny access to her parents. However, she speaks of plans to commit suicide at home over Christmas break.

Questions:

1. What institutional offices and/or systems are involved? Which should be involved in this case? How would you suggest that the systems/offices work together?

2. How would this case be different if Ms. Tu had created disruptions in her residence hall?

3. Should the university proceed with an involuntary commitment? With an involuntary withdrawal from the university? What legal claims might Ms. Tu have against the institution if it takes one of these pathways? Against Professor Caring? Against Dr. Chin?

4. After Ms. Tu stormed out of the counseling center, what should the therapist have done? Dr. Chin? Is there any other institutional agent who should be involved at this point?

5. Could any of Ms. Tu's behavior be characterized as a student code of conduct problem? Is discipline an appropriate strategy in this situation?

6. If the university were ultimately successful in hospitalizing the student, what issues then remain? If the student continues to refuse hospitalization, what issues remain?

7. Would you recommend that an institutional agent contact Ms. Tu's parents? Why or why not? Would you recommend telling Ms. Tu's parents that she plans to commit suicide at home over the Christmas vacation?

8. If the student commits suicide, what liability, if any, may the institution face?

9. How would this situation be different if this had occurred at a small college that has no counseling center?

PROBLEM-SOLVING EXERCISE B

(The Bipolar Student-Teacher Problem)

Martin Chalk is the dean of the State University School of Education. He has been advised that a senior, Joe Doe, is having difficulties with his student-teaching assignment. Doe, who plans to be an elementary school teacher, is in the middle of a 12-week student-teaching assignment at a local elementary school. However, he cannot be certified to teach in the state without completing his student-teaching assignment.

Doe's student teaching supervisor is Professor Mary Mack. Professor Mack approached Dean Chalk, stating that "Joe Doe shouldn't be near kids – he's crazy." When asked to elaborate, Professor Mack stated that Joe will not listen to her suggestions, is overly affectionate with the children in his class, has difficulty maintaining order in class, and refuses to follow the prescribed lesson plan. She said that her "professional integrity" does not permit her to continue as Joe's supervisor.

The Dean met with Joe, discussed his difficulties with Professor Mack (and noted a history of difficult relationships with other faculty in the School of Education), and suggested that Joe seek professional help to ascertain the source of his difficult relationships with faculty and his seeming inability to take direction. Joe objected, saying "Mack thinks I'm crazy, but I'm not – she's just old fashioned and is threatened by new ideas." Nevertheless, the Dean prevailed upon Joe to seek assistance from the University's counseling center. Joe reported back to the Dean that he had been diagnosed with bipolar disorder, and was told that, in addition to medication, he must be "protected" from situations in which his work will be criticized or in which he will have to be closely supervised. Joe demanded an "accommodation" that involved removing Professor Mack as his supervisor and substituting the elementary school principal (who is not on the University faculty, nor is she an adjunct professor), being provided a "curriculum consultant" at University expense to help him prepare lesson plans, and providing him with a full-time teacher's aide who will maintain class discipline. No other classes in the elementary school have teacher's aides.

Not surprisingly, the school principal refused to supervise Joe and to provide a teacher's aide. No other faculty in the School of Education were willing to supervise Joe. There are no funds to hire a curriculum consultant. The Dean needs to make a quick decision, because if Joe is to graduate on time and be certified as a teacher, he must complete his 12-week assignment on time. Joe has stated that if he is removed from the student teaching assignment, he will sue the University, the school, Professor Mack, the Dean, and anyone else he can think of.

How should the Dean respond?

PROBLEM-SOLVING EXERCISE C[*]

(The Faculty Skipping Class Problem)

Dr. Goose, President of the State University of Farmland, calls the Vice President for Academic Administration into his office and relates the following story:

> Yesterday I was at Barnyard Hall when my attention was drawn to a classroom because of the volume of noise coming from within. When I looked inside, I found the students there, but no faculty. I asked the students what class this was and was informed it was Agronomy 301, scheduled to be taught by Drs. Swine and Bovine. The students further told me that these professors came the first day of class, over seven weeks ago, and told them that all they had to do to get an "A" was to come to class everyday and sign the class roster.
>
> I then went to see Dr. Equine, the Chairperson of the Department of Agronomy, who informed me that Drs. Swine and Bovine were off consulting for Stye Incorporated. I asked him if he knew about this practice, and he stated he did. He also told me that he, too, consults for Stye Incorporated and knew that Drs. Swine and Bovine could use the extra money, just like him.

Dr. Goose tells the Vice President that he wants Dr. Equine removed as Chairperson immediately, and he further wants all three faculty members separated from the University as soon as possible. However, because Stye Incorporated is a major benefactor of the University, he wants to have all this done without any publicity, if at all possible.

The Vice President returns to her office and checks the personnel files, learning that:

1. Dr. Swine is an Assistant Professor in the third year of his first three-year contract.

2. Dr. Bovine is an Assistant Professor in the first year of his second three-year contract.

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[*] With thanks to Steven Olswang, Provost at City University of Seattle, who drafted the original problem on which this problem is based.

3. Dr. Equine is a Professor who received tenure 18 years ago. He has been Chairperson of the Department of Agronomy for seven years and is President of the Faculty Senate.

4. The University has adopted the 1940 *Statement of Academic Freedom and Tenure* of the AAUP, as well as its 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure* [see http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure and http://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure].

Upon checking further, the Vice President also learns that not all students in Agronomy 301 are happy with the cozy arrangement instituted by the professors. Some of these students are requesting a refund of tuition for the course or the entire semester, and others may claim the university has an obligation to them to re-build the entire Agronomy Department before next academic year.

The Faculty Handbook provides that untenured faculty who will not be reappointed have a one year notice period prior to nonreappointment, or one year of salary. Furthermore, the Faculty Handbook is silent on whether, or to what extent, faculty may engage in non-university related consulting activities. And Professor Equine has engaged in public criticism of the institution's president over the past three years.

1. If the president decides not to reappoint the two assistant professors, what process should be followed?

2. What discipline, if any, should the president levy on Dr. Equine?

3. How should the Vice President deal with the student complaints?

4. How should the President deal with Stye, Incorporated?

PROBLEM-SOLVING EXERCISE D

(The Students with Mental Disorders Problem)

State University, a public institution, has a large and diverse student body of 9,000 undergraduates and 4,000 graduate students. To maintain behavioral standards on the campus, State U. has a written disciplinary code called the *Code of Student Conduct*. It also has a Mental Health Policy that applies to students who have, or whom administrators suspect of having, mental health problems that manifest themselves on campus.

The Mental Health Policy states as follows:

> I. The University considers the maintenance of good mental health to be a critical aspect of the educational experience. To assist students in this regard, the University maintains a Counseling Center on campus that is staffed with mental health professionals and available to students 24 hours a day.
>
> II. The Dean of Students may refer a student to the Counseling Center for evaluation whenever the Dean believes that the student is suffering from a mental disorder that is adversely affecting his or her academic performance or behavior on campus.
>
> III. A student will be subject to involuntary administrative withdrawal from the University, or from University housing, if the Provost determines that the student suffers from a mental disorder that is adversely affecting his or her academic performance or behavior on campus in a way that is prejudicial to the institution or other members of its student body.

Not infrequently, administrators of State U. are faced with situations that may call for application of the Mental Health Policy. Usually such situations arise because another student or a faculty member, or sometimes a parent, has complained about the behavior of a particular student. The Provost is now facing two such cases, the circumstances of which are set out below. The Provost must determine what action to take in each of these cases.

1. Dennis and the False Prophets*

Dennis, a resident student, frequently sits in the middle of the residence hall in a yoga position and stares at everyone who passes. He also burns incense, chants and calls for strength to rid the world of pagan religions and false prophets, and then goes door to door telling other residents that they are false prophets. There are signs painted on bathroom doors that "[t]he end is near for false prophets." Many residents on the floor are very nervous and fearful. Most have complained to the Resident Advisor.

The Resident Hall Director spoke to Dennis, who simply stared at the Director and proclaimed, "I don't talk to those who belong to pagan religions. You are a devil and a false prophet. Your end is near." The Director informed Dennis that others in the hall were nervous, could not study or sleep, and were even afraid to use the bathroom at night. Dennis did not respond, and left the Director's office.

The day after the meeting with the Director, Dennis was observed placing a sign on another student's room door that said, "You are a false prophet and you cannot be allowed to continue your false ways. I commit my blood to put an end to your fake prophecies." There was blood smeared on the sign. The same day the Director received a blood stained hunting knife in the mail with a note that said, "You are a false prophet."

2. Gerry and the L.S.D**

Gerry is an eighteen-year-old freshman who lives in a residence hall reserved for honor students. One evening, she and her roommate ordered a pizza. When the pizza arrived, Gerry produced a large kitchen knife and proceeded to cut the pizza into smaller sections. Then, while her roommate was distracted at the other end of the table, Gerry walked behind the roommate and stabbed her, causing a serious wound requiring lengthy hospitalization. There had been no prior history of violence between the two women, who had regarded each other as close friends.

Gerry was promptly arrested and held in the county detention center for two days, until her parents paid the $10,000 bail set by a local magistrate. Her parents also obtained the services of a prominent criminal lawyer. His strategy in the case was to assert that Gerry's behavior was the result of her first time experimentation with LSD, shortly after she arrived at the college. The LSD reportedly produced a delayed hallucinatory experience, in which Gerry believed her roommate was planning to harm her by spreading poisonous mushrooms on the pizza. Gerry's lawyer expected to be successful in delaying her criminal trial for several months, and obtained a statement from a psychiatrist, who asserted that Gerry's hallucinatory experiences could be controlled with proper medication. Remarkably, the lawyer also secured the support of the victim, who wrote a forgiving testimonial in Gerry's behalf. Finally, Gerry's lawyer contacted the Dean of Students and stated that Gerry would now be returning to her residence hall room and resuming her studies. He cautioned the Dean that any administrative or disciplinary action taken against his client would be challenged on the ground that Gerry was a "disabled" person, as defined by Section 504 of the Rehabilitation Act of 1973. Furthermore, it was the lawyer's contention, given the upcoming criminal trial, that any administrative or disciplinary action would constitute a form of double jeopardy, prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

PROBLEM-SOLVING EXERCISE E

(The Homelessness Protest Problem)

On campuses across the country, college students have organized or participated in demonstrations demanding that their institutions give greater attention to the plight of the homeless in America. The public university in your state has recently been the scene of such demonstrations. In press statements and otherwise, the protesters claimed that the university is insensitive to the needs of the homeless and has failed to direct any of its human or financial resources to the social problem of homelessness.

On your campus and elsewhere in your state, the protests against homelessness have been organized by a group called Coalition Against Homelessness, comprised of students from various campuses in the state, along with community leaders and residents of the communities where the campuses are located. The organization views itself as part of a national campaign to send a message to politicians, higher education officials, and the public that homelessness has no place in our society. Typically, the homelessness protests have centered upon the erection of cardboard huts in the public areas of campuses. The declared purpose for using these cardboard huts is to impress upon school officials and the campus community the squalid living conditions and the desperation of the homeless in America. Sometimes, to enhance the impact of the protests, participants have attempted to live in, and sleep overnight in, the huts that they have erected.

Last week, coalition members erected nine huts on the main campus quadrangle at the public university. The majority of the participants were students at the university. For two nights after the huts were set up, students slept overnight in them. On the third day, however, the Vice Chancellor for Student Affairs ordered the huts torn down. Later that day they were dismantled by a university maintenance crew. (The huts had been an object of curiosity on the campus and had twice been vandalized prior to being torn down.) Coalition members vowed to set up other huts and continue the protest. According to one member, "We are here to educate people about homelessness. If that isn't the business of the university, I don't know what is."

The group's leaders scheduled a meeting with the University Chancellor and requested formal permission to erect other huts. The Chancellor denied the request, citing overriding concerns for the safety and security of members of the campus community. The Chancellor called the huts a "safety and security hazard liable to attract vandals." He authorized campus police to arrest anyone seeking to construct another protest hut on the campus or anyone interfering with the university maintenance crew's dismantling of any hut that is erected.

Yesterday afternoon the coalition sponsored another protest. Amid chants of "Down with Homelessness; Up with Huts," protest participants set up three other huts in the center of the

campus on the main quadrangle. Several persons immediately occupied each of the newly erected huts, and approximately 200 other persons gathered around the huts joining hands, chanting, and singing. After the protest had continued for about an hour, campus police arrived on the scene. At the same time several squad cars of local police from the city arrived. Working together, the campus and local police arrested three persons who were occupying the huts, as well as nine other persons who appeared to be the leaders of the protest. Using bullhorns, the police then disbanded the demonstration. Some of the remaining demonstrators marched across campus to the administration building and met with the Chancellor, who reiterated that the huts would not be allowed on campus. All the persons arrested were charged with trespass in violation of state law and with willful disturbance of school activities in violation of state law. Eight of the 12 persons arrested were students enrolled in the university. These students were also referred to the university judicial system and charged with a violation of the campus code of conduct: engaging in an unlawful demonstration on campus. Potential penalties for such a charge, if proven, include suspension or expulsion from the university.

The Chancellor must now decide how to deal with the various aspects of this problem, including whether to respond to a request from the Coalition Against Homelessness that the university negotiate with it concerning dropping the charges.

The two relevant state statutes are attached to this problem, as is the pertinent portion of the campus conduct code.

State Trespass Statute

Sec. 11-521. *Trespass*. Every entry without lawful authority onto the property of another, when committed with malicious intent, shall be a misdemeanor punishable by imprisonment not exceeding 30 days or by fine not exceeding $500.

State "Willful Disturbance" Statute

Sec. 44-106. *Disturbance of School Activities*. Every willful disturbance of the lawful activities of a public school or university, and every willful interference with the orderly use of school or university facilities, shall be a misdemeanor punishable by imprisonment not exceeding 60 days or by fine not exceeding $l,000.

Code of Campus Conduct

Distribution of leaflets, circulation of petitions, speeches, and demonstrations are permitted on the campus grounds unless they will disrupt the normal operations of the University or infringe on the rights of other persons. Solicitation of commercial sales on the campus grounds is prohibited without the express authorization of the Vice President for Business Affairs.

PROBLEM-SOLVING EXERCISE F[*]

(The Campus Hate Speech Problem)

State University is a large public institution. In recent years, the cultural diversity of the student body has increased substantially. During the same time, there have been a number of "hate speech" incidents at the university. (Hate speech is speech that demeans or denigrates particular persons or groups on the basis of race, ethnicity, gender, religion, sexual orientation, or disability.) The frequency of such incidents has been increasing. Most of these incidents have involved speech by students directed at other students. Many students have thus become concerned, especially minority students, Jewish students, and gay students. The university's student affairs administrators share these concerns, as do many university officials including the president.

State University has a Code of Conduct that regulates student behavior and subjects violators to various penalties including suspension and expulsion. Some of the hate speech incidents at the university do not seem to fit within any of the Code's prohibitions, however; and other incidents, though violative of one or more Code provisions, merited only minor penalties that seemed inadequate, given the gravity of the harm flowing from the use of hate speech.

The President of State University appointed a University Task Force on Hate Speech to review the campus hate speech problem and recommend an appropriate institutional policy. After considerable study, the Task Force submitted a final report to the President that included a proposed hate speech regulation and a recommendation that it be implemented.

The Task Force Report focused on civility and tolerance. Hate speech and hate behavior were a special concern, especially student hate speech and behavior directed against other students. Although the Task Force acknowledged that any policy encompassing verbal or written communications would raise concerns about free speech rights, it took the position that hard-core slurs and insults, and other acts of harassment or intimidation, are beneath the dignity of the First Amendment and are no part of the "free trade in ideas."

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[*] Information for this problem, and regulatory language for the hypothetical regulation, were adapted primarily from these sources: (1) *Report of the President's Ad Hoc Committee on Racial Harassment*, The University of Texas at Austin, Nov. 27, 1989 (Dean Mark Yudof, Chair); (2) "Civility Standards: Policy Against Discriminatory Harassment," an Oregon State University discussion paper, March 18, 1991 (drafted by Thomas Scheuermann); (3) Kaplin, "'Hate Speech' on the College Campus: Freedom of Speech and Equality at the Crossroads," 27 *Land and Water L. Rev.* 243 (1992) (Winston Howard Lecture, Univ. of Wyoming, April 12, 1991); (4) Smolla, "Introduction: Exercise in the Regulation of Hate Speech," 32 *Wm. & Mary L.Rev.* 207 (1991); and "Memorandum (with attachments) to Francis L. Lawrence, President," from the Free Speech Committee, Rutgers, Oct. 14, 1992. Students working on this problem should not consult any of these sources until after completing the problem, unless the instructor directs otherwise.

The Task Force recommended two changes in existing university policies. First, a new offense of "harassment" and "intimidation" should be created, the penalties for which could be enhanced if the harassment or intimidation was motivated by the race, ethnicity, gender, religion, sexual orientation, or disability of the victim. Second, existing conduct rules should be amended to provide that, if the wrongdoer's actions were motivated by the victim's race, ethnicity, gender, religion, sexual orientation, or disability, such motivation would be an aggravating circumstance that may justify a more severe punishment for the wrongdoer. These two proposed policies would be applicable, on or off the campus, when the alleged victim and the alleged wrongdoer are both members of the university community. The proposed policies also would apply to visitors or others who are not members of the university community if the violation takes place on campus and the alleged victim is a member of the university community.

The president sent the Task Force Report and proposed regulation to the university's General Counsel for review. The General Counsel noted that "potential First Amendment issues would be raised by any regulation of hate speech," but determined that "the Task Force has provided the basis for a regulation that would be defensible." After making a number of drafting changes in the committee's proposed regulation, the General Counsel approved it "conditioned on adoption of these modifications." The president submitted the Task Force report and the revised regulation to the Faculty Senate and to the Deans' Council, both of which approved the regulation. The president then directed that the regulation be implemented consistent with standard university procedures. (A copy of the new regulation is attached.)

Shortly after the new regulation went into effect, and before any disciplinary actions had been instituted under it, the state affiliate of the ACLU – representing a small group of students and faculty members – filed suit against the university and the president, claiming that the university's new regulation is invalid under the free speech and press clauses of the U.S. Constitution. Attorneys for the ACLU are now at work developing this litigation, and staff attorneys from the university general counsel's office are considering how best to defend the university's interests.

Meanwhile, university administrators have invoked the new regulation in four instances. In the first, an undergraduate student, returning from a late-night drinking party with fraternity brothers, passed by a campus dormitory and shouted racist comments that included prominent use of the word "nigger." From a dorm window, a resident asked the boisterous student to quiet down, whereupon the latter shouted back: "What are you, a faggot?" and "What are you, a Jew?" He repeated these shouts several times as dorm residents opened their windows and looked out. The student was found to have violated the new regulation and was suspended from school for a semester.

In the second incident, several white male students followed an African-American woman student across the campus at night. They taunted her, making sexually suggestive comments that prominently included the word "whore" and the statement "I've never tried a Black bitch before." The male students were expelled.

In the third incident, students blew up condoms with helium and made a balloon bouquet that they pinned to the residence hall room door of a female student. Along with the condoms was a sign reading "Jewish slut." These students were put on disciplinary probation for a semester.

In the fourth incident, a professor made statements at a meeting of a faculty academic standards committee. He asserted that minority students' academic performance suffers from the "inferior intelligence" of minorities and that this in turn is due to "genetic differences between whites and minorities." When committee members asked what support he had for these statements, he replied, "Isn't it obvious?" The professor's statements were reported in the campus newspaper; the story included the professor's response to a student reporter's request for comment: "The committee discussion was confidential and should not have been relayed to the paper – but yes, I said those things. I stand behind them. That's just the way it is." The professor was censured by a faculty committee, and a letter of reprimand was placed in his personnel file.

State University Civility Code

Section 1. State University is a place of robust intellectual discourse. A university is also, however, a unique academic community with a unique mission. Fulfillment of its mission may require that community members maintain reasonable levels of rationality and civility in their relations with other members of the community. Each member of the community is expected to be sufficiently tolerant of others that all community members can freely pursue academic and institutional goals in an open environment, can participate in intellectual discourse, and can take full advantage of educational opportunities. As a condition upon entry into this special community, the University requires its faculty, students, and staff to refrain from certain types of speech that harass or intimidate other community members. Actions that restrict the rights and opportunities of others through harassment or intimidation, even if these actions are communicative in character, are not protected and will not be condoned.

In an ideal world, a civility policy would be unnecessary. But in the real world of our campus, our community, and our state – which are rapidly becoming more diverse in terms of race, culture, and other characteristics – the University has the educational, moral, and legal

imperative to deal with issues of incivility, especially when they involve denigration or humiliation of others because of their race, ethnicity, or other group characteristics.

Section 2. It is the policy of State University to maintain an educational environment free from harassment or intimidation of either students or employees. Harassment and intimidation, as defined in Sections 3 and 4 below, are expressly prohibited. Students, faculty, and non-faculty employees are all subject to disciplinary action for violation of this prohibition. Campus visitors and other persons who are not members of the academic community will be subject to banishment from the campus for violation of the prohibition.

Section 3. "Harassment" is an action or communication, or pattern of actions and/or communications, that: (1) is intended to humiliate, demean, denigrate, vilify, or stigmatize a particular student or employee, or group of students or employees; and (2) has the effect of creating a hostile academic environment for such student(s)or employee(s).

Section 4. "Intimidation" is a threat, assault, or other action or communication that: (1) is intended to put one or more students or employees in fear of their life, their physical safety, or the security of their property, or the life, physical safety, or security of property of family members or friends; and (2) has the effect of putting the student or employee in such fear or would have the effect of putting a reasonable person in such fear.

Section 5. Persons who violate Section 2 of this regulation will be subject to the full range of disciplinary sanctions permissible under University disciplinary policies, which for students shall include dismissal or expulsion from the University.

Section 6. If a violation of Section 2 is committed because of the race, national or ethnic origin, gender, religion, sexual orientation, or disability of a student or employee against whom the action or communication is directed, such a discriminatory motivation shall be treated as an aggravating factor for the purpose of determining the appropriate penalty to be imposed on the violator, and shall provide a basis for enhancing the penalty beyond what it would have been absent such motivation.

Section 7. If a person violates any other applicable university misconduct rule, and the violation is committed because of the race, national or ethnic origin, gender, religion, sexual orientation, or disability of a student or employee against whom the action or communication is directed, such a discriminatory motivation shall be treated as an aggravating factor for the purpose of determining the appropriate penalty to be imposed on the violator and shall provide a basis for enhancing the penalty that otherwise would have attached to violation of that misconduct rule.

PROBLEM-SOLVING EXERCISE G

(The Sexual Harassment Problem)

The Education and Welfare Committee of the state senate in a populous state is considering the problem of sexual harassment on college campuses. The state has a large-scale public university system with nine campuses, as well as 13 regional community colleges. There also are numerous private higher education institutions within the state's boundaries; many are four-year liberal arts colleges; some are large graduate institutions; and a few are specialty schools such as a school of art and design.

Various women's groups and civil rights groups urged the Committee to investigate problems concerning the sexual harassment of female students by male faculty members. Several state senators in districts with large college student populations also called for an investigation, and the state's Commissioner of Education advised the committee that she would support such an investigation.

After preliminary committee staff investigations revealed that sexual harassment is a real problem on numerous public and private campuses in the state, the Committee chair scheduled public hearings on the matter. The first group of witnesses was students or former students from institutions in the state who testified to their own experiences regarding sexual harassment on campus. The testimony of the following five students, as summarized in an interim staff report, is representative of the overall testimony of this group:

> Student A testified that she had been subjected to repeated sexual advances by her violin instructor, a faculty member in the music department of a private college. As a result (she testified), she found it impossible to continue her violin studies and has withdrawn from the department. She was too embarrassed and anxious at the time to report the matter to college administrators.
>
> Student B, who graduated from another private college with a degree in sociology, testified that she was propositioned by a professor who offered to give her an A in a sociology seminar in exchange for her compliance with his sexual demands. When she refused, she received a D in the course, which (she claimed) did not represent a fair evaluation of her academic work, but resulted solely from her rejection of the professor's proposition. She complained to the chair of the sociology department, and then to the Dean, but never received any response other than one form letter from the Dean asserting that his office "would look into the matter."

Student C is a senior honors division student in chemistry at a public institution. She is enrolled in the senior research seminar, a two-semester course comprising half her credit load for the year. Chemistry honors students must take this seminar and receive at least a C in order to graduate with honors. The chemistry student testified that both the male professor who gives the seminar and the male graduate student assistant who supervises the laboratory are refusing to evaluate her work. This problem began after she had refused several invitations from the professor to go out with him (alone) for drinks after seminar meetings and several invitations from the graduate assistant to attend small weekend parties at his apartment. Since then, she has received no feedback about her progress in the seminar, even though other students regularly receive such feedback. As a result (she testified), she is "learning nothing" in the seminar, has no idea whether she will receive the C she needs to graduate with honors, and has no confidence that anyone in authority at her institution would be receptive to her complaints.

Student D, a sophomore at a public institution, testified that she has been harassed for two months by a senior male student. He made numerous harassing telephone calls to her (she said), sometimes lurked outside her classroom buildings before and after her classes, once entered her residence hall without her permission, and frequently made unwelcome comments to her when passing her on campus sidewalks or in the student union. Examples of such comments (also repeated in the phone calls), according to Student D's testimony, were: "I want you;" "I can't live without you;" "your eyes are so beautiful;" and "you have such a great body." Student D eventually complained to the dean of students, who called the alleged harasser in for a conference. When the activity continued, Student D complained again and asked to file charges, but the dean convinced her to let him refer the alleged harasser for counseling. The activity stopped temporarily, but had begun again shortly before Student D testified.

Student E, an undergraduate at the flagship campus of the public university system, took a biology class in which the male professor frequently made sexually suggestive comments and drew sexually suggestive diagrams on the blackboard. To illustrate the effects of outer space on the human body, for example, the professor used drawings of a shapely woman whose breast size changed with conditions of weightlessness. In other classes, the professor asked female students how they would describe "the physiology of love-making" and whether

they thought of intercourse more in terms of “pleasure” or in terms or “reproduction.”

As a result of such testimony, the Committee tentatively concluded that sexual harassment of female students by male faculty members and male students is a serious problem on campuses in the state; that when students have complained about such harassment, institutional administrators and faculty members have often failed to treat these complaints seriously or courageously; and that institutions’ established grievance procedures and investigatory processes for dealing with sexual harassment often are not working effectively. The committee is now considering whether it should legislate in this area, and has called further witnesses to obtain their viewpoints on the advisability of legislation, and on the scope and terms of any such legislation.

The committee will hear from the president (a student) of the statewide Student Government alliance – an umbrella organization representing the various student governments at both public and private institutions in the state; the chair of the Board of Regents of the state university system; the state affiliate of the American Association of University Professors; and the State Association of Independent Colleges and Schools. Among the questions the Committee is already considering (and for which it will seek enlightenment from the committee’s counsel, as well as from the witnesses) are these:

1. Are there existing federal statutes or regulations or state common law principles that would already prohibit the types of harassment described to the Committee by the student witnesses above?
2. If so, are there effective means for enforcing such statutes or regulations, or common law principles?
3. If the state legislature were to draft sexual harassment legislation, should it cover both public and private institutions, and in the same way?
4. Should the legislation cover student-to-student harassment, as well as faculty-to-student and staff-to-student harassment? Homosexual harassment as well as heterosexual harassment?
5. What kinds of substantive or procedural requirements should be built into the legislation?
6. What enforcement mechanisms, and what remedies or penalties, should the legislation include?

PROBLEM-SOLVING EXERCISE H

(The Computer Use Problem)

This problem concerns Rick Beach, a senior history major, and Amy Lynn Jensen, Rick's ex-girlfriend, who is a junior political science major. Both Rick and Amy are students at State University, a large public university.

After an extended relationship, Amy broke up with Rick. Rick was devastated and confused. Several weeks after the breakup, Rick decided to establish a Web page that he could use to express his feelings about Amy and the breakup. At State University, students have wide-ranging access to university computers and software, and to university computer networks that include gateways to the Internet. Rick has established and maintains a valid university computer access account with his own password, and for some time he has been a regular user of university computer resources. Rick created his Web page using these university resources and his university account. He also accesses his Web page and other Web pages, as do other students, by using university computer resources and his university account. Like other students, however, Rick does frequently use his own personal computer to plug into the university network on campus or to access the network from off-campus by way of the university dial-in service or the university web site.

About a week after Rick's Web page was up and running, the undergraduate school's Dean of Students received a letter from Amy, complaining about the Web page and asking the Dean to shut it down. Amy indicated that she felt threatened and harassed by the existence of the Web page. Soon thereafter, the Dean received calls from other female students who complained about the Web page and indicated that it is offensive, indecent, and demeaning to women.

The Dean reported the matter to the Director of the university's Office of Computer and Technology Services, and asked her to investigate. The Director checked to see that Rick had a valid access account, and that he had used his own name and password in establishing the Web page. The Director then read the contents of the Web page and called the Dean back to suggest that "we've got a problem." She urged the Dean to access the Web page and "see for yourself." The Dean did so, and did not like what he saw. He was upset because, in his opinion, the material Rick had developed was highly disrespectful to the women students of the campus and unfair to Amy in particular. The Dean then called Rick to relate to him that "we've got a problem." Rick insisted that there was nothing wrong with his Web site, and that he was "just expressing my feelings," as well as providing "some entertainment" for the campus. The Dean strongly suggested that Rick come in for a conference, and Rick reluctantly agreed to do so.

Rick was so distressed and concerned about the phone call from the Dean that he called a local attorney who had recently (and successfully) defended a college friend against a charge of

speeding. The attorney offered to accompany Rick to the conference with the Dean and also agreed to represent Rick if the University took any disciplinary action against him.

A day or two later, the Dean received a call from Amy, who told him/her that she was going to consult an attorney and that the Dean would be hearing back from her or the attorney soon. The next day, the Dean did receive a call from an attorney who announced that she was representing Amy. The attorney was quite clear and firm that her client had suffered injury and that her rights were being violated by the university's acquiescence in the continuing existence of the Web page.

The Dean of Students has asked the Director of Computer and Technology Services to attend the meeting with Rick and has also asked that an attorney from the university's Office of General Counsel be there. Rick, in turn, has suggested to the Dean that he may bring his own attorney. The Dean does not expect to achieve any final resolution of the issues or any closure at this meeting. His intention is to have an exploratory discussion that will help him frame the issues with more specificity and determine how serious they really are. If there is no final disposition at this meeting, as the Dean suspects there will not be, he plans to suggest that the parties submit their dispute to mediation. University policies provide for mediation of certain disputes between students, and it appears that this dispute would qualify. The Dean expects to ask Amy whether she is interested in pursuing this alternative.

State University has a written policy on computer use and misuse by members of the academic community. This policy, entitled "State University Policy on Responsible Computer Use" has been in effect since 1998. The text of the policy is included with this problem and set out below. The university also has a student Code of Conduct that imposes potention sanctions for the "harassment of students or staff."

In addition to the general questions set out in the Problem-Solving Directions, above, these more specific questions also may be used:

- If you are General Counsel to the University, how would you advise the Dean on the legal issues this situation may present, and on the strategies to use at the meeting with Rick and his attorney?

- If you are the Vice-President for Student Affairs, how would you advise the Dean on the policy issues this situation may present, and on the strategies to use at the meeting with Rick and his attorney?

- If an acceptable resolution is not forthcoming from the meeting, what are the next steps the university should take to resolve the matter – that is, what next steps with respect to Rick *and* what next steps with respect to Amy?

STATE UNIVERSITY POLICY ON RESPONSIBLE COMPUTER USE*

I.

General Objectives and Principles

This computer use policy strives to balance the freedoms necessary to accomplish the university's broad mission of research, teaching, and community and public service, with the constraints upon freedom that are necessary for the efficient use of shared computer resources. To establish and maintain this balance, the university and its Office of Computer and Technology Services manages a group of computers, and university networks and related software, to provide the university community with central computing resources sufficient to meet the needs of community members.

Students and other members of the university community may set up university computer access accounts free of charge. By opening such an account, students and other community members can open a gateway to a wealth of computing resources at the university and beyond. Due to the balance of interests that must be maintained, however, access to university computers and networks are a privilege and not a right. Inappropriate use of these computing resources can result in a loss of this privilege. By applying for and establishing an account, students and others agree to abide by all the provisions of this Policy.

The university cherishes the diversity of values and perspectives endemic in an academic institution and is respectful of freedom of expression. Therefore, it does not condone censorship, nor does it engage in the inspection of computer documents and files other than on an exceptional basis.

* Most of this policy is excerpted and adapted from a more extensive policy developed at Cornell University in the late 1990's. The excerpts are used here by permission.

II.

Purposes For Which University Computer Resources May Be Used

The basic premise of this Policy is that legitimate use of university computer resources does not extend to whatever an individual is capable of doing with them. Consistent with the general objectives and principles in Part I of this policy, the university's computers, software, and networks may be used for the following purposes:

- Teaching and instruction
- Learning
- Research and Scholarship
- Communications
- Extracurricular activities and educational enrichment activities

III.

Purposes For Which University Computer Resources May *Not* Be Used

The university's computers, software, and networks may *not* be used for the following purposes:

- E-mail Abombing,@ *i.e.*, the transmission of a crippling number of files across the network, which transmission causes a disk to fill up, the network to bog down, or an e-mail application to crash.

- Sending hoax messages or forged messages, including messages sent under someone else's network ID or someone else's password.

- Launching a computer virus.

- Soliciting sales, advertising or selling a service, or otherwise engaging in commercial or profit-making activities.

- Any activity or action that violates the university's Student Code of Conduct.

- Any activity or action that violates federal, state, or local laws.

Mere breaches of network etiquette ("netiquette") are not in and of themselves violations of this Policy. Examples of such breaches might be rude behavior, impolite behavior, heated arguments, or failing to stick to the topic in postings to discussion lists, chat rooms, or news groups. The university expects that the community of users will foster compliance with etiquette norms and will work out ways to handle breaches of etiquette on its own. The university itself cannot control etiquette.

IV.

Enforcement

Questions regarding this policy and its application may be directed to the Office of Computer and Technology Services or to the Office of the Dean of Students. Complaints regarding alleged violations of this policy may be directed to the Dean of Students or to the Judicial Programs Office. In addition, the Dean of Students has established a mediation program to provide for resolution of disputes between students or between students and university administrators.

Adopted May 7, 1998 by the
Office of the Vice President for Student Affairs

PROBLEM SOLVING EXERCISE I

(The Tweeting Professor Problem)

Dr. Sam Spade is mid-way through his fifth year at East Coast State University (ECSU), where he teaches mathematics. His contract extends for another year, during which he will be evaluated for tenure. Spade has gotten good student course evaluations during his five years at ECSU, and his department chair, Millie Vanilla, has told him that he is a "shoo-in" for tenure. Although Spade's classroom performance is reasonably good, he needs to publish several additional articles in the coming year in order to receive a positive evaluation for tenure from his department. Sam is very religious, and has often told his students that their method of dressing and their behavior, both in and out of class, are "sinful." He has offered to pray with them (outside of class) and has even hinted that students who accept this invitation may get extra credit in his class. Several students have complained about this extra credit activity to Professor Vanilla, but she has told the students that Professor Spade has religious freedom and she cannot interfere.

Sam has had some conflicts with departmental colleagues, whom he called "lustful sinners" who "have broken every one of the Ten Commandments" in a tweet to his non-ESCU friends. In another tweet to his Twitter followers he accused two departmental colleagues, both male, of "having a torrid affair right under the nose of Vacuous Vanilla." He has also accused the provost of sleeping with several female faculty members in his department in a tweet to his non-ESCU followers. Sam has Tweeted all of these comments to his friends from his home computer, and has not identified himself as an ECSU faculty member, but he has named the faculty members whom he has criticized. Unbeknownst to Sam, who doesn't know much about technology, several of his students are "following" him on Twitter and have come across these comments. The comments, as might be expected, have "gone viral" and have reached the faculty members who are the subject of Sam's criticisms.

The faculty members who have been named in Sam's tweets are furious and want him to be fired. The Faculty Handbook states that a faculty member may be dismissed for "capricious disregard for accepted standards of professional conduct." The Provost insists that Sam be fired, although he has a year to go under his contract. Professor Vanilla is also outraged and has "suspended" Sam from teaching. The President has asked the university attorney if they can "kick this jerk out permanently."

ECSU has adopted the AAUP 1940 Statement on Academic Freedom and Tenure. ESCU has no written policy on termination of faculty prior to the expiration of their contract.

For Appendix B:

1. If a faculty member, even one without tenure, is dismissed prior to the expiration of his or her contract, AAUP policies require that the dismissal be treated like the dismissal of a tenured faculty member, with full due process protections. See Text Sections 5.7.2 and 12.1.1.

2. Sam has a property interest in the remaining one year of his contract. Because ECSU is a public university, any discipline meted out to Professor Spade must comply with due process requirements. Therefore, he is entitled to notice and "some kind of hearing" (see *Goss v. Lopez*, discussed in the Text Section 9.3.2, p. 590) to address whether the suspension is appropriate.

3. Although Professor Spade enjoys religious freedom, he does not have the right to proselytize in class or to his students in any "extra credit" forum. See *Bishop v. Aranov*, discussed in Section 6.2.2 of the Text.

4. Because Professor Spade's teaching evaluations are good and he has been told he is a "shoo-in" for tenure, the university will not be able to use incompetence or inadequate academic performance as a rationale for his dismissal. The university might cite the "capricious disregard" language of the Faculty Handbook, but Spade's free speech rights (see item 5 below) may trump that language.

5. There are also possible free speech implications regarding Professor Spade's Tweets, which would be considered speech under the First Amendment. It is therefore important to analyze whether the tweets that are the subject of controversy would be ***protected*** speech. Does it help Professor Spade that he "tweeted" from his home rather than from his university office? That he used his own computer and software rarther than the university's? That he did not identify himself as an ECSU faculty member in his tweets?

6. ECSU may argue that the "tweets" caused a substantial disruption under the *Tinker* rationale if it decides to proceed with the termination (see Text Section 9.4).

7. Individuals identified in the "tweets" may be able to state defamation claims against Spade; the institution may argue that defamatory speech is not protected by the First Amendment.

APPENDIX A

GUIDELINES FOR WORKING ON PROBLEMS 1-25

The guidelines in this appendix provide brief suggestions for working through the 25 problems that appear in Part II of this *Cases, Problems, and Materials*. Each problem is keyed to one or more subsections of the Text. The discussions in these subsections provide a foundation for analyzing each problem. The guidelines below provide more pointed suggestions about specific issues to consider or resources to consult. **STUDENTS WHO ARE DOING THESE PROBLEMS AS COURSE ASSIGNMENTS SHOULD NOT CONSULT THESE GUIDELINES UNTIL AUTHORIZED TO DO SO BY THE INSTRUCTOR.**

* * * * * *

Problem 1

(*Secs. 3.2.2.4.* and *4.4. Institutional Liability for the Acts of Others* and *Personal Liability of Trustees, Administrators, and Staff*)

The primary issue in this problem is the possible liability of the institution for negligence. There also may be personal liability for negligence on the part of Mary's academic advisor or the Director of Overseas Programs.

Is there any indication that the institution had developed a set of policies to inform students as to the possible dangers of the sites to which they were going? Had the institution provided a responsible staff member with knowledge about the conditions at the sites the college is sending students to? Was there a mechanism to ensure that the faculty member/advisor provided the student with the information that she requested, and that she needed? What representations had the college made in its catalog or other documents that the student may have relied on?

Problem 2

(*Sec. 4.4.2. Personal Liability of Trustees, Administrators, and Staff*)

Defamation is the primary legal issue here, although other tort claims are possible (intentional infliction of emotional distress, tortious interference with contractual relations). The validity of the charges against Hall should be substantiated if Dean Moore intends to refer to them. How might this be done? Does Dean Moore have a legal or ethical duty to warn administrators at the neighboring state university? Even if she does not take any action to substantiate the charges? If she does not warn them, does she risk legal liability? For either basis of potential liability, is the institution potentially liable, or just the dean, or may they be jointly liable?

Problem 3

(*Secs. 3.2.* and *4.4. Institutional Liability for the Acts of Others, Personal Liability of Trustees, Administrators, and Staff* and *Institutional Management of Liability Risk*)

Agency theory, the university's regulations regarding contracting, and the delegations of authority within the university are all important to this problem. For a public university, there also may be some type of state board or state agency regulation regarding contracting or delegations of authority. Defamation analysis should address the elements of a defamation cause of action, whether the Chancellor's remarks were privileged, whether Cade is a public figure, and (if so) the "actual malice" standard of *New York Times v. Sullivan*. Also of significance, in a public university, is whether the institution could be liable for defamation by the student newspaper in a situation where the Constitution would not permit the public university to dictate the newspaper's content. The *Mazart* case in the Text Section 3.2.1, including the further discussion in Section 10.3.5, is helpful on this point. State constitutions may provide analogous defenses for some private universities. Also in a public university, the question of whether the university may be protected by sovereign immunity – or the Chancellor by official immunity – could be relevant.

Problem 4

(*Sec. 4.2. Employment Contracts*)

Although the Fair Labor Standards Act may provide a deceptively simple answer to this problem, there are more issues involved. How does the institution define a "full-time" employee? What does the employee handbook say about paid vacation time? Is this employee an at-will employee, or is she protected by a collective bargaining agreement or a handbook that can be viewed as a contract? Does the institution have a progressive discipline policy? Is it required by custom or by contract to follow it? Is this a public institution, and does the employee have a colorable free speech claim?

Problem 5

(*Sec. 4.5.2.1. Title VII*)

Under *Vance v. Ball State University*, one issue for analysis is whether Gene qualifies as a supervisor of the administrative assistant for purposes of Title VII. In considering this question, additional facts would be needed as to whether Gene could take "tangible employment actions" in relation to the administrative assistant, such as firing or demotion. If so, then Gene may qualify as a supervisor under Title VII, which could be the basis for vicarious (strict) employer liability under Title VII if a tangible employment action were taken against the administrative assistant. If Gene qualifies as a supervisor, but no tangible employment action were taken against the administrative assistant, strict liability can still apply, but in such instances an employer can raise two affirmative defenses under the *Faragher-Ellerth* standards. An employer can show that "(1) it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided" (see Text, pp. 170-171). The actions taken (or not taken) by the vice president for student affairs could implicate the availability of affirmative defenses if Gene is deemed a supervisor for the administrative assistant. Even if Gene does not qualify as a supervisor for Title VII purposes, inaction by the vice president for student affairs could trigger liability concerns, as Title VII liability can still attach to an employer for responding in a negligent manner to complaints of sexual harassment.

Problem 6

(*Sec. 5.3. Faculty Collective Bargaining*)

The interplay of mandatory, permissive, and illegal subjects of bargaining is the primary issue here. The analysis should examine which issues are the exclusive purview of the faculty union, and the legal implications of the president's permitting the faculty senate to deal with terms and conditions of employment. Students should also consider the teachings of *Yeshiva* (the Text Section 5.3) in order to determine whether a powerful faculty senate would suggest that faculty are "managerial employees" and thus unprotected by the NLRA.

Problem 7

(*Sec. 5.4. Nondiscrimination in Employment*)

This fact situation is similar to *Winkes v. Brown University*, 747 F.2d 792 (1st Cir. 1984). Is an outside offer an example of "any factor other than sex" for Equal Pay Act purposes? What if no outside offer existed, but the institution granted Gemini's request for a raise anyway? Would the institution have a successful defense to such an action?

A policy issue for consideration by administrators might be the impact on faculty morale of meeting Gemini's demands, and internal equity versus external equity and affirmative action concerns.

In addition to the immediate concern, consideration could be given to whether the university could prohibit the engineering school from hiring any male faculty until more female faculty have been hired.

Problem 8

(*Secs. 5.2.* and *5.7. Faculty Contracts* and *Standards* and *Criteria for Faculty Personnel Decisions*)

This problem involves possible breach of contract claims – for failure to perform the annual evaluation, and possibly for violating the tenure timetable if the institution decides to resolve the plagiarism allegation prior to the tenure decision process. It could also involve

claims of academic freedom if Mary is denied tenure, in part, because of the criticisms of the content of her teaching and her assignments. Are the reasons articulated by the department chair for denying Mary tenure appropriate? What information should the university counsel obtain before advising the dean?

Problem 9

(*Secs. 5.6.2., 5.7.2.* and *6.2. Standards and Criteria for Faculty Personnel Decisions, Procedures for Faculty Personnel Decisions,* and *Faculty Academic Freedom*)

Legal analysis should involve attention both to potentially legitimate grounds for a tenure denial based upon concern for the department's curricular needs and to potentially illegitimate grounds for a tenure denial based upon considerations that could constitute an academic freedom violation. May an institution deny tenure to an otherwise qualified faculty member who simply is a poor "fit?" To a faculty member who is disliked by the faculty but otherwise qualified? A faculty member who has forcefully expressed views which other faculty members oppose? The *Mt. Healthy* standard (429 U.S. 274 (1977)) would apply to this case. For further guidance, see *Hildebrand v. Board of Trustees of Michigan State University*, 662 F.2d 439 (6th Cir. 1981), a case upon which the problem is loosely based.

A second issue worthy of discussion is whether the professor's procedural due process rights have been violated or whether he is entitled to any further procedural rights before the President makes the final decision. The difficulty for the professor here would be in identifying any liberty or property interest that would be infringed by the tenure denial.

Problem 10

(*Secs. 6.1.7., 6.2.2., and 7.2.5. "Institutional" Academic Freedom, Freedom in Teaching, and Affirmative Action Programs)*

If the university president were to dismiss Sharp, one avenue of legal claims would come from her status as a tenured professor and the resulting contractual and due process obligations owed to her by the university. As covered in Sec. 5.7.2.4. of the Text, specific steps to satisfy due process considerations would likely need to be met in dismissing a tenured professor, like

Sharp, from a public university. As a threshold matter, a reason for cause to dismiss the professor would need to be identified in relation to the professor's classroom comments under applicable institutional employee standards. Based on the facts available, it likely would be difficult to identify a sufficient cause to terminate a tenured professor such as Sharp only on the basis of the comments made to the class.

In focusing specifically on the professor's comments to the class in terms of a First Amendment analysis, *Garcetti v. Ceballos* is relevant (see Text, p. 339, and Section 6.1.5., pp. 307-308). If the comments were made pursuant to Sharp carrying out her employment duties, then *Garcetti* could be implicated. Under *Garcetti*, public employee speech made as part of carrying out official job duties is not protected by the First Amendment. However, the U.S. Supreme Court explicitly left open whether faculty speech related to research and teaching is subject to the *Garcetti* standards. Lower federal courts have reached differing conclusions on faculty speech and *Garcetti* (see Secs. 6.2., 6.3, and 6.4), but some courts, such as the Ninth Circuit in *Demers v. Austin*, have concluded that an academic freedom exception exists under *Garcetti* (see CPM Part F. and Text, pp. 325-326). An important point to note is that the professor's comments potentially do not constitute speech made as part of carrying out official duties. Instead, the comments at issue could constitute private speech on the part of the professor that deal with an issue of public concern and are entitled to First Amendment protection absent a sufficient justification from the university to take action against the professor because of the speech, such as issues related to the classroom learning environment.

In terms of a potential lawsuit form the attorney general, as covered in Sec. 6.1.7., the university may be able to assert claims based on institutional autonomy. These claims could be bolstered by the university turning to the U.S. Supreme Court's decision in *Grutter v. Bollinger* (see Part E of CPM and the Text, pp. 313, 425-428). As covered in Sec. 11.2.2., state statutory or constitutional provisions may also play an important role in defining governance authority for public institutions and their independence from other governmental units. In a lawsuit, however, a key challenge for the university is that its plan has strong similarities to the one held unconstitutional by the U.S. Supreme Court in *Gratz v. Bollinger* (see Text, pp. 425), the companion case to *Grutter v. Bollinger*.

Problem 11

(*Sec. 6.2. Academic Freedom in Teaching*)

The problem has parallels to *Edwards v. California University of Pennsylvania* (see Text, pp. 329-330), where a federal appeals court rejected a professor's free speech claims related to course content and the course syllabus. *Webb v. Board of Trustees of Ball State University* (see Text, p. 329) could also be relevant, as the court in this case ruled that a professor did not have a right to teach a particular course. In this problem, the chair has threatened to remove the doctoral student from teaching the course, but the facts available do not indicate that other actions, such as loss of an assistantship position, have been threatened. The department could also assert that since Fletcher is a graduate student, rather than a professor, the department has a stronger rationale to assert control over the course content than even the circumstances presented in *Edwards* and *Webb*, which involved tenured professors. The public employee speech cases, especially *Garcetti v. Ceballos* (see Section 6.1.5.), could also be relevant. If the *Garcetti* standards are applied to the syllabus, it would seem to constitute expression made as part of carrying out official duties and, thus, not protected by the First Amendment. However, courts have disagreed whether an academic freedom exception exists under *Garcetti* (Text, pp. 339-340).

Problem 12

(*Sec. 7.1.3. The Contractual Rights of Students*)

The primary issue is whether the "student handbook" is a contract. Disclaimers could remove its contractual status, although the court's analysis in *Beukas v. Fairleigh Dickinson University* (Text Section 7.1.3) should also be considered. Other issues to be discussed include the apparent authority doctrine and detrimental reliance. See also Section 9.2 of *LHE* 5th for discussion of the *Olsson* and *Blank* cases.

Problem 13

(Sec. 7.1.4. Student Academic Freedom)

This problem pits a faculty member's freedom to require a pedagogically appropriate, germane writing assignment against students' disagreement with his personal and political views. Students should consult the AAUP 1940 Statement on Academic Freedom and Tenure, as well as the AAUP Joint Statement on Rights and Freedoms of Students, both of which are discussed in Section 7.1.4 of the Text.

Problem 14

(*Secs. 7.2.* and *7.5. Admissions*)

1. Law.

The key to the legal questions in this problem is to recognize: (a) that Eastern State University's Ten Percent Plan ("Plan"), on its face, is race-neutral, unlike the affirmative action policies at issue in *Grutter* and *Gratz* (and the other cases discussed in the Text Section 7.2.5); but (b) that the Plan may, in its operation and effect, disproportionately benefit minority students, an effect that was apparently intended by the ESU Board of Trustees.

Since the Plan benefits (or distinguishes between) students on the basis of class rank and geography, not on the basis of race as such, it may in that sense be considered race-neutral. And according to *Grutter* and *Gratz*, race-neutral admissions policies do not present the legal difficulties that race-preference policies do, either under the equal protection clause or under Title VI. Race-neutral policies, it may be said, do not discriminate on the basis of race and therefore are not subject to the strict scrutiny judicial review that the U.S. Supreme Court used in both *Grutter* and *Gratz* as well as in *Parents Involved* and *Fisher.*

But there are other Supreme Court cases providing that a policy that is race-neutral on its face may nevertheless be invalid on the basis of racial purpose (or intent) and racial effect (or impact) – that is, if the governmental body promulgating the race-neutral policy had a race-based purpose in mind, and the policy in operation had a disproportionate adverse effect on members of one race compared to another. See, for example, the Text Section 4.5.2.7 and, in particular, the *Feeney* case on p. 184; and see also the Text Section 11.5.5.

The next step in the analysis, therefore, is to apply the "racial purpose and effect" test to the Plan. It is important to begin by noting that the Board intended that the Plan would increase the percentage of minority students enrolled at ESU and that the Plan did have this effect.

In addition, it is now also important to study Justice Kennedy's opinion in *Parents Involved*, in which he indicates that there are some measures that educational institutions may take to "bring[ ] together students of diverse backgrounds" that are "race-conscious" measures, but do not classify students on the basis of race, and therefore are not subject to the strict scrutiny standard of reveiew. (See *Parents Involved*, 127 S. Ct. at 2792.) The legal issue then would be whether ESU's TenPercent Plan could be considered "race conscious" but not subject to strict scrutiny and thus likely valid for that reason. (The opinion by Chief Justice Roberts suggests a similar concept of race-conscious measures that are not subject to strict scrutiny (see *Parents Involved*, 127 S. Ct. at 2766).*)*

If the Plan is race-neutral, it is likely valid. If the Plan falls within the Kennedy concept of a race-conscious, but not race-based, plan, it could then also be valid. (The legal status of this concept is still unclear.) Otherwise, the Plan would fall within the racial purpose and effect test and, if it does have a racial purpose and effect, it would then be subject to strict scrutiny review. The Plan then would be valid under the equal protection clause and Title VI only if it met the various requirements for race-preferential plans set out in *Grutter*, as supplemented by *Parents Involved* and *Fisher* (which is doubtful). For a summary of these requirements, see the Text Section 7.2.5, pp. 442-446, points 6-17.

See Problem 10 for a university plan that is similar to the one disapproved of by the U.S. Supreme Court in *Gratz v. Bollinger*, the companion case to *Grutter*.

2. Policy

There are various policy perspectives that may be pertinent to the ESU Ten Percent Plan. From one perspective, for example, one could focus on the Plan's reliance for its success on what may be conditions of racial segregation in the state's urban high schools. From another perspective, one could focus on the Plan's negative effect on admissions officers' discretion to make decisions based on an individualized, "holistic," review of each application. Justice O'Connor, in *Grutter*, makes some policy-oriented comments about percentage plans. For other policy (and legal) considerations, see Michelle Adams, "Isn't It Ironic? The Central Paradox at the Heart of Percentage Plans," 62 *Ohio State L.J.* 1729 (2001).

Problem 15

(*Secs. 7.4.1.* and *7.6.2. Housing Regulations* and *Protection Against Violent Crime on Campus*)

This problem combines elements of *Eiseman* and *Nero* (both discussed in the Text Section 7.6.2. Students should discuss whether the attack was foreseeable and whether the college's decision to assign this student to a residence hall with much younger students was negligent. Additionally, the issue of the college's nonenforcement of its alcohol policy should be addressed; *Furek* (Text Section 10.2.3, p. 739) provides some teaching on the relationship between the enforcement of a policy and institutional liability.

Problem 16

(*Secs. 8.6.1.* and *8.6.5. Student Academic Issues* and *Academic Dismissals and Other Sanctions*)

Because the main issue is the student's academic performance, courts generally would be deferential to the academic judgments involved (see *Ewing* for assistance). But the case is complicated by allegations of faculty unprofessionalism and a lack of evaluative standards. The Provost should assess the impact of these allegations on this case, and their potential spillover effects on the other students in the department, before deciding the fate of the complaining student. The Provost also should determine whether there is any procedural defect in the process thus far and whether she must, as a matter of law, or should, as a matter of policy, provide any type of hearing or other procedural protection for the student before taking final action.

Regarding the second allegation in the student's petition, see the *Olsson* case, in the Text Section 8.2, pp. 512-513. Regarding the fourth allegation, see *McIntosh v. Borough of Manhattan Comm. Coll*., 433 N.Y. Supp. 2d 446 (1980), as well as *Ewing*. For further guidance, see also *Stoller v. College of Medicine*, 562 F. Supp. 403 (1983), and *Wilkenfield v. Powell*, 577 F. Supp. 579 (1983).

Problem 17

(*Secs. 9.1.3.* and *9.2.2.; see also Sec. 10.2.2.*
***Codes of Student Conduct, Disciplinary Rules and Regulations – -Public Institutions* and**
***Institutional Recognition and Regulation of Fraternal Organizations*)**

Constitutional protections are at issue here because the institution is public; therefore, the Off-Campus Misconduct Policy must be specific enough to avoid charges of unconstitutional vagueness, and (since the code apparently could apply to expressive conduct) it must be clear enough to avoid charges of overbreadth. Each subsection of the policy must clearly define the prohibited behavior with sufficient clarity to satisfy the due process clause's notice requirement.

Under subsection (a) of the policy, it is not clear that the fraternity party was an "event sponsored or sanctioned by the university or one of its schools or academic departments." The university might want to add language such as this after "departments": "or by a student organization recognized by the University."

The language of subsection (b) is also of concern, specifically the phrase "detrimental to the interests of the university." This language may suffer from vagueness because it does not give students fair notice of what conduct is forbidden and because it does not set a meaningful standard to guide and limit the discretion of those who adjudicate Code cases. Also, how does the university fit the current situation into this language? Destruction of property is a criminal offense, public urination is probably a misdemeanor, and the noise from the party probably violated municipal ordinances against creating a public nuisance. The issue here, therefore, is whether the university can claim that, because these are its students, their off-campus conduct was "detrimental" not only to state and local government interests but also to the university's own interests.

Merely attending a party probably is not grounds for charging a student with a Code violation.

If the university has a relationship or recognition statement with its fraternities (see Text Section 10.2.2.), the party may have violated the terms of that statement, and, if the statement so provides, the university might be able to revoke its recognition or sanction the fraternity in some way. But it is not clear that the university could use the Off-Campus Misconduct Code to take action directly against the fraternity, since the Code may apply only to individual students rather than student organizations.

The fraternity also may have liability under the state's social host law for damage done by a student intoxicated by the alcohol served at the party.

Problem 18

(*Secs. 9.4.* and *9.5. Student Protests and Freedom of Speech* and *Speech Codes and the Problem of Hate Speech)*

1. For the most part, the postings that students place on the kiosks, including the types of postings that have concerned State U, would clearly be considered to be expression within the meaning of the First Amendment. See *Giebel v. Sylvester*, 244 F.3d 1182, 1187-89 (9th Cir. 2001). The only apparent exceptions would be postings that can be characterized as obscenity (see the Text Section 10.3.5), child pornography, "true threats," or private defamation, all of which have been written out of the First Amendment (see the Text Section 7.5.1).
2. Since the kiosks used for the postings are the property of the university and thus state property, the scope of the university's authority to regulate these postings will depend on the character of the property. "Public Forum" analysis thus is a key part of this problem (Text Section 9.4.2). Specifically, state university's authority will differ depending on whether, for First Amendment purposes, the kiosks are: (a) a traditional public forum; (b) a designated forum; or (c) non-public forum property. Under U.S. Supreme Court precedents defining these categories of property, and lower court cases applying these precedents to the property of public colleges and universities, it appears that the kiosks would be considered to be a designated forum. More particularly, they would be a limited designated forum in that the university has limited their use to students.
3. Given that the kiosks are a limited, designated forum, State U. may limit the classes of speakers that have access to this forum, as they have done, and also may limit the classes of topics that may be discussed, as long as the limitations are (a) reasonable and (b) viewpoint neutral (Text Section 9.4.2). Using this rationale, State U. apparently could, for example, limit the topics to announcements of student meetings and events. In addition to these types of limits, State U. may also impose content-neutral time, place, and manner restrictions on the designated speakers' use of the kiosks. Once State U. has designated the class(es) of topics that may be discussed in the forum, however, it may not further regulate the content of this speech unless the regulation can pass a strict scrutiny standard of review.
4. Any proposals for regulating the "time, place, or manner" of posting on the kiosks would be subject to the standards of review developed by the U.S. Supreme Court in the *Clark* case and the *Ward* case (see the Text Section 9.4.3, after the *Shamloo* case). Consistent

with these standards, State U. may regulate the length of time postings may remain on the kiosks and may prohibit postings that cover other postings, as they do now. It may also regulate the size of the posters and notices that are placed on the kiosks, may prohibit postings that extend outside the borders of the kiosk's posting surfaces, may limit the number of duplicate postings or the total number of postings by a single student or student organization, and may probably regulate the size of the typing or writing on the postings.

5. If the State U. administrators wished to do so, they could require that all postings be presented in advance to the Student Activities Office to be date-stamped if they meet applicable requirements on size of the postings, size of the print, and duplicate or total postings. For such a system of review to be constitutional, it would be necessary that the Office (1) implement only genuinely content-neutral requirements for postings, and (2) process the posting requests within a short time frame – perhaps on a walk-in, while-you-wait basis. For a case that reviews content-neutrality requirements for such an approval system, see *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), Text Section 9.4.4; and for a case in which advance review requirements did not adhere to content-neutrality and were held to be unconstitutional, see *Khademi v. South Orange County Community College District*, 194 F. Supp. 2d 1011, 1024-27 (C.D. Cal. 2002),

6. The State U. administrators may ask counsel whether they could require that the name of the responsible student or student organization be placed on the posting. This raises the question whether speakers have a First Amendment right to speak anonymously. The U.S. Supreme Court faced this question and answered it affirmatively in *Talley v. California*, 362 U.S. 60 (1960), a case concerning the distribution of handbills in a city. There may still be some room for narrow identification requirements, however, when necessary to combat fraud or defamation. See *Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 502 F. Supp. 789, 803-804 (N.D. Ill. 1980).

7. The State U. administrators also may wish to regulate the <u>content</u> of kiosk postings, in order to deal more effectively with the types of hateful postings, and postings castigating university officials, that have recently appeared on the kiosks. The permissible options for such content regulations would be quite limited. If any postings constituted obscenity, child pornography, "true threats," or private defamation according to current U.S. Supreme court definitions, the University could prohibit these postings and punish violators consistent with the First Amendment (see point 1 above). The University also could prohibit postings that constituted incitement (*Brandenberg v. Ohio*, 395 U.S. 444 (1969) or that violated standards applicable to the defamation of "public figures" (*Garrison v. Louisiana*, 379 U.S. 64 (1964)). Similarly, the University may be able to

use U.S. Supreme Court rulings permitting some regulation of non-obscene sexually explicit speech (see, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)) as a basis for prohibiting some of the drawings that are sexually explicit. But all of these categories of speech are narrowly defined and would probably cover only a small percentage of the worrisome postings. Moreover, the Court's definitions for these categories of speech are technical and complex, and would be difficult for administrators to apply in practice.

8. Any new regulations applicable to the kiosks would have to be both narrow and clear in order to avoid the twin defects of overbreadth and vagueness (see, e.g., the Text Section 9.5.2, under "fourth free speech principle"). It would be especially important that regulations premised on a "content-neutral" rationale are drafted in language sufficient to ensure that they permit only genuinely content-neutral restrictions on postings; and that any regulations that restrict the content of postings (see point 7 above) are drafted in language that carefully follows and stays within the applicable definitions and standards for content-based regulations. Counsel would need to be substantially involved in the drafting process.

9. With or without new regulations on kiosk postings, if there were not enough room on the kiosks for all the notices students or student organizations wished to post, they may seek other options for their postings. Thus, both the Director and legal counsel should consider reviewing other existing campus rules on outdoor notices and posters, to ensure that they are consistent with the rules for the kiosks; and they also should consider adopting rules for potential posting areas that are not covered by any regulations. For each such area, counsel would again need to determine whether the property is a traditional forum, a designated forum, a nonpublic forum, or nonforum property (Text Section 9.4.2). For example, what is the correct categorization for trees and lampposts? For the outside doors and walls of buildings? For the grassy areas of the main quadrangle if posters on pointed sticks were planted into the ground? See, e.g., *Desyllas v. Bernstine,* 351 F.3d 934 (9th Cir. 2003), the Text Section 9.4.5.

Problem 19

(*Sec. 10.1. Student Organizations*)

The foundational precedents for this Problem are *Healy, Widmar, Rosenberger,* and *Southworth;* all are pertinent to the analysis. *Healy* is set out in Sec. 9.4 of this volume of materials, and *Rosenberger,* and *Southworth* are set out in Sec. 10.1 of this volume of materials. *Healy* is also discussed in the Text Sections 9.4.1 and 10.1.1; *Rosenberger* in the Text Section 10.1.5; and *Southworth* in the Text Section10.1.3. *Widmar* is discussed at length in the Text Section 10.1.5. The discussion of nondiscrimination principles in the Text Section 10.1.4 also is highly pertinent to the Problem.

The potential free exercise of religion and freedom of association issues that arise when the student organization that discriminates is religiously based are discussed in the Text Section 10.1.4, in particular the case of *Christian Legal Society v.Martinez,* discussed on pp. 709-715 of the Text.

Problem 20

(*Secs. 9.2., 9.4.* and *10.3. Disciplinary Rules and Regulations, Procedures for Suspension, Dismissal and Other Sanctions,* and *Student Press*)

The discussion of libel law in *Mazart* (the Text Section 10.3.6) suggests that the student editors may be exposed to liability. Regarding potential problems in establishing liability, see *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Regarding the university's liability, it is important to determine whether the student newspaper is an independent organization or an agent of the university (see the Text Section 3.2.1). Regarding the university's responsibility to deal internally with this matter, *Papish* (Text Section 10.3.5) suggests that (unless it can demonstrate the article is libelous) the university may encounter constitutional difficulties if it attempts to discipline the student editors or to regulate the content of the newspaper.

To what extent can administrators of private institutions control the content of student publications?

Problem 21

(*Sec. 10.4.6.; see also Secs. 11.5.3.* and *11.5.5. Sex Discrimination, Title IX,* and *Scope and Coverage Problems*)

This fact situation is somewhat similar to *Cohen v. Brown University*, set out in this *Cases, Problems, and Materials* and discussed in the Text, pp. 778-781. Students also should determine whether the members of the men's team have a Title IX discrimination claim, as well. On what basis could a court find that the women's team has a viable Title IX claim, but the men's team does not?

Problem 22

(*Sec. 11.2. State Provision of Public Postsecondary Education*)

Although the problem indicates that the state's coordinating board must approve all programs, students will need to assume additional facts about the state's regulatory power in order to provide a full answer to the problem. Potential issues to address include whether the programs developed for the off-campus sites are "new" programs and thus require state approval. The relationship between the college and the legislature will differ based on whether the college is constitutionally based (which may result in little legislative control over how the college spends its funds) or statutorily based (which would give the legislature considerably more control over how the college spends state funds).

Depending on how the neighboring states have defined a "postsecondary" program, the college's out-of-state television courses may require approval by the neighboring states. The college could argue, however, that the courses are "offered" on its own campus, in that no college employee physically enters the neighboring state to teach the course, and that the regulations of other states therefore do not apply. The university also might argue that the commerce clause or the First Amendment prohibits the other states from regulating.

The law related to these issues is likely to continue to develop as colleges find additional methods for delivering instruction beyond the borders of their campus.

Problem 23

(*Sec. 11.3.3. Copyright Laws*)

For an analysis of whether an individual's creation is a "work for hire" under Sec. 101 of the Copyright Act, see *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989). Contract law may apply, depending on whether the university has issued regulations governing the allocation of royalties for inventions or creations by the faculty done wholly or in part in university facilities or on university time. Similar problems can arise with patent royalties.

Problem 24

(*Secs. 11.5.3.* and *7.1.5. Title IX)*

This problem involves many aspects of the April 4, 2011 *Dear Colleague Letter* released by the U.S. Office for Civil Rights. There are serious issues that must be addressed: the alleged victim's right of confidentiality, the college's concern that one of the alleged assailants has attacked others, with implications for the safety of members of the college community, and the possibility of retaliation by the alleged assailant or his friends. Students should discuss how resident assistants should be trained to handle and report such situations, the need for intermediate protective measures for the victim, if indicated, what information, if any, should be given to the police, and the need to reach out to the alleged victim to ascertain what help, services, or counseling support may be indicated.

Problem 25

(*Secs. 11.5.4.* and 7.7.2. *Americans with Disabilities Act* and *Section 504.*)

This problem is similar to the facts of *U.S. v. Board of Trustees of University of Alabama (*see the Text Section 7.2.4.3). With regard to the institution's responsibility vis-a-vis the prospective nursing student who is hearing impaired, *Southeastern Community College* (the Text Section 7.2.4.3,) provides guidance. The analyses under Section 504 and the ADA are not substantially different.

APPENDIX B

GUIDELINES FOR COMPLETING LARGE-SCALE PROBLEM-SOLVING EXERCISES

The following materials suggest avenues and issues to pursue in working through each of the eight large-scale problem-solving exercises in Part II of this *Cases, Problems, and Materials*. Various readings also are suggested, including readings from *LHE* 5th, to provide background or illustrations relevant to the exercises. **STUDENTS WHO ARE DOING THESE PROBLEM-SOLVING EXERCISES AS COURSE ASSIGNMENTS SHOULD NOT CONSULT THESE MATERIALS UNTIL AUTHORIZED TO DO SO BY THE INSTRUCTOR.**

The focus of the following guidelines is on the legal issues potentially raised by each problem. The listing of legal issues is not exhaustive; minor or secondary issues are not covered, and additional major issues could arise if the instructor provides additional information or role instructions.

Although these problems also raise policy issues (see General Introduction to the Study of Higher Education Law in the Text), they generally are not covered by these guidelines. Similarly, these guidelines only occasionally address the strategy questions that these problems may present or the longer-range preventive planning issues that may arise in the wake of each specific problem. Since approaches to such issues can be quite variable, numerous viewpoints and positions might be substantiated. Individual review or group discussion of these matters may be guided by the problem-solving directions and problem-review questions that precede the problem-solving exercises.

PROBLEM SOLVING EXERCISE A

1. Student suicide cases focus on tort liability and, in particular, whether or not the institution had a special relationship with the student that would have created a duty to protect the student from her own behavior. Cases involving this "special relationship" are discussed in Text Section 3.2.2.6. See also, Gary Pavela, *Questions and Answers on College Student Suicide: A Law and Policy Perspective* (College Administration Publications, 2006).

2. Disability discrimination laws (specifically the ADA and Section 504), and the possibility of an involuntary medical withdrawal, also may figure into the analysis of this problem. For discussion, see the Text Section 9.2.4; and see generally the book by Gary Pavela listed in the Bibliography.

3. FERPA (see the Text Section 7.8) protects the confidentiality of student education records; and a student's medical records, if created by an employee of the institution, are considered education records. However, FERPA contains an exception for emergencies, including those involving health and safety. Therefore, if the mental health professionals and/or the college administrators believe that Ms. Tu's situation poses an imminent threat to her health or safety, they may contact her parents without incurring liability under FERPA.

4. For a suggested framework for developing campus policies on dealing with suicidal or troubled students, see *Framework for Developing Institutional Protocols for the Acutely Distressed or Suicidal College Student,* available from the JED Foundation, www.jedfoundation.org/framework.php.

PROBLEM-SOLVING EXERCISE B

1. The student's right to privacy is important, and must be guarded to avoid possible defamation liability or liability under some state law tort of invasion of privacy. A qualified privilege would likely apply if the dean and others who have been advised of Doe's condition disclosed that information only to individuals who need to know it. It is not clear that the school or the children's parents need to know it.

2. Because the education school is located in a state university, procedural due process protections would apply. The kind of process that is due depends upon whether the action the university takes is more akin to an "academic" decision or to a "disciplinary" action. If Doe is removed for unsatisfactory performance in his student teaching assignment (the disability issues are discussed below), this could be characterized as an "academic" decision. See *Board of Curators v. Horowitz* and *Regents of the University of Michigan v. Ewing,* discussed in the Text Section 8.2.

3. A major issue in this problem is whether the student is protected by Section 504, the ADA, or both. The reasoning of *Southeastern Community College* suggests that a student who cannot perform a requirement of his academic program or fulfill a licensing requirement is not "qualified." The ADA requires the Dean to make a determination as to whether the student is disabled and, if so, whether he is qualified with or without accommodation. Only if the student is or could become qualified must a reasonable accommodation be considered. This is a very important determination, and the Dean should seek the assistance of university staff who are familiar with the law and who are experienced in making these determinations. Appropriate mental health professionals, from the university counseling center or otherwise, should also be consulted.

4. The dean needs to consider whether he has a duty to warn the school administrators at the elementary school of Doe's diagnosis. He may wish first to consult with the diagnosing professional for advice. Depending on the state in which the university is located, and upon the conditions under which Doe divulged confidential information to the psychiatric professional, however, it may be difficult for the Dean to obtain this information. He may need a signed release from Doe in order to obtain this information.

5. For further guidance on the above points or other potential aspects of the problem, see the Text Sections 3.2.4, 7.2.4.3, 9.2.4, 8.6.5, 11.5.4, and 11.5.7.

PROBLEM-SOLVING EXERCISE C

1. This problem pits the professors' alleged "academic freedom" in the conduct of their courses against institutional interests and student interests in the quality of education. It also involves the issue of whether the institution can expect "full-time work" from "full-time faculty."

2. It is important to establish whether the institution has published regulations concerning class cancellation policies, class attendance by faculty, or grading and evaluation requirements. Any such regulations are likely to be considered part of the institution-faculty contract. Courts have upheld institutional regulations requiring faculty to perform their assigned tasks. See *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976). As long as the regulations are clear, are applied

consistently, and faculty have notice of them, it is unlikely that the faculty could claim substantive constitutional violations in their application.

3. Has the institution developed policies limiting the amount of time faculty may spend consulting? Courts also have permitted institutional regulations that either limit faculty consulting time or the amount of outside income a faculty member may earn (or both). See *Gross v. University of Tennessee,* 448 F. Supp. 245 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980), where the court found no constitutional violation, either procedural or substantive.

4. Does the Department Chair serve on an at-will basis (at the pleasure of the dean, provost, or president)? Is there a term of office? The university may be able to relieve Dr. Equine of his chair responsibilities without actually firing him as a professor.

5. What is the curricular content of Agronomy 301 supposed to be? Does it involve independent student work, or does the catalog bill it as a lecture or discussion course? Courts have viewed catalogs as having contractual features, so the course description is important regarding any possible suit by students, as well as for what it suggests regarding faculty responsibilities to the institution.

6. Regardless of the answers to the above questions, because the university is public, procedural due process protections must be afforded any faculty member with a property interest in his or her job.

    a. The department chair has presumably served satisfactorily as a faculty member, at least, for approximately two decades (although the vice president should determine whether, in fact, this is so). His tenure contract clearly constitutes a property interest in his faculty position (although probably not in his department chair position). Moreover, the AAUP 1940 *Statement* and related documents provide that a tenured professor cannot be dismissed without just cause. Any effort to dismiss or discipline Dr. Equine therefore could be taken only after a full due process hearing had been held in which the university set out the reasons for the action and the supporting evidence. It is questionable whether the facts of the problem would be viewed as sufficiently serious to constitute cause for discharging a tenured professor with over 20 years' longevity. Furthermore, it is unlikely that such a hearing could be conducted "without any publicity."

b. Dr. Bovine also will be protected procedurally, although his case is not as compelling. He has an expectation of at least two more years of employment. Any move to discharge or discipline Dr. Bovine would have to include due process protections similar to those to which Dr. Equine is entitled.

c. Dr. Swine's case is different. He is completing the last year of a three-year contract. If the incident occurred before the date by which assistant professors must be notified that their contracts will not be renewed, the university may simply not renew his contract, and a hearing need not be conducted (*Board of Regents v. Roth*, Part I (E) of this *Cases, Problems and Materials* under Section 5.7.2). However, if the incident occurred after the date by which nonrenewed faculty must be notified, then the university will either have to give Dr. Swine a one-year extension or conduct a hearing similar to the one that must be afforded Dr. Equine and Dr. Bovine.

7. Other issues concern whether the students can file a breach of contract claim against the university. Although courts are deferential to academic judgments of faculty and administrators, this problem could be viewed as a case of unprofessional conduct, not academic judgment. It is unlikely that a trial judge would be sympathetic to a professor's claim that academic freedom permits him <u>not</u> to teach <u>anything</u> in the course.

8. See generally the Text Sections 5.2, 5.6, 5.7, 6.1, and 7.1.3.

PROBLEM-SOLVING EXERCISE D

1. There are several threshold`, overarching issues concerning the Mental Health Policy on its face. First, some of its terms are broad and open-ended or unclear; thus, there are interpretive issues concerning the Policy's meaning and the extent of discretion allowed to administrators, especially under section III. Second, some of the language is potentially so vague (e.g., "mental disorder...adversely affecting...academic performance or behavior ...in a way that is prejudicial to the institution or other members of its student body") that it raises issues of fourteenth amendment vagueness (see the Text Section 9.2.2 for discussion of this doctrine). Third, the Policy includes no procedures by which to accomplish, or by which a student may challenge, an involuntary withdrawal – thus raising issues of fourteenth amendment procedural due process. One basic question in

this regard would be whether the procedures that the due process clause may require are akin to those for a disciplinary dismissal, or whether a different procedural model would be appropriate.

2. Concerning Dennis and Gerry specifically, there are various ways in which the Provost might seek to deal with their situations. Under section II of the Policy, the Provost might seek to refer the students for evaluation. Under section III, the Provost might seek to impose an involuntary administrative withdrawal from the university. Under the same section, the Provost might seek an involuntary withdrawal only from the residence halls. Alternatively, the Provost might seek to negotiate a voluntary withdrawal. Or the Provost could proceed under the Code of Student Conduct, treating the matter purely as a disciplinary problem. Or, prefatory to any of the above, the Provost might seek a temporary emergency suspension from the University or from the residence halls. The legal issues that arise will depend on which option(s) the Provost decides to pursue. Conversely, the option(s) that the Provost should pursue will depend in part on the legal risks that each entails. Moreover, the legal analysis and weighing of legal risks that would occur in Dennis' case differ in part from those that would occur in Gerry's case, so each case should be considered separately.

3. Regarding both Dennis and Gerry, there are issues of whether they are disabled students within the meaning of Section 504 (the Text Section 11.5.4) or the ADA (the Text Section 8.4), whether they are "otherwise qualified" disabled students entitled to the nondiscrimination protections of the law, and whether such protections would have any application to Dennis' and Gerry's particular circumstances.

4. Regarding Dennis, there is a potential freedom of speech or freedom of religion issue. Some of Dennis's activities involve the expression of religious views. Even though these views are unpopular or offensive, their expression is likely to receive some protection under the first amendment. Such issues would arise if the university sought to punish Dennis for the mere expression of his views.

5. Regarding Gerry, there are issues concerning the interrelationship between the pending criminal trial and any internal proceeding the university might schedule. Although Gerry's lawyer's claim of double jeopardy is without merit (see the Text Section 9.1.4), the university and the state prosecutors must take steps to protect Gerry's constitutional privilege against self-incrimination, and the university may be required by the due

process clause to allow Gerry the assistance of counsel in any internal proceedings (see the Text Section 9.1.4).

6. A review of the policy, strategy, and legal implications of the Dennis and Gerry cases is contained in G. Pavela, *The Dismissal of Students With Mental Disorders: Legal Issues, Policy Considerations, and Alternative Responses*, pp. 77-79 & 83-87 (College Admin. Pubs., 1984). For further guidance, see the Text Sections 4.4.2, 7.1.3, 7.4.1, 7.6.2, 9.1, 9.2.4, 9.4.1, 9.4.2, 9.5.2, 8.7, and 11.5.4.

PROBLEM-SOLVING EXERCISE E

1. Legal issues arise under both of the state statutes as well as under the campus conduct code. These issues implicate the rights of both the students and the "outsiders" (i.e., the non-student participants from the surrounding community). There are issues regarding interpretation of the statutes and code, as well as federal constitutional issues. The constitutional issues involve both potential challenges to the statutes and the code on their face and potential challenges to these provisions as applied to the particular circumstances of this problem. In analyzing the various issues, one should consider whether there are any differences in the way the two statutes apply – to the students as opposed to the outsiders – and whether there are any differences between the rights of the students and the rights of the outsiders.

2. The interpretive issues focus on language in the statutes and code that is uncertain in meaning and application, making it difficult to determine whether the defendants' actions meet all the elements of the offenses with which they are charged. The most serious examples of this problem are probably the "malicious intent" language in sec. 11-321, and the "willful disturbance" and "willful interference" language in sec. 44-106. The "entry without lawful authority" language in sec. 11-321 also creates problems, especially as applied to the students. (Can the students be found to be trespassers on their own campus?)

3. The facial constitutional issues involve first amendment overbreadth challenges and first and fourteenth amendment vagueness challenges. (See the Text Sections 9.1.3, 9.2.2, and 11.1.2 for discussions of overbreadth and vagueness.) Probably, the strongest challenges to be made would be first amendment vagueness challenges to the two state statutes.

4. The two statutes and the code, as applied to this situation, raise constitutional issues concerning the students' and the outsiders' free speech rights to engage in protest activities on the campus. In analyzing these issues, it is important to identify with precision the legitimate interests of the university or state that are implicated in this situation and the extent to which these interests are threatened by the students' and outsiders' activities. (For example, does the university have an aesthetic interest that is threatened?) In turn, it is important to identify the particular actions of the students and outsiders that allegedly threaten university or state interests: the erection of the huts? the interference with removal of the huts? the songs, chants, and other related protest activities?

5. This problem requires a consideration of the specific claims and defenses that could and should be asserted at trial on the state criminal charges and at the hearing on the code of conduct charges. Just as importantly, however, this problem requires a consideration of the possibilities for negotiation and settlement of this matter as an alternative to the trial and hearing. The question would be whether the university (or state), or the students or outsiders, should seek to negotiate a settlement and, if so, on what terms. The problem also requires consideration of whether and how the university should revise its own demonstration regulations to deal most effectively (and legitimately?) with future protests by the Coalition or other groups.

6. For good examples of cases in which the courts have analyzed issues similar to some of those suggested above, see *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986), and *Students Against Apartheid Coalition v. O'Neil*, 671 F. Supp. 1105 (W.D. Va. 1987), *affd.*, 838 F.2d 735 (4th Cir. 1988). For further guidance, see the Text Sections 9.1.3, 9.2.2, 9.5, and 11.1.2.

PROBLEM-SOLVING EXERCISE F

1. The ACLU's suit likely will challenge the Civility Code "on its face" and in its entirety, invoking the First Amendment as the primary support for the challenge. It thus is likely that overbreadth and vagueness arguments will be central to the analysis. The four incidents where the Code already has been applied could be used as examples for testing whether the Code as a whole, or particular provisions of it, are overbroad or vague.

2. Even if the provisions of the Civility Code are not overbroad or vague on their face, the Code provisions may still be invalid in some of their applications under the First Amendment. Such issues also could become part of the ACLU's lawsuit, and the four incidents where the Code already has been invoked could again be examples. Would the Code be unconstitutional as applied to one or more of these incidents?

3. To refine the analysis suggested in points 1 and 2, it is necessary to address each operative section of the Code (i.e., sections 2-7), considering each against the backdrop of section 1. For section 2, it also is necessary to distinguish among the three groups to which this section may apply: (a) students, (b) employees (faculty, administrators, and staff), and (c) outsiders who are not members of the university community. Different legal considerations may pertain not only from one section of the Code to another, but also from one of these groups to another.

4. In order for the university to defend its Code as being constitutional in all or some of its applications, it must demonstrate that the Code is based on some regulatory rationale that does not violate First Amendment principles. What rationale(s) (if any) might fit (and which sections and applications might they fit): A fighting words rationale? Obscenity? Incitement? Defamation? A "time, place, and manner" rationale? A "nonspeech" rationale, i.e., that the regulated activity is conduct rather than speech? To the extent that one or more of these rationales do not validate the Civility Code on its face, or in its applications, what other rationale(s) (if any) would do so?

5. Section 9.5 of the Text provides guidance for addressing the issues raised in points 1-4 above. For additional guidance on analyzing the Code's applications to faculty members, see the *Dambrot* case in the Text Section 9.5.1; *Martin v. Parrish* and *Hardy v. Jefferson Community Colle*ge in Section 6.2.2 of the Text; and the *Levin* case in Section 6.3 of the Text. For additional guidance on other issues that could arise regarding the Code's

applications to persons who are not members of the campus community, see the Text Sections 7.1.5, 9.3.3, and 11.1.2. For further general assistance, see the entries in the Bibliography for Chapter 10 of the Text.

6. Attempts to penalize violators of the Civility Code could also raise procedural due process issues regarding the sufficiency of the procedures utilized in determining the violation. See the Text Section 9.3.2 (students), the Text Section 5.7.2 (faculty), and Section 11.1.2 (outsiders). Regarding the Code's application to outsiders, there also could be issues concerning the university's authority to regulate access to the campus and to banish certain persons from the campus (see generally the Text Section 11.1.2).

PROBLEM-SOLVING EXERCISE G

1. This problem differs from problems A-F in that the context is the legislative process and the focus is statewide rather than limited to a single institution. (The problem-solving directions and questions at the beginning of the problems therefore have less applicability to this problem.) In addition to legal issues as such, this problem also will prompt consideration of the legislative process as a forum for resolution of higher education problems, consideration of legislative drafting strategies, and further consideration of the law/policy distinction (see section D of the General Introduction to the Study of Higher Education Law in the Text) especially as it applies to the interrelation of public law and public policy in the legislative process.

2. This problem concerns both student rights (and responsibilities) and faculty and staff rights (and responsibilities). Questions regarding the state legislature's authority, and its potential conflict with institutional authority and institutional internal law (see sections B & C of the General Introduction) also may arise. Since the legislature is studying sexual harassment at both public and private institutions, attention must be given to whether legal rights and responsibilities, legislative authority, or institutional authority would differ for legislative coverage of private, versus public, institutions.

3. Regarding existing law and existing legal rights, a major consideration would be whether and when the types of harassment alleged here would constitute sex discrimination prohibited by Title IX. Students also may have contractual rights (substantive or procedural) to assert under their contracts with the institution. In addition, tort law may

be a relevant source of students' rights to be free from harassment. Regarding faculty members, a major legal issue (or set of issues) concerns the nature and extent of protections that accused faculty members may have under their contracts with the institution. Moreover, faculty rights also might be infringed by false student accusations, which, if publicly disseminated by students or administrators under certain circumstances could be considered to be defamation or a tortious invasion of privacy. Faculty and staff members charged with sexual harassment also may have procedural due process protections under federal and state constitutions and perhaps free speech protections that would support claims that certain applications of harassment rules would interfere with faculty academic freedom.

4. Another issue regarding existing law would be whether and when Title IX (or other sources of law) would cover student-to-student sexual harassment (for instance, the type of harassment described in Student D's testimony).

5. For guidance on the above issues, see the Text Sections 3.2, 4.4.2, 5.6.2, 5.7, and 6.2.

PROBLEM SOLVING EXERCISE H

1. There are two primary sets of legal issues for the university. One set concerns "cyberspeech" and the First Amendment protections that might apply to Rick's Web page under the free speech and press clauses. The other set concerns peer sexual harassment and the university's potential liability – especially to Amy – under Title IX. Regarding the first set of issues, see generally the Text Section 7.5.1. Regarding the second set of issues, see generally the Text Section 7.1.5.

2. There also are various issues concerning dispute resolutions, in particular, issues concerning the best mechanisms and strategies for the university to use in attempting to resolve this problem.

PROBLEM-SOLVING EXERCISE I

1. If a faculty member, even one without tenure, is dismissed prior to the expiration of his or her contract, AAUP policies require the dismissal to be treated like the dismissal of a tenured faculty member, with full due process protections.

2. Because ECSU is a public university, any discipline meted out to Professor Spade must comply with due process requirements. Therefore, he is entitled to notice and "some kind of hearing" to address whether the suspension is appropriate.

3. Although Professor Spade enjoys religious freedom, he does not have the right to proselytize in class or to his students in any "extra credit" forum. See *Bishop v. Aranov*, discussed in Section 6.2.2 of the Text.

4. Because Professor Spade's teaching evaluations are good and he has been told he is a "shoo-in" for tenure, the university will not be able to use incompetence or inadequate academic performance as a rationale for his dismissal.

5. Consider the possible free speech implications of Professor Spade's tweets. Are these protected? Does it matter whether he "tweeted" from his university office or from his home? Would you answer be different if he had identified himself as an ECSU faculty member in his tweets?