Commentary—

PRIMARY & SECONDARY EDUCATION

Articles

Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 Pepp. L. Rev. 945 (2011). The author argues that, although *Everson v. Board of Education* is commonly supposed to be the predominant Establishment Clause decision leading to the banning of prayer from schools, in truth *Everson* played a smaller role than the subsequent decisions of *Engel v. Vitale* and *Abington School District v. Schempp*. The author examines these three decisions, their collective impact on constitutional doctrine, and questions that the decisions did not address. The author argues that these decisions exacerbated conflict because banning prayer from school alienates the religious constituency of the U.S., while allowing prayer in school alienates the secular constituency of the United States.

Scott Goldschmidt, *A New IDEA for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 Cath. U.L.Rev. 749 (2011). Congress has never clarified what constitutes an "appropriate" education under the Individuals with Disabilities Education Act (IDEA) and this ambiguity has led to a split among the United States Courts of Appeals. The author proposes and supports a recommended resolution to this circuit split regarding the meaning of "appropriate" education. Looking to congressional intent surrounding the IDEA and a Supreme Court decision interpreting the IDEA, the author argues that the Department of Education is in the best position to give "appropriate" education a nationwide definition. The author further argues that this definition should provide a meaningful educational benefit to students with disabilities.

Anthony Barone Kolenc, *When "I Do" Becomes "You Won't!"—Preserving the Right to Home School after Divorce*, 9 Ave Maria L. Rev. 263 (2011). This article outlines factors used in custody disputes involving the desire of one parent to home school their child. The author

addresses problems that arise when litigants rely on the constitutional interests of parents to advocate for home-school education, both in the courtroom and between parents. The article explains that the right to home-school after divorce implicates an analysis of the best interests of the child, which requires examining multiple issues, including the need to dispel judicial bias.

Laura C. Hoffman, *A Federal Solution that Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. Legis. 39 (2011). This article examines the history and purpose of the Keeping All Students Safe Act, which seeks to restrict the use of harmful restraint and seclusion in school settings. The author argues that the act may not go far enough in proscribing some seclusion and restraint techniques, leaving students with disabilities in peril.

Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 Harv. J. on Legis. 415 (2011). This article provides a framework for understanding the procedural protections required by the Individuals with Disabilities in Education Act (IDEA). The article asserts that both Congress and the courts have opined on the importance of procedural protections under the IDEA without explicitly defining what they are. While the procedural due process right to file suit for failure to comply with the IDEA may be an important part of the act itself, the author contends that procedural rights to participate in the process of creating an Individualized Education Program (IEP) is fundamental to implementation of the IDEA. The author concludes that this third category of due process in the IDEA—one focused on the manner in which the IEP's are created—must be expanded to ensure adequate protection under the IDEA.

Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection between the Student's Free Speech Rights and the School's Duty to Protect*, 62 Mercer L. Rev. 407 (2011). This article examines Supreme Court decisions to discuss what potential actions should be taken to combat hate speech and bullying in public schools. The authors conclude that a school may face liability if it fails to take reasonable measures to protect a child from bullying. The authors acknowledge, however, that the Supreme Court has yet to clearly define the scope of a school's duty to protect children from bullying and how

schools should balance this duty with the student's First Amendment rights. The authors specifically note that whether a school may impose disciplinary actions for cyberbullying is unclear. Therefore, the authors argue that the Supreme Court should recognize the difficult balancing tests that a school faces, and render a decision that allows school administrators the leeway to implement appropriate disciplinary measures against students that engage in hate speech and bullying.

Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. St. Thomas J. L. & Pub. Policy 1 (2011). This article discusses the consequences of teacher licensing in America. The author concludes that licensing decreases the pool of teachers available to any particular district, does not have a significant impact on the quality of education, and can force poorer school districts to increase class sizes and cut programs. The author suggests that certification is a better alternative to licensing.

Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395 (2011). This article looks at the different approaches used by courts to approach restrictions on student speech both on and off school grounds. The author suggests that when speech occurs outside of school supervision, the speech should be given protection from interference by school officials, but that the opposite is true if the speech is disruptive and occurs under school supervision. The author concludes that this approach is consistent with the existing First Amendment case law and gives administrators sufficient control, while preserving students' rights.

M. Blake Huffman, *The Equal Access Act Requires Equal Access for All: Why the Rowan-Salisbury School System's Policy Against "Sex-Based" Clubs, Developed to Ban Gay-Straight Alliances, Is Illegal,* 33 N.C. C. L. Rev. 137 (2011). This article discusses why a policy adopted by a school board banning "sex-based" clubs is illegal. The author argues that the policy discriminated against a club that taught tolerance between students of any sexual orientation, and that the policy cannot be justified because the club is not a danger to students' wellbeing and does not interfere with discipline or orderly conduct. The author concludes that the policy was adopted based on the community's notion of morality and is illegal under the Equal Access Act.

Brett G. Scharffs, *Echoes from the Past: What We Can Learn About Unity, Belonging and Respecting Differences from the Flag Salute Cases*, 25 BYU J. Pub. L. 361 (2011). This article first examines two cases, *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette*, which looked at laws requiring students to perform the pledge of allegiance and salute the flag. The author summarizes that, in *Gobitis*, conformity trumped freedom, while in *Barnette*, tolerance and the protection of the conscience were more important. The author concludes by looking at the idea of conscientious objection using the underlying themes from *Gobitis* and *Barnette*.

Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 Temp. Political & Civ. Rights L. Rev. 73 (2010). This article asserts that, despite the noble ideal of racial equality embodied in *Brown v. Board of Education*, subtle yet persistent differences in allocation of resources continue to perpetuate the myth of white superiority. The author argues that some programs, ostensibly aimed at achieving integration, actually are forms of de facto segregation that promote myths of racial superiority and inferiority. The author cites magnet schools, which may attract white students to predominantly black schools, but where programs reserved for magnet students are often far superior to those available to students enrolled by virtue of geographic location. The author suggests that true integration, in which a school is not readily categorized according to the racial makeup of its student population, can eliminate the isolation that perpetuates racial myths and stands in the way of the equality the Supreme Court envisioned in *Brown*.

Rena M. Lindevaldsen, *Holding Schools Accountable for their Sex-Ed Curricula*, 5 Liberty U. L. Rev. 463 (2011). This article outlines legal strategies for challenging public school districts for promoting awareness of gay, lesbian, bisexual and transgender issues. The author argues that some of the gender issues being taught can contradict the purpose of public education and, in districts with no opt-out provisions, violate constitutional parents' rights to make educational decisions on behalf of their children. The article laments the historical failure of legal challenges to controversial curricula and suggests three potential causes of action against school districts disseminating "factually inaccurate" and

"potentially harmful" information: 1) a claim of educational malpractice, 2) a claim for violation of federal parental rights, and 3) a demand for declaratory and injunctive relief.

India Geronimo, *Deconstructing the Marginalization of "Underclass" Students: Disciplinary Alternative Education*, 42 U. Tol. L. Rev. 429 (Winter 2011). This article shows how marginalization of minorities in various institutional settings leads to a lack of access to opportunities for minorities. The article begins by discussing the historical significance of a free public education and the disparities in education for poor minorities. The article goes on to define marginalization and alternative education as it applies to minorities. Next, the article focuses on how alternative education harms and disproportionately impacts minorities. The author then discusses the legal framework and impact alternative education has as it impinges upon minority students' due process and Fourth Amendment rights. The article concludes by recommending changes to the current system through public advocacy initiatives.

Jennifer S. Hendricks, Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. Pa. J. Const. L. 587 (2011). This article discusses how sex education in public schools can affect children and advocates the need for further studies. The author provides a description of current feminist-oriented advocacy on sex-education and indoctrination of students with gender sterotypes in schools. Additionally, the article outlines the problems with the current legal analysis and says the legal analysis should be rooted in equal protection and an endorsement method modeled after the one applied in First Amendment analysis. The author argues that an endorsement standard would limit public schools from indoctrinating school children in values that run counter to constitutional guarantees of sex equality.

Phillip Ruben Nava, *Equal Access Struggle: Counter-Military Recruitment on High School Campuses*, 44 John Marshall L. Rev 459 (2011). This article examines how the American policy of having a volunteer-only military force has led the Armed Forces to employ aggressive recruiting measures, including recruiting on high school campuses. The author explains that counter-military recruitment groups have sought to provide information at high schools about alternatives to mil-

itary service, but several schools have attempted to deny access to these groups out of fear of losing federal funding under a provision of the No Child Left Behind Act. However, the article notes that federal courts have ruled that the Equal Access Act and the First Amendment, generally require schools to give counter-military recruiting groups access, and that inclusion of counter military recruiters in the school forum helps to provide parents and students with a balanced perspective.

Christopher Cavaliere, *Category Shopping: Cracking the Student Speech Categories*, 40 Stetson L. Rev. 877 (2011). This article examines the regulation of student speech in schools guided by four landmark cases: *Tinker v. Des Moines Independent Community School District, Morse v. Frederick, Hazelwood School District v. Kuhlmeier* and *Bethel School District v. Fraser*. The author criticizes *Hazelwood, Morse,* and *Fraser,* because the standards given allow schools to regulate speech without regard to the actual content of the speech and the circumstances surrounding the speech, often causing judicial results that allow harmless speech to be prohibited. The author proposes that, since schools play a special role in society as an incubator of democracy and extension of the state, schools should only regulate speech that substantially undermines the school's ability to protect its own interests, such as educating the population and maintaining the welfare of its students.

Student Work—Articles, Notes, and Comments

Yoder Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned, 97 Va. L. Rev. 681 (2011). This note analyzes the 1972 Supreme Court ruling in *Wisconsin v. Yoder*, which allowed Amish students to be partially exempt from Wisconsin's compulsory education laws. The author argues that the Court should overturn *Yoder* for the following reasons: (1) it relied on factual assumptions that are no longer true; (2) the Amish can send their children to private Amish schools; (3) the Amish no longer focus on agricultural training; (4) the Amish have become less agricultural as secondary education has increased in importance and since child labor laws have reduced the options of Amish children. The author also concludes that the Amish have used the exemption from compulsory education to prevent children from defecting to secular life.

H.B. 190: Policing School Districts, but at What Expense?, 36 U. Dayton L. Rev. 249 (2011). This comment examines an Ohio law enacted to expand the number and types of background checks that must be performed for educational employees. The author states that individuals, apparently even those previously hired, must be terminated if they have committed certain offenses, and some offenses, including drug offenses, cannot be rehabilitated under the law. The author examines a case testing the law, which held that the law did not violate the U.S. Constitution's Contracts Clause and was not unconstitutionally retroactive. The author argues that the case was wrongly decided on legal grounds, and that the public policy of the state is promoted by a repeal of this law, as it unjustly affects employees that have been contributors to the educational system.

The Four-Week Challenge: Student Mothers, Maternity Leaves, and Pregnancy-Based Sex Discrimination, 4 Alb. Govt. L. Rev 538 (2011). This note argues that Title IX should be read to require that high schools offer at least four weeks of maternity leave to teenage mothers. The author cites child developmental issues, like psychological bonding, and maternal health as pressing reasons to accommodate teen mothers. The author further suggests that failing to offer minimal maternity leave can result in the violation of civil rights laws and structural gender discrimination.

Eliminating the Use of Restraint and Seclusion against Students with Disabilities, 16 Tex. J. on Civ. Liberties & Civ. Rights 189 (2011). This note examines the use of restraint and seclusion on students with disabilities, and advocates abolishment of such practices in American schools. The author argues that, despite the enactment of the Keeping Students Safe Act in 2010, students with disabilities are still at risk from these harmful practices, and though a good first step, students are still subject to the same risk of bodily harm and, in some cases, have less constitutional recourse. The author concludes that states must abolish restraint and seclusion practices and replace them with positive support plans and de-escalation techniques.

Privileges and Immunities, Public Education, and the Case for Public School Choice, 79 Geo. Wash. L. Rev. 1103 (2011). This article first states that interdistrict and intradistrict transfer policies are ineffective in giving students the opportunity to move from failing schools to success-

ful schools. The author argues that a student who lives in any state should be entitled to attend a public school in an adjacent state, so long as the student pays the receiving district for the cost of her education, and that this type of interstate transfer policy will lead to states offering effective interdistrict and intradistrict transfer policies that will universally improve the quality of public schools.

Stagnant Magnet Schools—An Un-compelling Use of Race-Conscious Policy, 6 Fla. A & M U. L. Rev. 163 (2010). Marking the 40th anniversary of the Supreme Court's decision in *Sweatt v. Painter*, this note examines the history of desegregation in one southeast Texas community, and questions whether the district's use of magnet schools remains a viable method of achieving diversity. The note describes *Sweatt* as a forerunner to *Brown v. Board of Education* and other cases striking down the separate-but-equal doctrine, where *Sweatt* involved a black student's ultimately successful effort to gain admission to the all-white University of Texas Law School. The author points to changes in community demographics and school leadership in the decades following *Sweatt*, and questions whether the magnet schools organized in an early attempt at integration advance the constitutional rights of students to equal educational opportunities. The note suggests that magnet schools driven by predominantly race-conscious policies deplete funding and may even defeat the educational goals they were designed to further.

The Future of the Equal Educational Opportunities Act § 1703(F) After Horne v. Flores*: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity,* 14 Harv. Latino. L. Rev. 211 (Spring 2011). This comment discusses the problems faced by English Language Learner (ELL) students in public schools. The comment suggests that the appropriate route to correct these problems is by using a No Child Left Behind (NCLB) standard to apply a private right of action under the Equal Education Opportunity Act (EEOA). Additionally, the comment provides arguments against objections to and counterarguments for using a NCLB standard. The comment concludes by advocating a new definition of "appropriate action" required by the EEOA to remove language barriers for ELL students.

How to Regulate Homeschooling: Why History Supports the Theory of Parental Choice, 2011 U. Ill. L Rev. 1061 (2011). This note discusses issues relating to homeschooling regulation. First, the author discusses the history of public education and the introduction of homeschooling. Based upon the historical underpinnings of parental choice, the note acknowledges the need for limited regulation of homeschooling education. The note concludes by advocating an objective standard of judging the sufficiency of the home-school education without impeding upon a parents' choice of methods.

CASENOTES

American Civ. Liberties Union v. Miami-Dade Co. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009), *cert. denied, 130 S. Ct. 659 (2009),* 56 Vill. L. Rev. 97. (School Libraries and the First Amendment).

Morse v. Frederick, 551 U.S. 393 (2007), 32 Whittier L. Rev. 509. (School Discipline and First Amendment).

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), 5 Liberty U. L. Rev. 303. (School Discipline and First Amendment).

BOOK REVIEWS

Paul Brickner, *Book Review*, 4. Alb. Govt. L. Rev. 507 (2011) (reviewing Melvin I. Urofsky, *Louis D. Brandeis: A Life.*) This review highlights the importance of Dr. Urofsky's recent biography of Justice Brandeis, whose contributions to free speech rights and privacy protections have made lasting impressions on American constitutional law. The review suggests, however, that some of Brandeis's personal and judicial failings may have been downplayed by Urofsky. The reviewer further compares Urofsky's biography with those of Alpheus T. Mason and Thomas K. McCraw, noting the comparative strengths of each author.

SYMPOSIUM

Symposium: *Education Reform in the 21st Century.* 20 Kan. J.L. & Pub. Pol'y 351-451 (2011). Derrick Darby, Richard E. Levy, *Slaying the*

Inequality Villain in School Finance: Is the Right to Education a Silver Bullet?, 20 Kan. J.L. & Pub. Pol'y, 351-387 (2011). Julian Vasquez Heilig, Heather A. Cole and Marilyn A. Springel, *Alternative Certification and Teach for America: The Search for High Quality Teachers,* 20 Kan. J.L. & Pub. Pol'y 388-412 (2011). Michele S. Moses. *Race, Affirmative Action, and Equality of Educational Opportunity in a so-called "Post-Racial" America,* 20 Kan. J.L. & Pub. Pol'y 413-427 (2011). Argun Saatcioglu, Aarti Bajaj and Michial Schuumacher, *Parental Expectations and Satisfaction with Charter Schools Evidence from a Midwestern City School District,* 20 Kan. J.L. & Pub. Pol'y 428-451 (2011). *The Director of National Intelligence and congressional oversight of the intelligence community: much needed clarifications and necessary institutional reforms.* 20 Kan. J.L. & Pub. Pol'y 452-476 (2011).

UNIVERSITIES AND OTHER INSTITUTIONS OF HIGHER LEARNING

Articles

John Garvey, *Intellect and Virtue: The Idea of a Catholic University*, 60 Cath. U. L. Rev. 563 (2011). In this address, the president of the Catholic University of America assesses the distinctive place of Catholic colleges in academia, and argues that Catholic colleges are poised to create a serious Catholic intellectual culture. The author sees this culture as being centered upon the essential connectedness of intellectual pursuits and the creation of virtuous character. The author examines historical ideas related to the pursuit of knowledge and its relation to virtue, and explores the ability of Catholic virtue theory to direct intellectual pursuits, concluding that a Catholic University is the perfect institution for expressing such ideals. The author reasons that learning virtue and knowledge can be aided by group interaction, by the presence of God through the celebration of sacrament, and in the well-rounded collegiate experience provided by Catholic campus organizations

William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. Econ. & Pol'y 485 (2011). The author examines the rising costs of higher education tuition and the increasing availability of

student loans to finance it. The author compares tuition inflation and loan availability to the recent bubble in the housing market. He next argues that the political response of increasing the money supply in the student loan market only exacerbates the problem of rising prices. Finally, the author presents potential solutions to America's rising tuition problem including means testing, tuition caps, progressive tuition rates, and expansion and mergers. The author argues that the current market forces and political response in the higher education loan market, if allowed to continue unaddressed, could lead to consequences as disastrous as those felt from the housing bubble.

Uri Abt, *Constitutional Academic Freedom and Anti-Affirmative Action Laws*, 37 J.C. & U.L. 609 (2011). The author examines the First Amendment and the Supreme Court's line of academic freedom cases to see if the First Amendment includes or supports a right of academic freedom. The author also examines whether a constitutionally protected right of academic freedom, if it exists, protects college and university admissions from state anti-affirmative action laws. Finally the author examines whether a right of academic freedom, if it exists, protects the faculty, students, or institution, or whether it merely protects the academic endeavor itself and thus protects individual actors only insofar as they are furthering that endeavor. The author's interpretation is that there is a constitutionally protected right of academic freedom that should serve to protect colleges and universities from state anti-affirmative action law.

Zachary R. Cormier, Christian Legal Society v. Martinez*: The Death Knell of Associational Freedom on the College Campus*, 17 Tex. Wesleyan L.Rev. 287 (2011). The author analyzes and critiques the Supreme Court decision in *Christian Legal Society v. Martinez*. The Court held that a public university may condition official recognition of a student group, and subsequently the use of university funds and facilities, on the group's agreement to open eligibility for membership to all students. The author argues, drawing support from Justice Alito's dissenting opinion, that this holding erodes the Constitutional right of freedom of association and the public university will no longer be a place where students can freely form or express their ideas.

Deborah J. Anthony, *Tradition, Conflict, and Progress: A Closer Look at Childbirth and Parental Leave Policy on University Campuses*, 12 Geo.

J. Gender & L. 91 (2011). This article examines maternity leave for university faculty members and concludes that many policies fail to satisfy the needs of women educators and fails to comply with applicable employment laws. The author argues that the cost of implementing maternity leave is far less than the combined costs of litigating employment discrimination cases and the public relations problems that such controversies cause. The author concludes that far too many institutions are in violation of Title IX, Title VII of the Civil Rights Act, the Pregnancy Discrimination Act and the Family and Medical Leave Act.

Denise Oas, *Immigration and Higher Education: The Debate over In-State Tuition*, 79 UMKC L. Rev 877 (2011). This article analyzes federal legislation seeking to bar states from giving in-state tuition to illegal aliens. The author examines state laws that attempt to circumvent the federal legislation and legislation that would close loopholes in the current laws. The author examines the experiences of states in educating illegal immigrants and concludes in favor of legislation that requires fairness to legal U.S. citizens.

Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. N.H. L. Rev. 443 (2011). This article examines the discrepancy between the disciplinary proceedings of public and private universities. Students at public colleges or universities are entitled to constitutional due process in disciplinary hearings, while private universities are held only to a "fundamental fairness" standard. The author notes that courts routinely afford varying levels of discretion to private institutions depending on the surrounding circumstances, obscuring the requirements of fundamental fairness. The author recommends several measures to ensure fundamental fairness in disciplinary proceedings, including distributing the disciplinary procedures to students; notifying the accused of all charges and evidence relating to the proceedings; and permitting the accused the assistance of faculty counsel.

Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?*, 37 J.C. & U.L. 491 (2011). This article introduces the "mismatch hypothesis," a theory that a student whose grade point average and test scores fall below the

school's average will learn less than the student would have learned had the student attended a school better correlated with the student's grade point average and test scores. The author points out several studies that claim that this phenomenon has particular significance in a law school setting; they have been cited by opponents of affirmative action as evidence that law schools should move towards a strictly meritorious selection process. The authors disagree with this position and point out that the results of the studies conducted on the mismatch hypothesis are inconclusive and should not be viewed as accurate indicators of the success of affirmative action.

Mary Ann Connell, Kerry Brian Melear & Frederick G. Savage, *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C. & U.L. 529 (2011). This article discusses the concept of collegiality and how it is being utilized to carry out employment decisions for teachers and professors in tenure track positions. The article notes that some favor the use of collegiality as a distinct basis for making employment decisions, while others are opposed. The article illustrates that courts overwhelmingly uphold collegiality as a basis for making employment decisions in the college and university setting, and these decisions put teachers and professors on notice that collegiality will become a part of their performance evaluation.

Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 Charleston L. Rev. 333 (2011). This article begins by discussing the effect that digital communication, such as email and social media websites, has had on university student's freedom of expression rights. The authors conclude that, as speech becomes more public on account of digital communication, speech that has been traditionally protected under the First Amendment is now being punished by universities. The authors claim that many university policies regarding digital communication are overbroad and unconstitutional. The article concludes that we should allow social expectations to evolve to accommodate speech that is becoming increasingly public, and in so doing, we may ease the tension on many university campuses caused by digital communication.

Paul C. Sarahan & Greg King, *University Nano Labs: Assessing and Minimizing Environmental, Health, and Safety Risks*, 37 J.C. & U.L.

589. This article discusses nanotechnology, the science of the very small, and the growth that the field is experiencing on account of a vigorous national interest in finding alternative energy sources. The article points out that a sizeable share of nanotechnology research is being conducted in university laboratories, and discusses some potential liability related to this research. Many are beginning to question whether these experiments present a risk to those who come in contact with nanoscale materials. The authors encourage universities to assess nanomaterial operations on an ongoing basis to ensure that proper protocols are in place. The article also details a process for conducting this assessment that will ensure the unique risks of nanomaterials are being identified and addressed.

Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 Geo. Mason U. Civ. Rights L.J. 349 (2011). This article proposes a system designed to both protect the free-expression rights of student groups sponsoring controversial speakers on campus and fairly reimburse universities for increased security costs associated with divisive speech. The author proposes a content-neutral policy for determining what constitutes a reasonable security fee and by whom it should be paid. The author suggests that the criteria would include such content-neutral factors as audience size, layout of the forum and whether admission is charged. Revisions of current policies are warranted to prevent the administrators having "unbridled discretion" that may lead to censorship, and to preserve the rights of student groups to host unpopular speakers.

Menahem Pasternak, *Employment Discrimination: Some Economic Definitions, Critique and Legal Implications*, 33 N.C. C. L. Rev. 163 (2011). This article seeks to broaden the definition of employment discrimination beyond the traditional notion of pay disparity based upon membership in a protected class, and uses microeconomic theory to distinguish between genuine discrimination and other causes of market failure. The author notes that differing wages among workers of equal productivity can be a result of misinformation that harms competition and profits, and leads ultimately to inefficiency in the marketplace. The author argues that a more comprehensive definition is needed to ferret out cases of discrimination that might have gone undetected under a tra-

ditional analysis. The proposed definition would show that some workers who appear to be paid differently due to differences in productivity are actually victims of discrimination attributable to barriers to professional entrance and mobility, governmental bureaucracy, unionization, taxation and imbalanced supply and demand.

STUDENT WORK—ARTICLES, NOTES, and COMMENTS

Bucking Grutter: Why Critical Mass Should Be Thrown Off the Affirmative-Action Horse, 16 Tex. J. on Civ. Liberties & Civ. Rights 233 (2011). This note examines "critical mass," which has become a cornerstone expression in affirmative action cases. The author describes the origins of the term and its use in the legal community. Particularly, the author argues that the Court's failure to appropriately analyze the empirical data in *Grutter v. Bollinger* has made "critical mass" an illusory, rather than a practical, tool in affirmative action discussions.

The Problems With Payouts: Assessing the Proposal for A Mandatory Distribution Requirement for University Endowments, 48 Harv. J. on Legis. 591 (2011). This note focuses on recent lawmaker proposals to mandate that wealthy colleges and universities make annual payments from their endowments. The author provides a basic framework of university endowments and the genesis of these proposals in the recent economic crisis, contending that mandatory payout proposals would not increase financial aid to students or tuition affordability as many believed; rather, a mandatory payout would start an "academic arms race," infringing on university autonomy and decreasing available need-based aid to lower and middle-income students.

University-Funded Discrimination: Unresolved Issues After the Supreme Court's "Resolution" of the Circuit Split on University Funding for Discriminatory Organizations, 96 Iowa L. Rev. 1767(2011). This note details the United States Supreme Court's recent decision, *Christian Legal Society v. Martinez,* regarding university anti-discrimination policies and student organization funding. The note discusses the interplay between students' First Amendment rights to free speech and freedom of association with universities' interest in protect-

ing students in protected classes from discrimination. The note then discusses the opposing positions between the federal circuit courts and how the split was not fixed by the Supreme Court's recent decision on the matter. Additionally, the note covers how these non-discrimination policies are constitutional in light of the First Amendment. Furthermore, the note concludes by advocating the lower courts hold anti-discrimination policies constitutional.

Casenotes

Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368 (S.D. Ga. 2010), 62 Mercer L. Rev. 1011. (Gay Rights).

Fisher v. U. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), 63 Me. L. Rev. 569. (Race in Admissions Policies).

Symposium

Symposium: *Violence on Campus: Students Who Are a Danger to Self or Others and Appropriate Institutional Responses*, 17 Wash. & Lee J. C.R. & Soc. Just., 1-183 (2010). Ann MacLean Massie, *Symposium: Introductions*, 17 Wash. & Lee J. C.R. & Soc. Just., 1-11 (2010). Gary Pavela, *College Suicide: A Law and Policy Perspective*, 17 Wash. & Lee J. C.R. & Soc. Just., 13-28 (2010). Daryl J. Lapp, *The Duty Paradox: Getting it Right After a Decade of Litigation Involving the Risk of Student Suicide*, 17 Wash. & Lee J. C.R. & Soc. Just. 29-58 (2010). Eileen P. Ryan, *What Psychiatry, Developmental Psychology, and Neuroscience Can Teach us about At-Risk Students*, 17 Wash. & Lee J. C.R. & Soc. Just., 59-78 (2010). Ann P. Haas, *Detecting and Engaging At-Risk Students*, 17 Wash. & Lee J. C.R. & Soc. Just., 79-91 (2010). Lucinda Roy, *Insights Gleaned from the Tragedy of Virginia Tech.*, 17 Wash. & Lee J. C.R. & Soc. Just., 93-123 (2010). "Bela" Aradhana Sood, M.D. *What the Governor's Panel Learned.* 17 Wash. & Lee J. C.R. & Soc. Just., 125-139 (2010). Richard Brusca and Colin Ram, *A Failure to Communicate: Did Privacy Law Contribute to the Virginia Tech Tragedy?*, 17 Wash. & Lee J. C.R. & Soc. Just., 141-168 (2010). Donald Challis, *Appropriate Response of Campus Security Forces*. 17 Wash. & Lee J. C.R. & Soc. Just., 169-183 (2010).