

# DECIPHERING THE SUPREMACY OF FEDERAL FUNDING CONDITIONS: WHY STATE OPEN RECORDS LAWS MUST YIELD TO FERPA

**Abstract:** The Family Educational Rights and Privacy Act (FERPA) requires that universities receiving federal funds through the U.S. Department of Education maintain baseline student privacy protections. Simultaneously, state open records laws require public universities, as state actors, to disclose certain types of information upon a request from the public. When both statutes apply to requested information, courts have reached opposite results as to the universities' obligations. Some have concluded that the records must remain private because of FERPA. Others have concluded that the state open records law requires disclosure regardless, because FERPA is merely a funding condition and not a federal prohibition. This Note proposes a framework for more uniformly resolving the relationship between FERPA and state open records laws. It argues that FERPA is a valid federal conditional funding statute under the current unconstitutional conditions doctrine. As a result, the Supremacy Clause must dictate the outcome when FERPA and a state open records law conflict. Therefore, when a state open records law would require disclosure of information protected by FERPA, FERPA must trump the contradictory state law requirements as a binding federal law.

## INTRODUCTION

In May 2009, the *Chicago Tribune* ran a series, "Clout Goes to College," in which it revealed the existence of a list of well-connected applicants maintained by the University of Illinois Urbana-Champaign.<sup>1</sup> Some of the prospective students on the list were admitted to the university despite poor academic qualifications.<sup>2</sup> "Category I," the University of Illinois's private ranking system for applicants with connections to high-powered politicians and other wealthy influencers, had been a well-kept secret, known only to those who benefitted from it and those

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<sup>1</sup> Jodi S. Cohen et al., *Clout Goes to College*, CHI. TRIB., May 29, 2009, § 1, at 1. The *Tribune* publishes regular updates to this story online. See *Watchdog*, CHI. TRIB., <http://www.chicagotribune.com/news/watchdog/college/> (last visited May 13, 2012).

<sup>2</sup> Cohen et al., *supra* note 1.

within the admissions office, many of whom resisted it.<sup>3</sup> Outrage ensued throughout the state upon the revelation that a public university was engaging in practices typical of the most elite private universities.<sup>4</sup> In response, the university formed a task force to review its admissions practices.<sup>5</sup> By October, the university had new policies “aimed at keeping clout out of admissions.”<sup>6</sup>

To gain access to the information needed to expose this scandal, the *Tribune* filed requests under Illinois’s Freedom of Information Act, which permits members of the public to inspect the records of state entities.<sup>7</sup> Through these requests, the *Tribune* received over 1800 pages of documents.<sup>8</sup> These documents redacted student names, grades, test scores, and other information which the *Tribune* believed was critical to revealing the extent of the scandal.<sup>9</sup> Nonetheless, the *Tribune*’s exposé hit hard; the university’s president and nearly every trustee resigned following the revelation of the clout list.<sup>10</sup> Despite the success of the initial series, the *Tribune* persisted in seeking access to the names and records of current students who benefitted from the list.<sup>11</sup> In response to the *Tribune*’s continued requests, the university claimed that it was prohibited from disclosing that information by the Family Educational Rights and Privacy Act of 1974 (FERPA), a federal statute conditioning the receipt of federal funds on universities’ compliance with baseline student privacy protections.<sup>12</sup>

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.* (quoting a college counselor who said, “This is not a private institution. This is yours and mine. Our flagship state university should not be a part of any political shenanigans.”); Jodi S. Cohen, *No-Clout Rules Get 1st Test at U. of I.*, CHI. TRIB., Oct. 29, 2009, § 1, at 1.

<sup>5</sup> Cohen, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> Cohen et al., *supra* note 1; see 5 ILL. COMP. STAT. ANN. 140/3(a) (West Supp. 2011).

<sup>8</sup> Cohen et al., *supra* note 1.

<sup>9</sup> See *id.*

<sup>10</sup> See Cohen, *supra* note 4; Tara Malone, *Two U. of I. Trustees Still Ignore Quinn’s Call for Resignations*, CHI. TRIB., Aug. 23, 2009, <http://www.chicagotribune.com/news/local/chiquinn-trustee-22-aug23,0,2541140.story>. Additionally, former Illinois governor Rod Blagojevich’s own impeachment likely included investigation into his involvement with the clout list. Tara Malone et al., *Blagojevich’s Role Probed as Panel Queries U. of I. Trustees*, CHI. TRIB., July 15, 2009, § 1, at 1.

<sup>11</sup> See Brief of Appellant at 5, *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672 (7th Cir. 2011) (No. 11-2066) [hereinafter Ill. Appellant Brief].

<sup>12</sup> *Id.* Universities often cite FERPA to avoid disclosing requested information. See Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1061.

FERPA is one of many federal statutes regulating the higher education sector through Congress's power to attach conditions to its spending.<sup>13</sup> By placing conditions on the receipt of federal funds, Congress may use the carrot of federal funding to achieve federal policy goals in areas traditionally of state concern, like education.<sup>14</sup> Such efforts are invariably successful because most universities, including public universities, depend on federal funds in the form of student financial aid, research grants, and other financial resources to survive.<sup>15</sup>

In addition, state legislatures also regulate the education sector, in particular by placing obligations on public universities.<sup>16</sup> At times, state laws seeking to achieve local policy goals place requirements on public

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<sup>13</sup> See LEO H. BRADLEY, *SCHOOL LAW FOR PUBLIC, PRIVATE, AND PAROCHIAL EDUCATORS* 13 (2005); WILLIAM A. KAPLIN & BARBARA A. LEE, *A LEGAL GUIDE FOR STUDENT AFFAIRS PROFESSIONALS* 673–74 (2d ed. 2009); STEPHEN B. THOMAS ET AL., *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 12–15 (6th ed. 2009). Article I, section 8 of the U.S. Constitution states, "Congress shall have Power To . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8. In 1936, in *United States v. Butler*, the U.S. Supreme Court held that Congress may use this power to spend federal funds broadly. See 297 U.S. 1, 66 (1936). Other federal statutes placing funding conditions on universities include Title IX of the Educational Amendments of 1972, section 504 of the Americans with Disabilities Act, Title VI of the Civil Rights Act of 1964, and the Higher Education Opportunity Act of 2008. See KAPLIN & LEE, *supra*, at 725; Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 649, 650–51 (2010).

<sup>14</sup> See BRADLEY, *supra* note 13, at 13, 17; Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under F.E.R.P.A.*, 149 EDUC. L. REP. 283, 297 n.57 (2001); see also David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 SAN DIEGO L. REV. 496, 535 (2007) ("Congress today probably directs more human behavior by conditions accompanying federal funding than by any exercise of its legislative powers."). Numerous scholars have noted that Congress has often used its spending power to achieve regulations that would be impermissible under Congress's other powers. See John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 64 (2001); Neil S. Siegel, *Dole's Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165, 167–68 (2008); William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 EDUC. L. REP. 951, 977 (2000).

<sup>15</sup> See DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 143 (2003); Baker, *supra* note 14, at 298; see also KAPLIN & LEE, *supra* note 13, at 722–25 (describing types of federal funds for universities). See generally ASS'N OF PUB. & LAND-GRANT UNIVS., *ENSURING PUBLIC RESEARCH UNIVERSITIES REMAIN VITAL: A REPORT TO THE MEMBERSHIP ON THE RESEARCH UNIVERSITY REGIONAL DELIBERATIONS* (2010) [hereinafter RESEARCH UNIVERSITIES], available at <http://www.education.virginia.gov/initiatives/highereducation/EnsuringPublicResearchUniversitiesRemainStrong.pdf> (calling for improved federal-state financial partnerships to sustain public universities); NAT'L CONFERENCE ON STATE LEGISLATURES FISCAL AFFAIRS PROGRAM, *STATE FUNDING FOR HIGHER EDUCATION IN FY 2009 AND FY 2010* (2010), available at <http://www.ncsl.org/documents/fiscal/HigherEdFundingFINAL.pdf> (demonstrating that states increasingly rely on federal funds to support public universities).

<sup>16</sup> See KAPLIN & LEE, *supra* note 13, at 13, 648, 657.

universities that conflict with those attached to federal funding.<sup>17</sup> This conflict is particularly vivid in the case of FERPA and state open records laws.<sup>18</sup> Open records laws often require public universities, as state actors, to make many of their records available to the public upon request.<sup>19</sup> As a result, when university officials receive an open records request that would require disclosure of particular students' identities, they must weigh their obligations as federal fund recipients against their legal duties under state law.<sup>20</sup>

When asked to help universities resolve this conflict, courts have taken divergent approaches.<sup>21</sup> In 2002, in *United States v. Miami University*, the U.S. Court of Appeals for the Sixth Circuit held that Miami University did not need to disclose student disciplinary records requested by the *Chronicle of Higher Education*, because FERPA's privacy requirements were exempt from the state open records law.<sup>22</sup> But in 2011, in *Chicago Tribune Co. v. University of Illinois Board of Trustees*, the U.S. District Court for the Northern District of Illinois held that FERPA does not prohibit the University of Illinois from disclosing personally identifiable information about students on its clout list to the *Chicago Tribune* under the state open records law.<sup>23</sup>

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<sup>17</sup> See Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 92, 113 (2008).

<sup>18</sup> See *id.*

<sup>19</sup> See KAPLIN & LEE, *supra* note 13, at 661; Daggett, *supra* note 17, at 97.

<sup>20</sup> See Ill. Appellant Brief, *supra* note 11, at 11. Scholars have criticized FERPA for enabling universities to hide scandalous information under the guise of protecting student privacy. See Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1556–57 (2012) (“The goal is nondisclosure. The chorus is student privacy. The tool: the FERPA defense.”); Salzwedel & Ericson, *supra* note 12, at 1112 (“It is sadly ironic that institutions whose reason for being is to search for truth are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment [FERPA].”). But at least one scholar has argued that FERPA and state open records laws are easily reconcilable by simply releasing segregated, redacted student data. See Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to “De-Identified” Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 185, 196 (2009). Nonetheless, universities face frequent requests from news outlets for nonredacted information, such as for the grades of the members of an athletic team. See Salzwedel & Ericson, *supra* note 12, at 1054–56.

<sup>21</sup> Compare *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672, 676–77 (N.D. Ill. 2011) (holding that FERPA requirements do not excuse a university from state open records law requirements), *argued*, No. 11-2066 (7th Cir. Sept. 30, 2011), with *United States v. Miami Univ.*, 294 F.3d 797, 804, 811 (6th Cir. 2002) (holding that FERPA requirements prohibit disclosure under state open records law).

<sup>22</sup> 294 F.3d at 804, 811. The United States, on behalf of the U.S. Department of Education (the “Department”), had requested an injunction to prohibit Miami University from releasing the records. See *id.* at 804.

<sup>23</sup> 781 F. Supp. 2d at 676–77.

Although numerous education law scholars have noted the conflict between FERPA and state open records laws, none have yet explored this conflict in light of the significant power of conditional funding statutes to displace state law under the Supremacy Clause.<sup>24</sup> This Note fills that gap by examining when Congress permissibly may use its power to place conditions on federal spending to influence the behavior of educational institutions, even to the extent of displacing state law.<sup>25</sup>

This Note argues that courts reviewing conflicts between FERPA and state open records laws have failed to employ the unconstitutional conditions doctrine—the appropriate analytical framework to resolve the conflict—and as a result have reached vastly different outcomes on similar facts.<sup>26</sup> Relying predominantly on an assessment of how critical federal funds are to a university, some courts have identified FERPA as an applicable federal law whose requirements must either displace or be exempt from state law.<sup>27</sup> Meanwhile, others have interpreted FERPA as a contractual agreement whose terms must cede to state law.<sup>28</sup> This Note argues that FERPA should be recognized as a binding federal law not because universities could not survive without federal funds or because it represents good policy, but because FERPA is a valid conditional funding statute whose terms a federal fund recipient has accepted.<sup>29</sup> Therefore, when assessing conflicts between FERPA and state open records laws, courts should utilize the unconstitutional conditions doctrine, stemming from the U.S. Supreme Court’s 1987 decision in *South Dakota v. Dole*, to determine whether FERPA is a constitutional use of Congress’s spending power.<sup>30</sup> If a court concludes that it is, as nearly every court will under the current doctrine, then FERPA must fall within an exemp-

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<sup>24</sup> See KAPLIN & LEE, *supra* note 13, at 273; Baker, *supra* note 14, at 283, 297 n.57; Daggett, *supra* note 17, at 92, 113.

<sup>25</sup> See *infra* notes 32–44 and accompanying text. Underlying this question is an exploration of the extent to which the federal government’s policy goals in areas of traditional state concern may displace state goals through the carrot of federal funding. See Lynn A. Baker, *Conditional Federal Spending and States’ Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 104, 105 (2001) (arguing that Congress’s spending power and ability to place conditions on funds presents “the greatest threat to autonomy”).

<sup>26</sup> See *supra* note 21.

<sup>27</sup> See, e.g., *Miami Univ.*, 294 F.3d at 804, 811 (concluding that FERPA prohibits certain disclosures, and holding that the records at issue could not be disclosed because the Ohio Public Records Act’s “federal law” exemption includes FERPA).

<sup>28</sup> See, e.g., *Bauer v. Kincaid*, 759 F. Supp. 575, 587, 589 (W.D. Mo. 1991) (concluding that FERPA imposes a penalty for, but does not prohibit, disclosure and holding that FERPA does not fall within the Missouri Sunshine Law’s “federal law” exemption).

<sup>29</sup> See *infra* notes 30–285 and accompanying text.

<sup>30</sup> See *infra* notes 290–298 and accompanying text.

tion to the state open records law, or else, pursuant to the Supremacy Clause, displace the state law to the extent of the conflict.<sup>31</sup>

Part I of this Note provides an overview of the purpose, scope, and terms of FERPA and state open records laws.<sup>32</sup> Part II examines the interaction of FERPA and state open records laws in cases brought in both state and federal courts, showing that courts are split on how to resolve the conflict.<sup>33</sup> Part II further illustrates the variety of approaches courts use to resolve the conflict.<sup>34</sup>

Part III introduces both the Supremacy Clause and the Spending Clause and examines their relationship.<sup>35</sup> It provides an overview of the *Dole* criteria and the unconstitutional conditions doctrine for assessing the constitutionality of conditions on federal funds.<sup>36</sup> It then briefly discusses scholarly perspectives on whether these criteria sufficiently preserve the federalism values underlying the division of federal and state power.<sup>37</sup> The Part concludes that, despite *Dole*'s flaws, the *Dole* criteria remain the predominant mechanism for determining whether a conditional funding statute is valid such that the Supremacy Clause may attach to it.<sup>38</sup>

Part IV returns to FERPA to conduct a brief analysis of its constitutionality using *Dole* and the unconstitutional conditions doctrine.<sup>39</sup> It identifies some areas of concern, particularly regarding the question of state consent to federal funding conditions.<sup>40</sup> But Part IV ultimately concludes that in most states, FERPA will meet the *Dole* criteria for a valid conditional funding statute.<sup>41</sup> Finally, based on the findings of Part IV, Part V suggests an analytical framework for courts reviewing conflicts between FERPA and state open records laws.<sup>42</sup> It argues that courts should conduct a *Dole* analysis to recognize FERPA as binding law when its terms have been validly accepted.<sup>43</sup> This approach acknowledges Congress's authority to utilize its spending power to achieve certain behaviors and also ensures that states are actually consenting to waiving

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<sup>31</sup> See *infra* notes 299–301 and accompanying text.

<sup>32</sup> See *infra* notes 46–105 and accompanying text.

<sup>33</sup> See *infra* notes 106–154 and accompanying text.

<sup>34</sup> See *infra* notes 155–161 and accompanying text.

<sup>35</sup> See *infra* notes 162–227 and accompanying text.

<sup>36</sup> See *infra* notes 187–220 and accompanying text.

<sup>37</sup> See *infra* notes 221–225 and accompanying text.

<sup>38</sup> See *infra* notes 224–227 and accompanying text.

<sup>39</sup> See *infra* notes 228–285 and accompanying text.

<sup>40</sup> See *infra* notes 246–282 and accompanying text.

<sup>41</sup> See *infra* notes 283–285 and accompanying text.

<sup>42</sup> See *infra* notes 286–305 and accompanying text.

<sup>43</sup> See *infra* notes 290–305 and accompanying text.

the right to impose contrary regulations in exchange for receiving federal funds.<sup>44</sup> Thus, where FERPA survives the *Dole* test, it must either fall within an exemption to a state open records law or displace it, in accordance with the Supremacy Clause.<sup>45</sup>

## I. FERPA AND STATE OPEN RECORDS LAWS: COMPETING POLICIES

A significant tension arises between two core democratic concepts—individual privacy and the public’s right to know about the government’s activities—in the context of public universities.<sup>46</sup> Students’ records, which are maintained by public universities as state actors, contain grades, disciplinary proceeding reports, and an array of other information that a student or the university may desire to keep private.<sup>47</sup> These records often contain the very information that news media seek in order to expose questionable university practices or policies and to hold public universities accountable to the public.<sup>48</sup> Given these competing interests, states and the federal government have passed regulatory schemes that protect student privacy yet provide public access to the records of state actors.<sup>49</sup> This Part provides an overview of student record privacy protections, as embodied in FERPA, and the

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<sup>44</sup> See *infra* notes 302–305 and accompanying text.

<sup>45</sup> See *infra* notes 299–301 and accompanying text.

<sup>46</sup> See KAPLIN & LEE, *supra* note 13, at 273. The concept of privacy has long served as an important tenet in guiding the relationship between the private person and the public sphere, and particularly in limiting the scope of the government’s ability to compel the disclosure of personal information. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–97 (1890) (providing an early and influential discussion of the right to privacy at common law); see also Amitai Etzioni, *A Communitarian Perspective on Privacy*, 32 CONN. L. REV. 897, 897–99 (2000) (noting the article’s influence and describing the concept of informational privacy, or “exemption from scrutiny”). Additionally, freedom of information and the right to know about the government’s activities are also values central to a democratic society. See Peter Molnar, *The Paradox of Informed Participation: What Universities Can Do for Freedom of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 571, 571 (2009); Daxton R. “Chip” Stewart, *Let the Sunshine In, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL’Y 265, 265 (2010). If the government is truly to be accountable to the people, the people must be informed of what their government is doing. See HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 15–16 (1999); Stewart, *supra*, at 268.

<sup>47</sup> See Brief for Electronic Privacy Information Center (EPIC) as Amicus Curiae in Support of Appellant at 7–8, *Chicago Tribune*, 781 F. Supp. 2d 672 (7th Cir. 2011) (No. 11-2066) [hereinafter EPIC Brief]; Daggett, *supra* note 17, at 75.

<sup>48</sup> See Daggett, *supra* note 17, at 113. See generally *Reporter’s Guide to FERPA*, SOC’Y OF PROF. JOURNALISTS, <http://www.spj.org/ferpa.asp> (last visited May 13, 2012) (offering guidance to journalists seeking to gain access to information shielded by FERPA).

<sup>49</sup> See THOMAS ET AL., *supra* note 13, at 99–100.

right of access to the records of public entities, as granted by state open records laws.<sup>50</sup>

### A. FERPA

FERPA is one of many state and federal statutes regulating privacy by prohibiting the disclosure of personal information.<sup>51</sup> FERPA conditions receipt of federal funds upon a university's protection against disclosure of personally identifiable information in students' education records.<sup>52</sup> Congress enacted FERPA to protect student privacy in light of increasing concern about the use of student records, particularly at the postsecondary level.<sup>53</sup> Senator James Buckley, one of the authors of the Joint Statement in Explanation of the Buckley/Pell Amendment (the only official indication of legislative intent), was concerned about "systematic violations of the privacy of students . . . through . . . the unauthorized, inappropriate release of personal data."<sup>54</sup> To address this problem, Congress sought to establish a baseline of federal privacy protection, allowing the states to create additional protections if desired.<sup>55</sup>

Congress enacted FERPA pursuant to its power under the Spending Clause to spend for the general welfare and its accompanying authority to place conditions on the receipt of federal funds.<sup>56</sup> FERPA

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<sup>50</sup> See *infra* notes 51–105 and accompanying text.

<sup>51</sup> See Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141, 144–45 (2010). For example, the Privacy Act of 1974 limits federal agencies' collection and disclosure of personal information. See FOERSTEL, *supra* note 46, at 65.

<sup>52</sup> 20 U.S.C. § 1232g(b)(1) (2006 & Supp. IV 2010). FERPA states, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . . ) of students without [their] written consent." *Id.* § 1232g(b)(1). FERPA also grants students affirmative rights to inspect and request to amend their records. *Id.* § 1232g(a)(1)(A). The Department is responsible for promulgating regulations in furtherance of FERPA. See *id.* § 1232g(c).

<sup>53</sup> See Joint Statement in Explanation of Buckley/Pell Amendment, 120 CONG. REC. 39,862–63 (1974) [hereinafter Joint Statement]; Senator Buckley's Address Before the Legislative Conference of the National Congress of Parents and Teachers, 121 CONG. REC. 13,990–91 (1975) [hereinafter Buckley].

<sup>54</sup> Buckley, *supra* note 53, at 13,991. FERPA passed as an amendment on the floor and therefore lacks traditional legislative history to shed light on Congress's intent. See *Legislative History of Major FERPA Provisions*, U.S. DEPARTMENT OF EDUC., 1, <http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf> (last updated June 2002) [hereinafter *Legislative History*].

<sup>55</sup> See Joint Statement, *supra* note 53, at 39,863 (indicating that FERPA sets "a minimum Federal standard for record confidentiality and access").

<sup>56</sup> See U.S. CONST. art. I, § 8, cl. 1; *South Dakota v. Dole*, 483 U.S. 206–07 (1987).



thus applies to any “educational agency or institution” that receives federal funds from the U.S. Department of Education (the “Department”).<sup>57</sup> As a result, practically every public, private, and sectarian higher education institution in the United States meets this criterion.<sup>58</sup> This is because federal funds, in the form of grants and student financial aid, are essential to university operations.<sup>59</sup> In fact, even if only one student at a university receives federal financial assistance, the university as a whole is considered to receive federal funds for the purposes of FERPA and other federal education laws.<sup>60</sup>

FERPA applies to “education records,” which the Department defines as records “[d]irectly related to a student” and “[m]aintained by an educational agency or institution.”<sup>61</sup> At the postsecondary level, FERPA provides students with certain rights regarding the privacy and

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<sup>57</sup> 20 U.S.C. § 1232g(a)(1)(A) (conditioning funds on compliance); *id.* § 1232g(a)(3) (defining “educational agency or institution”).

<sup>58</sup> See BERNSTEIN, *supra* note 15, at 143; Baker, *supra* note 14, at 298. Given the high cost of maintaining a higher education institution and educating a student, it is nearly impossible for an institution, public or private, to survive without allowing students to offset the tuition costs with federal financial aid. See BERNSTEIN, *supra* note 15, at 143. Currently, it appears that there are only four private higher education institutions in the United States that do not receive federal funds and therefore are not bound by FERPA: Grove City College in Pennsylvania, Hillsdale College in Michigan, Patrick Henry College in Virginia, and Principia College in Illinois. See James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 988 n.188 (2011); *Financial Aid: Private Student Loans*, PATRICK HENRY C., [http://www.phc.edu/Private\\_Student\\_Loans.php](http://www.phc.edu/Private_Student_Loans.php) (last visited May 13, 2012); *Frequently Asked Questions*, PRINCIPIA C., <http://www.principiacollege.edu/admissions/financial-aid/faq> (last visited May 13, 2012).

<sup>59</sup> See EPIC Brief, *supra* note 47, at 13–16 (discussing the extent to which public universities rely upon federal funds); RESEARCH UNIVERSITIES, *supra* note 15, at 12–13, 15.

<sup>60</sup> See *Grove City Coll. v. Bell*, 465 U.S. 555, 575–76 (1984); BERNSTEIN, *supra* note 15, at 142–43.

<sup>61</sup> See 34 C.F.R. § 99.3 (2011). The precise definition of “education record” has been the subject of a Supreme Court case and numerous revisions to FERPA. See *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 430, 436 (2002); Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620–22 (1997). The regulations currently indicate six categories of information within “education records” that are not covered by FERPA: “sole possession” records, such as professor’s memory aids; law enforcement records; employment records, but not including those of students who are employees as a result of their student status; medical records; alumni records created after the individual is no longer a student; and grades on peer-graded assignments before a teacher collects and records them. 34 C.F.R. § 99.3; see *Owasso*, 534 U.S. at 430, 436 (holding that peer-graded assignments were not education records under FERPA and instigating a revision to the FERPA regulations).

disclosure of their education records.<sup>62</sup> First, FERPA prohibits the non-consensual disclosure of “personally identifiable information” contained in a student’s education record.<sup>63</sup> Second, in addition to limiting the disclosures an institution can make without student consent, FERPA gives students a number of affirmative rights regarding their educational records.<sup>64</sup> Students have the right to inspect and review their education records, to request amendment of records if they believe them to be inaccurate or otherwise to violate their rights under FERPA, to consent to disclosure of otherwise protected information, to file a complaint of an alleged FERPA violation with the Department, and to be notified annually by the institution of these rights.<sup>65</sup>

Despite these protections, FERPA allows educational institutions to disclose student information in a number of situations.<sup>66</sup> FERPA permits institutions to disclose anonymous information, often in the form of aggregate data, as long as the disclosure does not reveal any individual students’ identities.<sup>67</sup> Additionally, FERPA permits the disclosure of personally identifiable information without student consent when others have a need to know because of their professional capacities, such as other school officials who have a “legitimate educational interest,” government representatives, or individuals conducting institutional accreditation surveys.<sup>68</sup> FERPA also permits (but does not appear to require) disclosure for an institutional disciplinary proceeding or to comply with a court order or subpoena.<sup>69</sup> Further, after many amendments, FERPA now contains a number of exceptions to protect the safety of students

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<sup>62</sup> See 20 U.S.C. § 1232g(d) (2006 & Supp. IV 2010). FERPA grants the rights to parents of K–12 students, but transfers these rights to students upon turning eighteen or enrolling at a postsecondary institution. See *id.*

<sup>63</sup> See *id.* § 1232g(b)(1). An institution may release any information if it obtains the student’s prior written consent. See 34 C.F.R. § 99.30.

<sup>64</sup> See 20 U.S.C. § 1232g(a).

<sup>65</sup> 34 C.F.R. § 99.7; see 20 U.S.C. § 1232g(a)(1), (2).

<sup>66</sup> See 34 C.F.R. § 99.30 (permitting students to consent to disclosure); *id.* § 99.31; FERPA, 76 Fed. Reg. 75,641–42 (Dec. 2, 2011) (to be codified at 34 C.F.R. pt. 99.31) (describing permitted nonconsensual disclosures).

<sup>67</sup> See 34 C.F.R. § 99.31(b); Peltz, *supra* note 20, at 185, 196. Although such disclosures may redact traditional identifiers such as names and contact information, there remains the possibility that redacted records, on the whole, can nevertheless enable direct identification of a student. See CLIFFORD A. RAMIREZ, FERPA CLEAR AND SIMPLE: THE COLLEGE PROFESSIONAL’S GUIDE TO COMPLIANCE 35 (2009). As a result, the FERPA regulations indicate that an educational institution must “[make] a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” 34 C.F.R. § 99.31(b)(1).

<sup>68</sup> See 34 C.F.R. § 99.31(a); FERPA, 76 Fed. Reg. at 75,641–42.

<sup>69</sup> See 34 C.F.R. § 99.31(a)(9), (14).

and others on campus, including information regarding sexual assault disciplinary proceedings and other campus crime information.<sup>70</sup>

In addition to permitting disclosures in certain situations, FERPA allows the general disclosure of “directory information” on the grounds that the disclosure of such information does not constitute an invasion of privacy.<sup>71</sup> The FERPA regulations provide some examples of information that can be classified as directory information, such as name, address, photograph, enrollment status, birthday, and degrees earned, and indicate that Social Security numbers and certain other identification numbers cannot be classified as such.<sup>72</sup> But the regulations do not provide an exhaustive list of either category.<sup>73</sup> Institutions may determine what constitutes directory information and must publish their definitions in an annual notification.<sup>74</sup> Students may request that their directory information be withheld; otherwise directory information may be released without authorization.<sup>75</sup>

The Department is tasked with enforcing FERPA through its Family Policy Compliance Office (FPCO).<sup>76</sup> Although FERPA serves important individual privacy interests, it is enforceable only through agency action, not by the individuals whose information it protects.<sup>77</sup> In 2002, in *Gonzaga University v. Doe*, the Supreme Court held that there is no

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<sup>70</sup> See *id.* § 99.31(a) (10), (13), (16); KAPLIN & LEE, *supra* note 13, at 270–71. Numerous students and scholars have written about these disclosures, many of which were added to the FERPA regulations following incidents in which universities did not disclose students’ suicidal tendencies or the identity of potential sexual assault perpetrators, thereby compromising student safety. See generally Brusca & Ram, *supra* note 51 (assessing whether FERPA and other privacy laws prohibit university officials from reporting a student’s risk of harming himself and others to parents); Katrina Chapman, *A Preventable Tragedy at Virginia Tech: Why Confusion over FERPA’s Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349 (2009) (arguing that FERPA does not sufficiently accommodate the need for disclosure in emergency situations).

<sup>71</sup> See 34 C.F.R. §§ 99.31, 99.37; FERPA, 76 Fed. Reg. at 75,641–642 (“Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.”).

<sup>72</sup> See FERPA, 76 Fed. Reg. at 75,641.

<sup>73</sup> See *id.*

<sup>74</sup> See 34 C.F.R. § 99.37; RAMIREZ, *supra* note 67, at 49. Institutions are supposed to classify as directory information only that information which it deems necessary. See RAMIREZ, *supra* note 67, at 44–45. The Family Policy Compliance Office, which enforces FERPA, recommends that universities not include race, gender, nationality, and religious affiliation in their definition of directory information, but it is not expressly prohibited by the regulation. See *id.* at 50.

<sup>75</sup> See 34 C.F.R. § 99.37(b).

<sup>76</sup> See 20 U.S.C. § 1232g(c) (2006 & Supp. IV 2010); 34 C.F.R. §§ 99.60, 99.63.

<sup>77</sup> See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002); see also Daggett, *supra* note 17, at 64–65.

private right of action under FERPA.<sup>78</sup> Instead, individuals may file complaints with the FPCO, which investigates potential violations and enforces FERPA at its discretion.<sup>79</sup> Noncompliance may result in the withholding of federal funding, but the Department has never resorted to such measures.<sup>80</sup>

Despite the potentially significant penalties associated with non-compliance with FERPA, the statute and its regulations are ambiguous in places and remain open to universities' interpretations.<sup>81</sup> In many instances where FERPA is unclear the Department's regulations leave room for institutions to create their own definitions.<sup>82</sup> Further, the Supreme Court rarely has stepped in to help define FERPA's terms.<sup>83</sup> As a result, universities often struggle to understand their specific obligations under FERPA.<sup>84</sup>

### B. *State Open Records Laws*

Congress and state legislatures have enacted open records laws to promote government accountability by providing access upon request to government records.<sup>85</sup> The federal Freedom of Information Act

<sup>78</sup> See 536 U.S. at 290.

<sup>79</sup> See 34 C.F.R. §§ 99.60, 99.63.

<sup>80</sup> See 20 U.S.C. § 1232g(b) (indicating that "[n]o funds shall be made available under any applicable program to any educational agency or institution" if FERPA's terms are violated); RAMIREZ, *supra* note 67, at 24, 27 (acknowledging that the Department has never withheld funds for noncompliance but noting that the threat remains credible and fosters compliance).

<sup>81</sup> See Daggett, *supra* note 17, at 92; Salzwedel & Ericson, *supra* note 12, at 1066–67.

<sup>82</sup> See RAMIREZ, *supra* note 67, at 27. For example, the FERPA regulations define "student" as "an individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records." 34 C.F.R. § 99.3. Institutions may define for themselves when a student becomes "in attendance." See RAMIREZ, *supra* note 67, at 29–30. Further, who counts as a "student" has not been clearly defined for nontraditional student populations, for whom the "in attendance" requirement raises questions. See *Tarka v. Franklin*, 891 F.2d 102, 107 (5th Cir. 1989) (holding that a student who was denied admission to a university's graduate school but audited the university classes was not a "student" under FERPA); FERPA, CATHOLIC U. OF AM. GEN. COUNS.'S OFF., <http://counsel.cua.edu/ferpa/questions/index.cfm> (last updated July 6, 2010) (answers attributed to Steven J. McDonald, General Counsel of the Rhode Island School of Design).

<sup>83</sup> See Daggett, *supra* note 17, at 63–64.

<sup>84</sup> See *id.* at 112–13.

<sup>85</sup> See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a) (2006 & Supp. IV 2010) (requiring that "[e]ach agency . . . make available to the public information" as described by the statute); 5 ILL. COMP. STAT. ANN. 140/3 (West Supp. 2011) (requiring that "[e]ach public body . . . make available to any person for inspection or copying all public records," with some exceptions). Laws requiring disclosure of government records are known by many names. See Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public*

(FOIA), passed in 1966, seeks to foster governmental transparency and an informed democratic society by granting access to the records of federal agencies and entities to the public.<sup>86</sup> Similarly, state open records laws promote transparency and accountability by making government documents accessible for public inspection.<sup>87</sup> To achieve these ends, state open records laws often contain a presumption of openness—requiring the disclosure of records maintained by state entities upon request—and an instruction to construe the disclosure requirements liberally.<sup>88</sup> Further, in 1988 in *U.S. Department of Justice v. Julian*, the Supreme Court held that courts should construe FOIA exemptions narrowly.<sup>89</sup> Thus, most open records laws lean in favor of disclosure.<sup>90</sup>

Because they are state actors, public universities are usually bound by state open records laws.<sup>91</sup> This means that any interested party may submit a written request under the state open records law to the public university as a state agency.<sup>92</sup> Generally, the university must respond promptly to the request even if it believes the requested records fall within an exemption.<sup>93</sup> An agency or university often has significant

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*Schoolchildren*, 108 W. VA. L. REV. 361, 388 (2005) (noting the various terms used for such laws). In this Note, the term “open records laws” will refer to freedom of information acts, right-to-know laws, public records laws, and, in some instances, sunshine laws. *See id.*

<sup>86</sup> See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); Statement by the President Upon Signing the “Freedom of Information Act,” II PUB. PAPERS 699 (July 4, 1966).

<sup>87</sup> See Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65, 66 (1996) (noting that most state statutes closely resemble the federal FOIA). The Illinois Freedom of Information Act, for example, begins with the premise that “all persons are entitled to full and complete information regarding the affairs of government” in order “to ensure that it is being conducted in the public interest.” 5 ILL. COMP. STAT. ANN. 140/1. Such access “promotes the transparency and accountability of public bodies at all levels of government.” *Id.*

<sup>88</sup> See, e.g., 5 ILL. COMP. STAT. ANN. 140/1, 1.2; KAN. STAT. ANN. § 45-216 (2000); N.J. STAT. ANN. § 47:1A-1 (West 2003); TEX. GOV'T CODE ANN. § 552.001 (West 2004).

<sup>89</sup> See 486 U.S. 1, 8 (1988).

<sup>90</sup> See *id.*; Nowadzky, *supra* note 87, at 66.

<sup>91</sup> See KAPLIN & LEE, *supra* note 13, at 661. In some states, however, open records laws do not apply to public higher education institutions, because those states do not consider such institutions to be state agencies. *See id.* at 273.

<sup>92</sup> See, e.g., 5 ILL. COMP. STAT. ANN. 140/3(c) (West Supp. 2011); KAN. STAT. ANN. § 45-216 (declaring that “public records shall be open for inspection *by any person*” (emphasis added)).

<sup>93</sup> See, e.g., 5 ILL. COMP. STAT. ANN. 140/3(c), (d), (e) (requiring that the state agency reply to the request within five business days); KAN. STAT. ANN. § 45-218(d) (requiring agency reply “as soon as possible” and within three business days).

discretion as to whether to claim an applicable exemption or to disclose the requested information.<sup>94</sup>

Federal and state open records laws contain exemptions that recognize compelling policy concerns, such as individual privacy.<sup>95</sup> State open records laws are fairly consistent in their exemption of disclosures that would constitute an “unwarranted invasion of personal privacy.”<sup>96</sup> Further, most state open records laws empower or even require courts to balance the interests of access and privacy to determine whether a certain record may be disclosed.<sup>97</sup>

State laws vary significantly in how they address exemptions for student records, which present additional privacy concerns.<sup>98</sup> A number of state open records laws explicitly exempt student records.<sup>99</sup> Others exempt certain information that may appear in student records but do not exempt postsecondary student records generally.<sup>100</sup> In some

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<sup>94</sup> See ALAN CHARLES RAUL, *PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY* 27 (2002). The public entity seeking to claim an exemption carries the burden of proving the exemption’s applicability. See, e.g., 5 ILL. COMP. STAT. ANN. 140/1.2 (requiring Illinois public entities to prove exemption by clear and convincing evidence); LA. REV. STAT. ANN. § 44:31(3) (2007) (“The burden of proving that a public record is not subject to inspection, copying, or reproduction [rests] with the custodian [of the record].”); see also Nowadzky, *supra* note 87, at 66–69 & n.6 (providing additional state examples of agency burdens, both legislatively created and judicially imposed, of showing that exemption applies). But see MICH. COMP. LAWS ANN. § 15.243(1), (2) (West Supp. 2011) (providing a number of discretionary exemptions, but indicating a mandatory exemption for disclosures prohibited by FERPA).

<sup>95</sup> See Nowadzky, *supra* note 87, at 86, 90–91 (noting commonality of exemptions with two exceptions: Maryland, which delineates only two categories of confidential information and defers significantly to the particular agency, and New Jersey, which defers exceptions entirely to the executive and judicial branches). Common exemptions include medical and personnel records, library records, trade secrets, law enforcement records, internal affairs investigations, and records protected under attorney-client privilege. See *id.* at 86–89; see also RAUL, *supra* note 94, at 26–27 (explaining FOIA’s exemptions).

<sup>96</sup> E.g., CAL. GOV’T CODE § 6254(c) (West Supp. 2012); 5 ILL. COMP. STAT. ANN. 140/7(1)(c); KAN. STAT. ANN. § 45-221(30) (Supp. 2010); MICH. COMP. LAWS ANN. § 15.243(1)(a); VT. STAT. ANN. tit. 1, § 317(c)(12) (Supp. 2011).

<sup>97</sup> See Nowadzky, *supra* note 87, at 79.

<sup>98</sup> See Stuart, *supra* note 85, at 387–92. States also vary in whether they include student records within the definition of public records at all. Compare OHIO REV. CODE ANN. § 149.43(A)(1) (West Supp. 2011) (including records maintained by schools in the definition of public records), with N.J. STAT. ANN. § 47:1A-1.1 (West Supp. 2011) (excluding postsecondary student records from the definition of public records).

<sup>99</sup> See, e.g., TENN. CODE ANN. § 10-7-504(a)(4) (Supp. 2011); TEX. GOV’T CODE ANN. § 552.114 (West 2004); VT. STAT. ANN. tit. 1, § 317(c)(11).

<sup>100</sup> See, e.g., 5 ILL. COMP. STAT. ANN. 140/7(1)(j) (West Supp. 2011) (exempting exam information, faculty evaluation information from “academic peers,” faculty course and research materials, and student disciplinary adjudication information only if disclosure would reveal the student’s identity); LA. REV. STAT. ANN. § 44:4(16), (27) (West Supp. 2012) (exempting

states, education laws, rather than the state open records law, indicate that student records are exempt from disclosure requirements.<sup>101</sup> Further, some state open records laws specifically exempt disclosures that are otherwise prohibited by FERPA.<sup>102</sup> Absent an explicit exemption for FERPA, however, the significant variation in statutory language means that state open records laws' exemptions for student records may or may not align with FERPA's definitions and requirements.<sup>103</sup> Nonetheless, despite variation in treatment of student records, most state open records laws contain a catch-all exemption for those disclosures that are "otherwise prohibited" by another state or federal law.<sup>104</sup> Such exemptions are subject to judicial interpretation and frequently to an instruction to construe exemptions narrowly.<sup>105</sup>

## II. INCONSISTENT READINGS: COURTS' DIVERGENT APPROACHES TO RECONCILING FERPA AND STATE OPEN RECORDS LAWS

The tension between FERPA and state open records laws arises most often when a news outlet submits an open records request for student information from a university.<sup>106</sup> Often, the media want to know

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higher education institution's records regarding trade secrets, patentable research, private document collections donated for preservation, and exam information); KAN. STAT. ANN. § 45-221(9), (17), (23) (exempting exam information, student financial aid application information, and library records); MD. CODE ANN., STATE GOV'T § 10-616(k) (LexisNexis Supp. 2011) (exempting only certain information contained in student records).

<sup>101</sup> See, e.g., MISS. CODE ANN. § 37-15-3 (Supp. 2011); N.C. GEN. STAT. § 115C-402(c) (2011).

<sup>102</sup> See, e.g., ALASKA STAT. § 40.25.120(a)(5) (2010); ARK. CODE ANN. § 25-19-105(b)(2) (Supp. 2011); MICH. COMP. LAWS § 15.243(2) (West Supp. 2011).

<sup>103</sup> See Stuart, *supra* note 85, at 377–83 (discussing the different types of student privacy statutes and the variability in alignment with FERPA); *Student Privacy: State Laws*, ELECTRONIC PRIVACY INFO. CENTER, [http://epic.org/privacy/student/#state\\_laws](http://epic.org/privacy/student/#state_laws) (last visited May 13, 2012) (noting that, as of 2002, thirty-five states provide student record privacy protections beyond FERPA).

<sup>104</sup> See, e.g., CAL. GOV'T CODE § 6254(k) (West Supp. 2012) (exempting from the disclosure requirements "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law"); GA. CODE ANN. § 50-18-72(a)(1) (Supp. 2011) (exempting records "[s]pecifically required by federal statute or regulation to be kept confidential"); KAN. STAT. ANN. § 45-221(a)(1) (exempting "[r]ecords the disclosure of which is specifically prohibited or restricted by federal law"); MD. CODE ANN., STATE GOV'T § 10-615(2) (exempting records "the inspection [of which] would be contrary to a State statute [or] a federal statute or a regulation that is issued under the statute and has the force of law"). Similarly, the federal FOIA exempts documents whose disclosure is specifically prohibited by other statutes. 5 U.S.C. § 522(b)(1)–(9) (2006 & Supp. IV 2010).

<sup>105</sup> See Nowadzky, *supra* note 87, at 66; cf. *Julian*, 486 U.S. at 8 (noting that federal FOIA exemptions are narrowly construed).

<sup>106</sup> See Paul J. Batista, *Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include Right to Sue*, 14 MARQ. SPORTS L. REV. 319, 320–21 (2004) (describing scenarios in

about a sexual assault or other safety issue, a student-athlete's academic performance, or a questionable policy of admitting well-connected students.<sup>107</sup> If the requester is satisfied with redacted records, then no issue arises—a university can comply with its obligations under FERPA not to disclose personally identifiable information and with state law requirements to disclose certain records.<sup>108</sup> But if the requester seeks personally identifiable information from student records, courts must determine first whether FERPA applies to the requested disclosure and then whether FERPA falls within an exemption to the state open records law.<sup>109</sup>

Courts have approached this scenario in two ways.<sup>110</sup> Section A describes some courts' conclusion that FERPA functions like any other federal law and falls within the "otherwise prohibited" exemption to the state law.<sup>111</sup> This results in no conflict between FERPA and the state open records laws, because the state law accommodates FERPA's requirements and allows the university not to disclose the information in compliance with both federal funding conditions and state law.<sup>112</sup> Section B describes other courts' conclusion that FERPA is optional because it is a condition that arises only with the choice to receive federal funds, and thus it does not fall within the "otherwise prohibited" exemption to the state law.<sup>113</sup> As a result, there is a conflict between FERPA and the state open records laws, and universities are required both to disclose under state law and not to disclose under the terms attached to the federal funding they receive.<sup>114</sup> Section C discusses the implications of this split.<sup>115</sup>

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which the media might seek student-athlete information); Salzwedel & Ericson, *supra* note 12, at 1054–57 (same).

<sup>107</sup> Cf. Charles N. Davis, *Top Ten Story Ideas for FERPA Enterprisers*, SOC'Y PROF. JOURNALISTS, <http://www.spj.org/ferpa4.asp> (last visited May 14, 2012) (providing a list for reporters of interesting story ideas that do not run into FERPA issues).

<sup>108</sup> See, e.g., Bd. of Trs., Cut Bank Pub. Schs. v. Cut Bank Pioneer Press, 160 P.3d 482, 488 (Mont. 2007) (holding that disclosure of redacted records does not violate FERPA).

<sup>109</sup> See, e.g., United States v. Miami Univ., 294 F.3d 797, 804, 811 (6th Cir. 2002). Although the precise reach of FERPA's protections is critical to understanding the relationship between FERPA and state open records laws, particularly because FERPA's applicability is notoriously confusing, a discussion of FERPA's specific reach is beyond the scope of this Note. See generally Daggett, *supra* note 17 (providing an overview of FERPA and calling for Congress to amend FERPA to improve its effectiveness).

<sup>110</sup> See *infra* notes 116–154 and accompanying text.

<sup>111</sup> See *infra* notes 116–139 and accompanying text.

<sup>112</sup> See *infra* notes 116–139 and accompanying text.

<sup>113</sup> See *infra* notes 140–154 and accompanying text.

<sup>114</sup> See Daggett, *supra* note 17, at 97, 99; *infra* notes 140–154 and accompanying text.

<sup>115</sup> See *infra* notes 155–161 and accompanying text.



A. *Decisions That Have Found No Conflict Because FERPA Is a Federal Law Whose Requirements Are Exempt from the State Open Records Law*

Numerous state courts and one federal appeals court have concluded that a university's acceptance of federal funds renders the FERPA conditions on those funds binding, and therefore FERPA falls within the "otherwise prohibited" exemption to state open records laws.<sup>116</sup> In 2002, in *United States v. Miami University*, the U.S. Court of Appeals for the Sixth Circuit held that the Ohio Public Record Act's "otherwise prohibited" exemption encompassed FERPA, in part because a university's acceptance of federal funds renders the conditions on those funds legally binding.<sup>117</sup> As a result, the court held that two universities did not need to disclose unredacted student disciplinary records because FERPA's prohibition of disclosure of these records constituted a federal prohibition exempted under the state open records law.<sup>118</sup>

In *Miami University*, the *Chronicle of Higher Education*, a national news source, requested minimally redacted student disciplinary records from Miami University of Ohio and Ohio State University under the Ohio Public Records Act.<sup>119</sup> Because of the Ohio Supreme Court's prior interpretation of the Act, Miami University believed that it was obligated to comply.<sup>120</sup> Thus, pursuant to FERPA, the university contacted the Department to inform them of the university's potential inability to comply with FERPA.<sup>121</sup> The U.S. Department of Education (the "Department") responded that it believed that disciplinary records are cov-

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<sup>116</sup> See, e.g., *Miami Univ.*, 294 F.3d at 811; *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ. (Indiana Newspapers)*, 787 N.E.2d 893, 903-04 (Ind. App. 2003); *Caledonian-Record Publ'g Co. v. Vt. State Coll.*, 833 A.2d 1273, 1275 (Vt. 2003). A number of these cases cited a 1998 North Carolina appeals court case, *DTH Publishing Corp. v. University of North Carolina at Chapel Hill*. See 496 S.E.2d 8, 12, 13 (N.C. Ct. App. 1998) (concluding that information protected by FERPA falls within the "otherwise prohibited" exemption of the state open meetings law because, "[a]lthough FERPA does not require [the University] to do anything, but instead operates by withholding funds . . . FERPA does make student education records 'privileged or confidential' for [open meeting law] purposes").

<sup>117</sup> 294 F.3d at 803, 809.

<sup>118</sup> See *id.* at 803.

<sup>119</sup> *Id.* at 804.

<sup>120</sup> See *id.* The University believed that this was the court's view because in 1997, in *State ex rel. Miami Student v. Miami University*, the Ohio Supreme Court concluded that the same type of disciplinary records were not protected by FERPA and therefore could not be exempt from disclosure under the "otherwise prohibited" exemption. See 680 N.E.2d 956, 958, 959 (Ohio 1997).

<sup>121</sup> See *Miami Univ.*, 294 F.3d at 804.

ered by FERPA.<sup>122</sup> Miami University nonetheless disclosed the records to the *Chronicle*, and upon learning of this disclosure, the United States, in part on behalf of the Department, filed a complaint in federal court seeking an injunction prohibiting both Miami University and Ohio State University from disclosing student disciplinary records to the *Chronicle*.<sup>123</sup> Despite granting the *Chronicle's* motion to intervene, the district court granted the Department's motion for summary judgment and the injunction prohibiting the record's release.<sup>124</sup>

On appeal, the Sixth Circuit affirmed the district court's judgment that the proper interpretation of FERPA encompassed the disciplinary records at issue; it also implied that the state open record law's "otherwise prohibited" exemption should apply when FERPA protects the information.<sup>125</sup> In conducting its analysis, the Sixth Circuit noted, "Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states."<sup>126</sup> The court emphasized that compliance with FERPA's conditions is mandatory if a university accepts federal education funds.<sup>127</sup> Further, the court noted that the federal government may employ any available legal or equitable remedies to enforce the conditions as a "contractual" agreement.<sup>128</sup> The court thus affirmed the injunction prohibiting the universities from disclosing the information as an appropriate remedy for violating FERPA.<sup>129</sup>

Following *Miami University*, some state courts concluded that if a university has accepted federal funds, FERPA is a federal law that falls within the "otherwise prohibited" exemption to state open records laws.<sup>130</sup> One court interpreted FERPA as threatening to rescind funding upon wrongful disclosure rather than prohibiting such disclosure, but it perceived this threat as sufficiently meaningful to consider FERPA a binding federal law.<sup>131</sup> Others, like the Sixth Circuit in *Miami University*, concluded that if FERPA applies to the student information at issue, then

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<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See *id.* at 804–05.

<sup>125</sup> See *id.* at 809, 811, 813, 824. The court further noted that the district court did not need to defer to the Ohio Supreme Court's interpretation of FERPA because federal courts must defer to state court interpretations only of their own state laws. See *id.* at 811.

<sup>126</sup> *Id.* at 808.

<sup>127</sup> *Miami Univ.*, 294 F.3d at 808–09.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.* at 819–20.

<sup>130</sup> See *Indiana Newspapers*, 787 N.E.2d at 903–04; *Caledonian-Record*, 833 A.2d at 1275.

<sup>131</sup> See *Osborn v. Bd. of Regents of the Univ. of Wis. Sys.*, 647 N.W.2d 158, 167–68 (Wis. 2002).

the disclosure of that information is “otherwise prohibited” by federal law because FERPA is such a law.<sup>132</sup> For example, one state court concluded that a university need not disclose FERPA-protected information because the state open records law exempted such information from disclosure.<sup>133</sup> Thus, the acceptance of federal funds makes FERPA’s prohibitions binding and therefore makes them an exemption from state open records law disclosures.<sup>134</sup>

Although most courts do not reach the issue of whether FERPA preempts the state law because they determine that it fits within the “otherwise prohibited” exemption, one state court has concluded that FERPA is the type of federal law that preempts any conflicting state law.<sup>135</sup> In 2002, the California Court of Appeal for the Fourth District, in *Rim of the World Unified School District v. Superior Court*, held that FERPA preempted a portion of the California Education Code, a state law requiring disclosure of student expulsion records upon request.<sup>136</sup> The court noted that FERPA does not directly prohibit the disclosure of student information, but it does prohibit a university’s receipt of federal funds if the university discloses certain student information.<sup>137</sup> The court thus concluded that there was “a genuine, undeniable conflict” between the state law requiring disclosure and FERPA,<sup>138</sup> and therefore FERPA preempts the portion of the state law that required disclosure of student expulsion records.<sup>139</sup>

### B. *Decisions That Have Found a Conflict Because FERPA Is a Contractual Condition, Not a Federal Law*

In contrast, a number of courts have concluded that FERPA, as a condition on federal funding, is not a federal law affirmatively prohibiting disclosure, and that it therefore does not fall within the “other-

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<sup>132</sup> See, e.g., *Indiana Newspapers*, 787 N.E.2d at 903–04, 909 (concluding that FERPA requires confidentiality within its terms, and holding that documents pertaining to the firing of a university basketball coach should be released under the Indiana open records law as long as they are sufficiently redacted to comply with FERPA).

<sup>133</sup> See *id.* at 903–04.

<sup>134</sup> See *Miami Univ.*, 294 F.3d at 811; *Indiana Newspapers*, 787 N.E.2d at 903–04; *Caledonian-Record*, 833 A.2d at 1275; *Osborn*, 647 N.W.2d at 167–68.

<sup>135</sup> See *Rim of the World Unified Sch. Dist. v. Superior Court*, 129 Cal. Rptr. 2d 11, 12, 15 (Ct. App. 2002); see Daggett, *supra* note 17, at 97.

<sup>136</sup> 129 Cal. Rptr. 2d at 12, 15.

<sup>137</sup> See *id.* at 14.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 15.

wise prohibited” exemption to state open records laws.<sup>140</sup> These courts, explicitly or implicitly, have therefore required universities to disclose information pursuant to the state open records laws despite the universities’ potential obligation not to disclose that information under FERPA.<sup>141</sup>

For example, in 1991, in *Bauer v. Kincaid*, the District Court for the Western District of Missouri held that a university must disclose campus security reports to a student newspaper upon its request pursuant to the state open records law, despite a school policy preventing access to such reports by the media and the public.<sup>142</sup> In response to the university’s defense that it could not disclose the records because of FERPA, the court considered whether FERPA met the state open records law’s narrowly construed exemption for records “protected from disclosure by law.”<sup>143</sup> It concluded that FERPA did not meet the exemption because FERPA “imposes a penalty” for disclosure but does not “prohibit” disclosure.<sup>144</sup> Absent an express federal requirement, FERPA could not fall within the exemption, and therefore the university must disclose under the open records law.<sup>145</sup> Similarly, in 2011 in *Chicago Tribune Co. v. University of Illinois*, the District Court for the Northern District of Illinois held that the state had the choice to accept federal funds and the FERPA conditions accompanying those funds, and therefore FERPA did not “specifically prohibit” disclosure of information whose disclosure was required by the state open records law.<sup>146</sup>

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<sup>140</sup> See, e.g., *Chi. Tribune Co. v. Univ. of Ill.*, 781 F. Supp. 2d 672, 675 (N.D. Ill. 2011), argued, No. 11-2066 (7th Cir. Sept. 30, 2011); *Bauer v. Kincaid*, 759 F. Supp. 575, 587, 589 (W.D. Mo. 1991).

<sup>141</sup> See, e.g., *Chicago Tribune*, 781 F. Supp. 2d at 676–77; *Bauer*, 759 F. Supp. at 594–95.

<sup>142</sup> See *Bauer*, 759 F. Supp. at 580, 587, 595. Although the court also held that FERPA did not protect the campus security reports, it indicated that, even if FERPA did apply, FERPA would not constitute an exemption to the open records law. See *id.* at 587, 594–95.

<sup>143</sup> *Id.* at 587.

<sup>144</sup> *Id.* at 587, 589.

<sup>145</sup> See *id.* at 587, 595; see also *E. Conn. State Univ. v. Freedom of Info. Comm’n*, No. CV 960556097, 1996 WL 580966, at \*1, \*3–4 (Conn. Super. Ct. Sept. 30, 1996) (requiring release of FERPA-protected audio tape of a student disciplinary hearing to the professor who initiated the student complaint because it concluded that FERPA is “merely” a precondition for funding and not a prohibition on disclosure or state laws requiring disclosure).

<sup>146</sup> See *Chicago Tribune*, 781 F. Supp. 2d at 675, 677. A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit is currently considering this case on appeal and focusing in particular on whether FERPA compliance constitutes a “choice” for public universities and therefore does not fall under the “otherwise prohibited” exemption to the Illinois Freedom of Information Act. See generally Oral Argument, *Chicago Tribune*, 781 F. Supp. 2d 672 (No. 11-2066), available at <http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=arg> (enter case number “11-2066,” follow “list cases,” follow “11-2066,” follow “Oral Argument”) (inquiring as to who authorized the University of Illinois to accept the federal

Other courts have not reached the issue of whether FERPA falls within the “otherwise prohibited” exemption because they have concluded that FERPA does not apply to the student information at issue.<sup>147</sup> Nonetheless, at least one court has raised doubts that FERPA would fall within an “otherwise prohibited” exemption.<sup>148</sup> In 1993 in *Red & Black Publishing Co. v. Board of Regents*, the Georgia Supreme Court concluded that the requested records and proceedings of a student organization at the University of Georgia were not protected by FERPA and therefore must be disclosed under the Georgia Open Records Act.<sup>149</sup> But the court also noted that even if FERPA did apply, a federal funding condition would not fall within the “otherwise prohibited” exemption because it merely threatens to withdraw funds, and does not directly prohibit disclosure.<sup>150</sup>

Further, two courts have held that FERPA does not preempt state laws requiring disclosure.<sup>151</sup> In the absence of an applicable state law exemption, these courts determined that there was no conflict between the state and federal laws and no indication that FERPA preempts state law otherwise; the courts thus held that the schools must follow the state law.<sup>152</sup> For example, in 1994, in *Princeton City School District, Board of Education v. Ohio State Board of Education*, the Ohio Court of Appeals held that FERPA did not preempt a state statute requiring schools to provide student information to a state-wide data system because FERPA does not prohibit the release of information, it merely threatens the withdrawal of funds if such information is disclosed.<sup>153</sup> Thus, the court saw no direct conflict between FERPA and the state data system’s disclosure requirements.<sup>154</sup>

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funds, and therefore bind itself to the funds’ conditions, and whether this person had the authority to displace state law in doing so).

<sup>147</sup> See, e.g., *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *Kirwan v. Diamondback*, 721 A.2d 196, 206, 261 (Md. 1998).

<sup>148</sup> See *Red & Black*, 427 S.E.2d at 261.

<sup>149</sup> *Id.* at 259, 262.

<sup>150</sup> See *id.* at 261.

<sup>151</sup> *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1108 (D.S.D. 1995); *Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ.*, 645 N.E.2d 773, 778 (Ohio Ct. App. 1994).

<sup>152</sup> See *Maynard*, 876 F. Supp. at 1108; *Princeton City*, 645 N.E.2d at 778.

<sup>153</sup> See *Princeton City*, 645 N.E.2d at 778.

<sup>154</sup> See *id.* (“[E]ven if [the state data system] did require schools to release information in violation of FERPA . . . it is still possible to comply with both. The [student] information would be released, and FERPA would cut off federal funds. FERPA, however, would not prevent the release of the [student] information.”).

*C. Different Outcomes Stem from Different Readings of FERPA,  
Not of State Open Records Laws*

Courts' divergent approaches in reconciling FERPA and state open records laws seem to stem not from courts' interpretations of the state open records laws, but from their interpretations of FERPA.<sup>155</sup> The consequences of these disparate approaches are significant.<sup>156</sup> In states where FERPA is considered a contractual funding condition and not binding federal law, public universities are required to disclose student information under state law that they simultaneously are required not to disclose as a condition of their federal funding.<sup>157</sup> As a result, these universities are left in the precarious position of having to decide between the lesser of two evils: comply with FERPA, and risk the penalties of noncompliance with the state open records law, or comply with the state open records law, and risk the penalties of noncompliance with FERPA.<sup>158</sup> Meanwhile, public universities in states where courts understand FERPA as an affirmative obligation face no conflict; universities need not disclose information protected by FERPA because the state open records law exempts such disclosures.<sup>159</sup> Thus, these disparate approaches mean that any intentions of national uniformity for student privacy through FERPA are frustrated not by the differences in state open records laws, but by the differences in courts' understandings of FERPA.<sup>160</sup> Judicial interpretations of FERPA as a contractual condition

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<sup>155</sup> See Baker, *supra* note 14, at 299–300 (describing various ways in which courts have limited FERPA's scope to resolve conflicts with state open records laws). Courts that conclude that FERPA is not a prohibition tend to take seriously their obligation to construe state open records laws liberally and their exemptions narrowly. See, e.g., *Chicago Tribune*, 781 F. Supp. 2d at 676–77; *Bauer*, 759 F. Supp. at 587. As a result, they construe FERPA to be outside the narrow bounds of the “otherwise prohibited” exemption. See, e.g., *Chicago Tribune*, 781 F. Supp. 2d at 676–77; *Bauer*, 759 F. Supp. at 587. In contrast, courts reaching the conclusion that FERPA is a prohibition tend to look carefully at the intent and purpose of FERPA and state open records laws, and recognize the consequences of disclosure: the threat of a withdrawal of federal funds and the compromising of students' privacy. See, e.g., *Indiana Newspapers*, 787 N.E.2d at 903–04.

<sup>156</sup> See Baker, *supra* note 14, at 283, 311–12.

<sup>157</sup> See *id.* at 283 (noting that narrow judicial interpretations of FERPA place public universities “between the proverbial rock and a hard place”); Daggett, *supra* note 17, at 99.

<sup>158</sup> See Baker, *supra* note 14, at 283, 311–12 (referring to this situation as “dual liability”). When presented with this “choice,” universities are incentivized to manipulate or ignore FERPA. See Salzwedel & Ericson, *supra* note 12, at 1097. Despite threatening severe sanctions, FERPA's ultimate penalty is too drastic to be a realistic threat. See Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 57 (1997).

<sup>159</sup> See Daggett, *supra* note 17, at 97.

<sup>160</sup> See *id.*

and not a federal law thus put public universities in a precarious position.<sup>161</sup>

### III. VALID CONDITIONAL FUNDING STATUTES HAVE THE POWER TO TRUMP AND DISPLACE CONTRARY STATE LAW

At the heart of the judicial divide in reconciling FERPA with state open records laws is whether FERPA, as a federal conditional funding statute, has the force of law such that it may displace contrary state law under the Supremacy Clause.<sup>162</sup> If it does, then when FERPA and state open records laws conflict and there is no exemption to resolve the conflict, the Supremacy Clause can step in to determine the relationship.<sup>163</sup> If it does not, then FERPA represents contractual terms between the federal government and the federal fund recipient and does not without more trump or displace contrary state law.<sup>164</sup>

Section A introduces the Supremacy Clause and demonstrates that it applies to valid conditional funding statutes.<sup>165</sup> Section B outlines the unconstitutional conditions doctrine, which assesses the validity of conditional funding statutes, and demonstrates that conditional funding statutes must meet a low bar to be found constitutional.<sup>166</sup> This Part concludes that as long as FERPA meets this low bar, it is capable of trumping or displacing contrary state open records laws via the Supremacy Clause.<sup>167</sup>

#### A. *The Supremacy Clause Applies to Valid Conditional Funding Statutes*

The Supremacy Clause of the U.S. Constitution provides that valid exercises of congressional power trump state and local laws.<sup>168</sup> Supremacy thus dictates the outcome when state and federal laws directly conflict.<sup>169</sup> Through supremacy, state laws are automatically displaced

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<sup>161</sup> See Baker, *supra* note 14, at 311–14.

<sup>162</sup> See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 746 (2008).

<sup>163</sup> See U.S. CONST. art. VI, cl. 2. The Supremacy Clause dictates the relationship between federal and state laws when a direct conflict arises between them. See Merrill, *supra* note 162, at 746.

<sup>164</sup> See Engdahl, *supra* note 14, at 530, 532.

<sup>165</sup> See *infra* notes 168–176 and accompanying text.

<sup>166</sup> See *infra* notes 177–227 and accompanying text.

<sup>167</sup> See *infra* notes 224–227 and accompanying text.

<sup>168</sup> U.S. CONST. art. VI, cl. 2 (“[T]he laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land.”).

<sup>169</sup> Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39, 41 (2005); Merrill, *supra* note 162, at 731, 746.

to the extent that they conflict with federal law.<sup>170</sup> For the Supremacy Clause to apply, the federal law must be pursuant to a valid exercise of Congress's enumerated powers.<sup>171</sup> Thus, if a federal government action has "the force and effect of binding federal law," it carries the possibility of trumping or displacing state law.<sup>172</sup>

The Supremacy Clause should apply to valid federal conditional funding statutes because Congress's enumerated powers include the power to spend for the general welfare, and Congress has authority to attach conditions to this spending.<sup>173</sup> Further, the Supreme Court has implied that the Supremacy Clause applies to such statutes and their implementing regulations.<sup>174</sup> For example, in a number of cases reviewing state implementation of the Aid for Families with Dependent Children (AFDC) program, a conditional funding component of the Social Security Act, the Supreme Court held that the state law or regulation at issue was invalid under the Supremacy Clause because it conflicted with the federal statute delineating the terms of AFDC, whose funds and accompanying conditions the states had accepted.<sup>175</sup> Despite some dissent to this proposition, a number of scholars have affirmed that the Supremacy Clause applies to conditional funding statutes, noting in particular that the choice inherent in whether to be bound by a conditional funding statute does not make such statutes any less valid as federal laws.<sup>176</sup>

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<sup>170</sup> See Gardbaum, *supra* note 169, at 40, 62 (noting that the Supremacy Clause requires "irreconcilability between state and federal laws and not mere interference or inconvenience"). Congress may also establish a relationship between federal and state law, and thereby between federal and state power, through preemption. See *Gade v. Nat'l Solid Waste Mgmt. Assoc.*, 505 U.S. 88, 98 (1992). Through preemption, a federal law may displace a state law even if the two laws do not directly conflict. See *id.* Some scholars have noted that preemption and supremacy are often conflated but are in theory distinct mechanisms. See Gardbaum, *supra* note 169, at 41; Merrill, *supra* note 162, at 730–31.

<sup>171</sup> See *City of New York v. FCC*, 486 U.S. 57, 63 (1988) (indicating that the Supremacy Clause applies to any actions of the federal government pursuant to its constitutional authority, including in implementing regulations); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 99 (2003) (emphasizing that the Supremacy Clause applies only to valid actions pursuant to enumerated powers).

<sup>172</sup> See Merrill, *supra* note 162, at 762–63.

<sup>173</sup> See U.S. CONST. art. I, § 8, cl. 1; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>174</sup> See, e.g., *Blum v. Bacon*, 457 U.S. 132, 133, 145–46 (1982); *Townsend v. Swank*, 404 U.S. 282, 284, 285 (1971); *King v. Smith*, 392 U.S. 309, 311, 316, 333 (1968).

<sup>175</sup> See, e.g., *Blum*, 457 U.S. at 133, 145–46; *Townsend*, 404 U.S. at 284, 285; *King*, 392 U.S. at 311, 316, 333.

<sup>176</sup> See Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 392 (2008); Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. 27, 77, 78 (2008); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 426 (2004). At least one scholar



B. *What Constitutes a Valid Conditional Funding Statute: The Minimal Restrictions of South Dakota v. Dole*

The central question for conditional funding statutes, then, is not whether the Supremacy Clause can apply to them, because the Supreme Court has indicated that it can, but whether a statute has been validly enacted such that the Supremacy Clause *does* apply.<sup>177</sup> Therefore, before using the Supremacy Clause to displace state law, courts must assess whether the conditional funding statute that purportedly conflicts with a state law is a valid exercise of Congress's power to spend and place conditions on funds.<sup>178</sup>

1. The Constitutionality of Conditions on Funds

Congress's power to enact conditional funding statutes stems from its power to tax and spend.<sup>179</sup> Congress may attach conditions to money it provides as aid to states and other entities.<sup>180</sup> Although some states have challenged this power as a violation of the Tenth Amendment or as otherwise overextending Congress's power, the Supreme Court has held that Congress may use funding conditions to achieve policy goals even in areas in which Congress may lack the power to regulate directly.<sup>181</sup> This is because states and other entities may choose to accept federal funds, and therefore they may choose whether to be bound by

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has implied that the Supremacy Clause does not apply to conditional funding statutes because the choice to accept the conditions makes such statutes more akin to contracts than binding "law." See Engdahl, *supra* note 14, at 498, 534. This contract theory builds on the Supreme Court's analogy of conditional funding statutes to a contractual offer. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). According to this view, Spending Clause legislation is "extraneous" congressional regulation beyond Congress's enumerated powers. Engdahl, *supra* note 14, at 530, 534. Numerous scholars, however, have challenged the contract theory's logic and propriety. See Bagenstos, *supra*, at 390–91 (criticizing contract theorists for extending the metaphor too far); Brian D. Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 170 (2004) (arguing that the contract theory's logic actually leads to the conclusion that conditional funding statutes related to advancing the general welfare are necessary and proper and are therefore "law" pursuant to an enumerated power regardless of whether they are also contractual); Sloss, *supra*, at 424–25 (noting that Justices Antonin Scalia and Clarence Thomas, who seem to support the contract theory, do not accept Professor Engdahl's proposition that conditional funding statutes are different from other federal laws).

<sup>177</sup> See Clark, *supra* note 171, at 99, 101.

<sup>178</sup> See *id.* at 100, 101.

<sup>179</sup> See U.S. CONST. art. I, § 8, cl. 1.

<sup>180</sup> See *Dole*, 483 U.S. at 206.

<sup>181</sup> See *id.* at 206–07; *United States v. Butler*, 297 U.S. 1, 66 (1936).

the conditions on those funds.<sup>182</sup> As a result, Congress often uses its spending power in areas of traditional state concern, such as welfare and education.<sup>183</sup> Through conditions on these funds, the federal government is able to promote certain behaviors or minimum standards nationwide, to the extent that states accept the funds and accompanying conditions.<sup>184</sup>

## 2. Minimal Limits on Funding Conditions: The Unconstitutional Conditions Doctrine

Although Congress's power to spend and to attach conditions to spending is broad, the Supreme Court has placed some limitations upon this power.<sup>185</sup> In 1987, in *South Dakota v. Dole*, the Supreme Court summarized these restrictions.<sup>186</sup> First, Congress's use of the spending power must be for the "general welfare."<sup>187</sup> Second, conditions on the receipt of funds must be expressly stated and unambiguous, such that the states can voluntarily and knowingly accept those conditions.<sup>188</sup> Third, the conditions must have a "nexus" to the particular federal interest or concern of the spending.<sup>189</sup> Fourth, conditions or funding grants may not be otherwise barred by another constitutional provision.<sup>190</sup> Fifth, the "financial inducement offered by Congress [may not] be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>191</sup> After considering these restrictions, the *Dole* Court held that a condition imposing a national minimum age for purchasing alcohol in return for receipt of federal highway grants was a constitutional use of Congress's power.<sup>192</sup> It reached this conclusion despite the

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<sup>182</sup> See *Pennhurst*, 451 U.S. at 17.

<sup>183</sup> See Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 777 (2008).

<sup>184</sup> See Baker, *supra* note 14, at 297 n.57; Rebecca E. Zeitlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 203 (2002).

<sup>185</sup> See *Dole*, 483 U.S. at 206–07, 211; *Pennhurst*, 451 U.S. at 17 n.13.

<sup>186</sup> See 483 U.S. at 206.

<sup>187</sup> *Id.* at 207.

<sup>188</sup> *Id.*; *Pennhurst*, 451 U.S. at 17.

<sup>189</sup> *Dole*, 483 U.S. at 207–08; *Massachusetts v. United States*, 435 U.S. 444, 461 (1978); Bagenstos, *supra* note 176, at 355.

<sup>190</sup> *Dole*, 483 U.S. at 208.

<sup>191</sup> *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). Some scholars view the coercion element as part of the fourth limitation. See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 526 n.326 (2002); Galle, *supra* note 176, at 161 & n.44.

<sup>192</sup> See *Dole*, 483 U.S. at 206.

attenuated nexus between a minimum drinking age and highway improvements, and despite Congress's lack of power to regulate alcohol purchasing directly because it is an area reserved to the states by the Twenty-first Amendment.<sup>193</sup>

*Dole* and subsequent cases employing it have evinced a broad understanding of Congress's power to condition funds, only narrowly limited by the restrictions set out in *Dole*'s unconstitutional conditions doctrine.<sup>194</sup> On the first restriction, the Court has left the definition of general welfare to Congress.<sup>195</sup> As such, the general welfare restriction is practically meaningless.<sup>196</sup> Similarly, the Court has interpreted the third restriction, requiring a relationship to the federal interest underlying the spending and often referred to as the "nexus" or "germaneness" restriction, as more of a guideline than a meaningful limitation.<sup>197</sup> Further, although intended to prevent the federal government from overreaching, the nexus restriction, like the general welfare requirement, is likely to remain meaningless because of the nebulous nature of a nexus.<sup>198</sup>

The Court has also interpreted narrowly the fourth restriction, the constitutional limitation on Congress's conditioning power, by excluding the Tenth Amendment as a bar to congressional spending conditions.<sup>199</sup> In *Dole*, the Court indicated an express limitation that Congress may not use its spending power as an incitement for otherwise unconstitutional behavior by the states.<sup>200</sup> But aside from restricting Congress from inducing unconstitutional behavior, other constitutional provisions do not place meaningful limits on Congress's ability to con-

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<sup>193</sup> See U.S. CONST. amend. XXI; *Dole*, 483 U.S. at 205–06. The federal statute setting a minimum alcohol purchasing age of twenty-one purportedly advanced a national policy objective of promoting safe highways free of drunk drivers. See *Dole*, 483 U.S. at 208.

<sup>194</sup> See Bagenstos, *supra* note 176, at 355; Baker & Berman, *supra* note 191, at 464.

<sup>195</sup> See *Dole*, 483 U.S. at 207; *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937).

<sup>196</sup> See *Dole*, 483 U.S. at 207 n.2, 208; Bagenstos, *supra* note 176, at 356, 359.

<sup>197</sup> See Bagenstos, *supra* note 176, at 365, 367. The *Dole* Court suggested that this undeveloped restriction may not be a strict requirement and declined to clarify the strength of the relationship required. See *Dole*, 483 U.S. at 207–08 & n.3. Instead, the Court concluded that there was a sufficient nexus between setting a minimum drinking age and spending for highway improvements. See *id.* at 208. In her *Dole* dissent, Justice Sandra Day O'Connor emphasized the importance of this requirement in keeping Congress's spending power within its appropriate scope. See *id.* at 217–18 (O'Connor, J., dissenting).

<sup>198</sup> See Bagenstos, *supra* note 176, at 367–69.

<sup>199</sup> See *Dole*, 483 U.S. at 209, 210; *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947).

<sup>200</sup> *Dole*, 483 U.S. at 210.

dition the receipt of federal funds.<sup>201</sup> For example, the *Dole* Court noted that the Tenth Amendment “did not concomitantly limit the range of conditions legitimately placed on federal grants.”<sup>202</sup> This is because states retain the power to choose whether to accept federal funds.<sup>203</sup> Thus, funding conditions may regulate in spheres that are traditionally areas of state concern without raising Tenth Amendment concerns, because the conditional nature of the funds allows states the option of forfeiting certain regulatory powers in exchange for funding.<sup>204</sup> As long as the condition is not unconstitutional in and of itself, Congress can use conditions to regulate behavior in ways that it otherwise could not directly.<sup>205</sup>

Further, courts have interpreted the fifth limitation of no coercion narrowly, rejecting states’ assertions that the amount of money accompanying certain conditional funding statutes is so significant as to shift from incentivizing to impermissibly coercing states.<sup>206</sup> The coercion limitation could meaningfully enforce Tenth Amendment boundaries by preventing Congress from infringing on states’ autonomy; a federal funding offer so appealing that the states are essentially forced to accept the funds and the accompanying conditions would go too far.<sup>207</sup> But courts have not found the allure of funding so coercive that such

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<sup>201</sup> *Id.* at 209, 210 (suggesting that “the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly”).

<sup>202</sup> *Dole*, 483 U.S. at 210; see Zeitlow, *supra* note 184, at 167 (noting this lack of “state sovereignty-based limits” to the spending power).

<sup>203</sup> *Dole*, 483 U.S. at 210; *Steward*, 301 U.S. at 595.

<sup>204</sup> See *Dole*, 483 U.S. at 210–11; *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 295 (4th Cir. 2002); see also *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58, 59 (2006) (emphasizing that universities may choose whether to accept federal funds, and holding that the Solomon Amendment is an acceptable exercise of the congressional spending power); *Grove City Coll. v. Bell*, 465 U.S. 555, 575–76 (1984) (stating that universities have a choice in whether to accept federal funds and the accompanying conditions, and holding that a university is free to deny federal funds in order to avoid having to comply with Title IX).

<sup>205</sup> *Dole*, 483 U.S. at 210.

<sup>206</sup> See, e.g., *Dole*, 483 U.S. at 211; *Steward*, 301 U.S. at 590; *West Virginia*, 289 F.3d at 288–91; *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997).

<sup>207</sup> See *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (defining coercion as “leav[ing] the state with no practical alternative but to comply with federal restrictions”); Galle, *supra* note 176, at 161 & n.44. Although many courts have shied away from further defining and unpacking the coercion theory and have thus not found coercion, the Fourth and Eleventh Circuits have recognized the value of the coercion theory and attempted to apply it meaningfully. See *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1262, 1266–67 (11th Cir. 2011), *partial cert. granted*, 132 S. Ct. 604 (2011); *West Virginia*, 289 F.3d at 288–91, 294.

statutes overstep the line of encouragement into unconstitutional coercion.<sup>208</sup> For example, in *Dole*, the Court determined that the percentage of federal highway funds the state would forgo if it chose not to comply with the conditions was not significant enough to constitute coercion.<sup>209</sup> Instead, the Court concluded that congressional “encouragement” of state compliance with a national policy through conditioning receipt of funds “is a valid use of the spending power.”<sup>210</sup> Neither the Supreme Court nor the lower courts have subsequently found any conditional funding statute so coercive as to be invalid.<sup>211</sup> Further, a number of scholars suggest that the coercion argument will remain unpersuasive, even when it seems that states have no choice but to accept the funds, because the line between encouragement and coercion is too vague for courts to navigate.<sup>212</sup>

Of the *Dole* restrictions, the second “unambiguous, for voluntary and knowing acceptance” requirement has seen the greatest utilization by courts and scholars as a meaningful restriction on funding conditions.<sup>213</sup> The clear notice or clear statement rule, which has developed as an offshoot of this restriction, requires transparent communication of the conditions on funds in order for a conditional funding statute to be valid.<sup>214</sup> The rule builds on the contract metaphor of voluntary and knowing acceptance of a contract’s terms.<sup>215</sup> Under this doctrine, “the Court refuses to recognize any duty burdening a state unless, in the Court’s view, the language of the statute clearly requires it.”<sup>216</sup> Accordingly, states must clearly understand what is expected of them by ac-

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<sup>208</sup> See *Dole*, 483 U.S. at 211; *Kansas*, 214 F.3d at 1201–02; *California*, 104 F.3d at 1092.

<sup>209</sup> *Dole*, 483 U.S. at 211–12.

<sup>210</sup> *Id.*

<sup>211</sup> See Bagenstos, *supra* note 176, at 372 (noting that only one court has come close to finding coercion—the Fourth Circuit, in 1997, in *Virginia Department of Education v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (per curiam), *superseded by statute*, 20 U.S.C. § 1412 (2006)).

<sup>212</sup> See Bagenstos, *supra* note 176, at 372–74, 376 (suggesting that the coercion theory will not take hold because any federal spending on states is a gift, not an entitlement); Baker & Berman, *supra* note 191, at 467–69; see also Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 882, 930 (2008) (arguing that there is no empirical proof that states need the money so significantly that conditional funding is coercive).

<sup>213</sup> See Galle, *supra* note 176, at 162; Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1069–70 (2010).

<sup>214</sup> See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Dole*, 483 U.S. at 207; Seligmann, *supra* note 213, at 1069–70.

<sup>215</sup> See *Pennhurst*, 451 U.S. at 17, 24–25; Bagenstos, *supra* note 176, at 393–94.

<sup>216</sup> Galle, *supra* note 176, at 157.

cepting funds in order to make an informed choice.<sup>217</sup> Thus, due to more extensive development of this concept by courts and scholars, the requirement of voluntary and knowing acceptance, through clear notice of funding terms, appears to operate as the most likely restriction on federal funding conditions.<sup>218</sup>

Some scholars are troubled by the limited restrictions *Dole* and the unconstitutional conditions doctrine place on conditional funding statutes and have called for more meaningful judicial enforcement of restraints on conditional spending.<sup>219</sup> In particular, they argue that *Dole* and the existing unconstitutional conditions doctrine do not sufficiently prevent Congress from infringing on states' rights to regulate and act autonomously.<sup>220</sup> But at least one scholar has suggested that the political process, coupled with state officials' capacity to consider federalism values in decision making, sufficiently enforces Congress's boundaries, and that therefore greater development and enforcement of the *Dole* criteria are unnecessary.<sup>221</sup> Further, proponents of the existing unconstitutional conditions doctrine believe that newer developments, like the clear statement rule, have made significant progress in ensuring notice and consent.<sup>222</sup> From this perspective, even if *Dole*'s current interpretation places few restrictions on conditional funding

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<sup>217</sup> See Zeitlow, *supra* note 184, at 205. One scholar has criticized the clear statement rule for promoting an assumption that state actors are not capable of making informed and appropriate decisions that reflect federalism values. See Galle, *supra* note 212, at 934–35. Further, as uncertainty is an element in any contract or bargain, if the contract metaphor is applied to conditional funding statutes, such uncertainty should be permitted. See Galle, *supra* note 176, at 175.

<sup>218</sup> See Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 167 (2001); Seligmann, *supra* note 213, at 1071.

<sup>219</sup> See Baker, *supra* note 25, at 106 (proposing a presumption of invalidity for conditions that could not be enacted validly under another of Congress's powers, rebuttable only by a showing that spending is for reimbursement, not regulation); Baker & Berman, *supra* note 191, at 470, 521 (calling for a reinvigoration of the coercion and relatedness restrictions); see also Cedar Rapids Cnty. Sch. Dist. v. Garret F., 526 U.S. 66, 84 (1998) (Thomas, J., dissenting) (disagreeing with the *Dole* Court's unwillingness to restrict the spending power and the conditions that flow from it, and writing that "[w]e must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate").

<sup>220</sup> See Baker, *supra* note 25, at 106–07, 111 (criticizing *Dole* for misaligning the balance of power by disregarding the Tenth Amendment and for making the incorrect assumption that states have a choice in whether to accept federal funds); Merrill, *supra* note 162, at 749 (noting that states must be sufficiently represented in decisions to displace state law through conditional funding statutes).

<sup>221</sup> See Galle, *supra* note 212, at 880–81, 882; Galle, *supra* note 176, at 159, 229–30; see also Zeitlow, *supra* note 184, at 205 (suggesting that existing criteria are sufficient to protect state sovereignty because they require acknowledgment of state policy implications).

<sup>222</sup> See Seligmann, *supra* note 213, at 1114–15.

statutes, the test has the capacity to impose greater limits if courts chose to use it as such.<sup>223</sup>

In sum, as the Supreme Court has concluded that the Supremacy Clause applies to valid conditional funding statutes such that they can displace contrary state law, the key analytical question is whether a conditional funding statute is a valid use of the spending power.<sup>224</sup> Under the unconstitutional conditions doctrine stemming from *Dole*, most (if not all) conditional funding statutes withstand judicial scrutiny.<sup>225</sup> But despite some criticisms of this low bar, *Dole* remains the analytical tool with which courts assess the validity of conditional funding statutes.<sup>226</sup> Thus, for a conditional funding statute to trump or displace a contrary state law, it must pass muster under *Dole*.<sup>227</sup>

#### IV. HOW FERPA MEASURES UP: ASSESSING FERPA'S VALIDITY UNDER *DOLE* AND ITS CAPACITY TO TRUMP CONTRARY STATE LAW

If FERPA meets the low bar set in 1987 by the U.S. Supreme Court in *South Dakota v. Dole* for a valid conditional funding statute, then the Supremacy Clause must guide the outcome when FERPA conflicts with a state open records law.<sup>228</sup> This Part applies the *Dole* analysis to FERPA by offering a preliminary assessment of areas in which FERPA may raise concerns given the limitations imposed by *Dole* and the unconstitutional conditions doctrine.<sup>229</sup> Section A shows that FERPA easily meets three of *Dole*'s requirements.<sup>230</sup> Section B addresses the coercion question, concluding that FERPA does not coerce participation, despite at-

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<sup>223</sup> See Zeitlow, *supra* note 184, at 182.

<sup>224</sup> See *supra* notes 177–178 and accompanying text.

<sup>225</sup> See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1209 (2004); Galle, *supra* note 176, at 162; cf. Nicole Liguori, Note, *Leaving No Child Behind (Except in States That Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1069–70 (2006) (arguing that the No Child Left Behind Act unconstitutionally intrudes on an area traditionally of state concern and dilutes diversity in education policy, but noting that under the current unconstitutional conditions doctrine it would pass muster).

<sup>226</sup> See *Florida*, 648 F.3d at 1262–67 (using *Dole* to conclude that the Medicaid expansion portion of the Affordable Healthcare Act is a valid congressional action, in part because it does not coerce state participation); Siegel, *supra* note 14, at 166–67 (noting that the Supreme Court has had opportunities to revise the *Dole* jurisprudence but has not done so).

<sup>227</sup> See generally *Dole*, 483 U.S. 203 (outlining the *Dole* factors).

<sup>228</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987); Baker & Berman, *supra* note 191, at 460; Clark, *supra* note 171, at 92.

<sup>229</sup> See *infra* notes 234–285 and accompanying text.

<sup>230</sup> See *infra* notes 234–245 and accompanying text.

taching a significant revenue stream to its conditions.<sup>231</sup> Finally, Section C raises questions about the states' voluntary and knowing acceptance of FERPA's conditions.<sup>232</sup> This Part concludes that, under the current conditional spending jurisprudence, FERPA survives constitutional scrutiny.<sup>233</sup>

#### A. General Welfare, Relatedness, and No Constitutional Bar Otherwise

FERPA clearly survives three of the *Dole* criteria.<sup>234</sup> Although FERPA itself does not provide any funding or grants, its conditions accompany any education spending by the U.S. Department of Education (the "Department") authorized by Congress, including student financial aid, such as Pell Grants and Perkins Loans, and grants through the American Recovery and Reinvestment Act, the Higher Education Opportunity Act, and other funding programs.<sup>235</sup> These programs serve the general welfare by facilitating the production of an educated, capable workforce, and by providing opportunities for individuals of all means to obtain higher education.<sup>236</sup> FERPA thus fulfills the first *Dole* requirement because the spending to which the FERPA conditions apply is for the general welfare.<sup>237</sup>

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<sup>231</sup> See *infra* notes 246–255 and accompanying text.

<sup>232</sup> See *infra* notes 256–285 and accompanying text.

<sup>233</sup> See *infra* notes 283–285 and accompanying text.

<sup>234</sup> See 20 U.S.C. § 1232g (2006 & Supp. IV 2010); *Dole*, 483 U.S. at 206–08.

<sup>235</sup> See 20 U.S.C. § 1232g(b)(1) (indicating that “[n]o funds shall be made available” through any of the Department’s spending programs if FERPA’s terms are not met); cf. *Grove City Coll. v. Bell*, 465 U.S. 555, 575–76 (1984) (holding that if any student at a university receives federal funds to attend, the university must comply with Title IX). See generally U.S. DEP’T OF EDUC., FISCAL YEAR 2013 BUDGET, <http://www.ed.gov/about/overview/budget/budget13/summary/13summary.pdf> (last visited May 14, 2012) [hereinafter 2013 BUDGET] (providing an overview of projected spending and discretionary grants by the Department).

<sup>236</sup> See RESEARCH UNIVERSITIES, *supra* note 15, at 5. Congress has spent for higher education purposes since the 1800s. See KAPLIN & LEE, *supra* note 13, at 723. Further, courts give significant deference to Congress’s definition of general welfare, suggesting that an education spending program will pass muster as long as Congress believes it is spending for the general welfare. See *Dole*, 483 U.S. at 207; BRADLEY, *supra* note 13, at 12–13.

<sup>237</sup> See *Dole*, 483 U.S. at 207. Despite judicial deference to Congress’s definition of the general welfare, some scholars suggest that an education spending program may not meet the “general welfare” requirement, because the benefits of such spending are too localized. See Bagenstos, *supra* note 176, at 359; John C. Eastman, *Is the Solomon Amendment “F.A.I.R.”? Some Thoughts on Congress’s Power to Impose This Condition on Federal Spending*, 50 VILL. L. REV. 1171, 1178–79 (2005).



FERPA also meets the minimal nexus or relatedness *Dole* requirement.<sup>238</sup> FERPA's conditions are intended "to protect . . . individuals' right to privacy" in educational settings.<sup>239</sup> Through its spending programs, Congress provides significant financial resources to higher education institutions, and FERPA imposes the caveat that those institutions must maintain baseline privacy protections for the students they serve.<sup>240</sup> This is particularly important because higher education institutions collect extensive information about students.<sup>241</sup> As FERPA's privacy protections bear a rational relationship to spending for higher education, at least as much as a minimum drinking age bears to spending for highway improvements, FERPA survives the third *Dole* requirement.<sup>242</sup>

Additionally, FERPA meets *Dole*'s fourth requirement, which prohibits conditions that require unconstitutional behavior.<sup>243</sup> Instituting privacy protections is not otherwise unconstitutional; in fact, federal and state governments regulate privacy through many other means.<sup>244</sup> Further, given that *Dole* dismissed the Tenth Amendment as a limitation on congressional power to condition funds, FERPA's regulation of privacy in the education sector, which is an area traditionally of state concern, does not appear to be a bar to FERPA's conditions.<sup>245</sup>

### B. Absence of Coercion

The significant amount of federal funding tied to FERPA raises questions about whether FERPA leaves states and universities no choice but to accept the funds, in violation of *Dole*'s fifth coercion restriction.<sup>246</sup> Scholars and practitioners have characterized universities' need

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<sup>238</sup> See 20 U.S.C. § 1232g(b); *Dole*, 483 U.S. at 207; *New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>239</sup> Joint Statement, *supra* note 53, at 39,862.

<sup>240</sup> See 20 U.S.C. § 1232g(b); 2013 BUDGET, *supra* note 235, at 2.

<sup>241</sup> See Daggett, *supra* note 17, at 75.

<sup>242</sup> See 20 U.S.C. § 1232g(b); *Dole*, 483 U.S. at 207, 209; cf. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 596 (2005) (analyzing the relatedness question for the Religious Land Use and Institutionalized Persons Act (RLUIPA), another conditional funding statute).

<sup>243</sup> See *Dole*, 483 U.S. at 208.

<sup>244</sup> See RAUL, *supra* note 94, at 19–20; Stuart, *supra* note 85, at 364; cf. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (upholding the Solomon Amendment, and noting that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly").

<sup>245</sup> See 20 U.S.C. § 1232g(b); *Dole*, 483 U.S. at 210.

<sup>246</sup> See *Dole*, 483 U.S. at 211; KAPLIN & LEE, *supra* note 13, at 722–23. In fiscal year 2007, the federal government overall provided more than \$69.7 billion to higher education insti-

for federal funds as so critical that in practice universities must accept whatever conditions Congress attaches to them.<sup>247</sup> Despite this weighty reliance, the coercion restriction as courts currently interpret it is very unlikely to lead to a finding that FERPA, or any conditional funding statute, is unconstitutional;<sup>248</sup> “[E]ven where the scope of the federal grant at issue may make the State’s voluntary decision not to accept the funds ‘an unrealistic option,’ compliance with the conditions placed on the federal funds ‘is the price a federally funded [entity] must pay.’”<sup>249</sup> Thus, a conditional funding statute can be politically coercive, but not so coercive as a legal matter to violate *Dole*, because the state retains the option not to accept.<sup>250</sup> Even if noncompliance results in complete

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tutions. Jenna Ashley Robinson & John Eick, *The Academic-Governmental Complex*, THE JOHN WILLIAM POPE CENTER FOR HIGHER EDUC. POL’Y (Mar. 21, 2010), <http://www.popecenter.org/commentaries/article.html?id=2320>. Of these funds, approximately \$30.5 billion came from the Department. *Id.* In 2013, the Department aims to spend \$36.1 billion on Pell Grants alone, \$128.9 billion in low-interest student loans and other student aid programs, and \$3.2 billion for specific higher education initiatives from President Obama. *See* 2013 BUDGET, *supra* note 235, at 44, 54. In 2007–2008, twelve percent of the University of California system’s operating budget came from federal appropriations, and eight percent came from student fees, much of which is paid for by federal loans and grants to students. *See* LEGISLATIVE ANALYST’S OFFICE, A PRIMER: FUNDING HIGHER EDUCATION 32, 34 (2005) [hereinafter PRIMER], available at [http://www.lao.ca.gov/2005/fund\\_highred/062905\\_fundng\\_highred.pdf](http://www.lao.ca.gov/2005/fund_highred/062905_fundng_highred.pdf); UNIV. OF CAL. OFFICE OF THE PRESIDENT, THE UC BUDGET: MYTHS AND FACTS 1 (2009), available at <http://www.universityofcalifornia.edu/news/budgetmyths.pdf>. In 2011, at the University of Illinois, federal financial aid covered approximately sixty-three percent of students’ tuition and fee payments, and other federal funds constituted approximately nineteen percent of the university’s total operating revenue. Ill. Appellant Brief, *supra* note 11, at 8.

<sup>247</sup> *See* BERNSTEIN, *supra* note 15, at 143; KAPLIN & LEE, *supra* note 13, at 722–23.

<sup>248</sup> *See Dole*, 483 U.S. at 211–12. This is because no court has found coercion thus far. *See* West Virginia v. U.S. Dep’t of Health & Human Servs., 289 F.3d 281, 289 (4th Cir. 2002). Further, despite the federal government’s sizeable contributions to universities’ operating budgets, public universities also receive significant funds from the state. *See* RESEARCH UNIVERSITIES, *supra* note 15, at 15.

<sup>249</sup> *See* Gaubatz, *supra* note 242, at 597 (quoting Bd. of Educ. of Westside Cnty. Schs. v. Mergens, 496 U.S. 226, 241 (1990)).

<sup>250</sup> *Cf.* Michael Heise, *The Political Economy of Educational Federalism*, 56 EMORY L.J. 125, 128, 156 (2006) (discussing the No Child Left Behind Act as politically coercive). In 1989 in *Nevada v. Skinner*, the U.S. Court of Appeals for the Ninth Circuit described why the coercion element is more of a political question than a judicial question:

[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state’s financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.

884 F.2d 445, 448 (9th Cir. 1989).

withdrawal of federal funds and subsequent political challenges, a conditional funding statute still will not be considered coercive.<sup>251</sup> If a state disagreed strongly enough with FERPA, it could compensate for the loss of federal funding on its own.<sup>252</sup>

When considered in this light, FERPA appears just as acceptable as any other federal funding statute.<sup>253</sup> Congress recognized a need for student privacy protections and decided to encourage such protections by conditioning the receipt of federal education dollars on compliance with a baseline privacy standard.<sup>254</sup> Thus, despite the seemingly mandatory reliance by universities on federal funds, FERPA is not unconstitutionally coercive.<sup>255</sup>

### C. Voluntary and Knowing Acceptance of Unambiguous Conditions

*Dole's* second restriction, voluntary and knowing acceptance of funding conditions through clear notice of the obligations, raises more significant questions about FERPA's validity.<sup>256</sup> Although FERPA's terms are sufficiently unambiguous to pass muster under this requirement, the processes by which federal fund recipients actually accept funds and the accompanying conditions may not embody the consent envisioned by this *Dole* requirement.<sup>257</sup>

The plain language of FERPA conditions funds on universities refraining from having a policy or practice that permits the disclosure of personally identifiable information from student records.<sup>258</sup> Thus, FERPA's terms are unambiguous because "a participant who accepts federal education funds is well aware of the conditions imposed by . . .

<sup>251</sup> Cf. *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (upholding section 504 of the Rehabilitation Act, a federal conditional funding statute, in Arkansas, despite the fact that federal education funds constituted twelve percent of the state's K-12 education budget, because although forgoing the funds "would be politically painful," the state still had a choice in whether to accept them).

<sup>252</sup> Cf. DAVID W. BRENEMAN, ASS'N OF GOVERNING BODS. OF UNIVS. & COLLS., ARE THE STATES AND PUBLIC HIGHER EDUCATION STRIKING A NEW BARGAIN? 7-11 (2004) (describing creative solutions for increasing state funding of public colleges and universities).

<sup>253</sup> See 20 U.S.C. § 1232g (2006 & Supp. 2010); cf. Gaubatz, *supra* note 242, at 598 (concluding that RLUIPA is not coercive).

<sup>254</sup> See 20 U.S.C. § 1232g(b); Joint Statement, *supra* note 53, at 39,862; KAPLIN & LEE, *supra* note 13, at 722-23.

<sup>255</sup> See 20 U.S.C. § 1232g; *Mergens*, 496 U.S. at 241; *Dole*, 483 U.S. at 211; cf. Heise, *supra* note 250, at 128, 158 (arguing that the No Child Left Behind Act is not unconstitutionally coercive).

<sup>256</sup> See *Dole*, 483 U.S. at 207; *infra* notes 263-282 and accompanying text.

<sup>257</sup> See *Dole*, 483 U.S. at 207; *infra* notes 258-282 and accompanying text.

<sup>258</sup> 20 U.S.C. § 1232g(b).

FERPA and is clearly able to ascertain what is expected of it.”<sup>259</sup> At least one scholar argues that even if FERPA’s general requirement is clear, the scope of FERPA’s prohibitions and the meaning of particular terms within it are too ambiguous.<sup>260</sup> But another scholar has suggested that agency adjustments to a statute’s implementing regulations do not render it unclear by default.<sup>261</sup> As a result, any ambiguity in the details of FERPA’s application is likely insufficient to argue that the state cannot make an informed choice regarding whether to accept the funds and their conditions.<sup>262</sup>

The question of meaningful consent to the conditions, however, raises more significant questions about FERPA’s validity in accordance with the *Dole* requirements.<sup>263</sup> Although FERPA puts forth unambiguous conditions for states to accept voluntarily, the unit of the state doing the consenting may not reflect the level of consent contemplated by the *Dole* requirement.<sup>264</sup> *Dole* seems to envision high-level state officials in the executive or legislative branches making a conscious decision to accept federal funds and their conditions.<sup>265</sup> From this perspective, elected or at least politically accountable state officials voluntarily and knowingly accept both the conditions themselves and the impact they have on state statutory schemes.<sup>266</sup> These officials then also bear the consequence of a breakdown in legislative policy or voter dissatisfaction when state laws, such as open records laws, are displaced by contrary federal requirements.<sup>267</sup> The clear notice requirement thus enables

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<sup>259</sup> *United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002); cf. *Rumsfeld*, 547 U.S. at 58, 59 (upholding the Solomon Amendment, a similarly worded conditional funding statute, in part implicitly because its conditions were unambiguous).

<sup>260</sup> See Daggett, *supra* note 17, at 92.

<sup>261</sup> See Engstrom, *supra* note 225, at 1218.

<sup>262</sup> See *Dole*, 483 U.S. at 207–08. Further, one scholar has suggested that conditional funding statutes like FERPA that prohibit certain actions may survive with greater ambiguity than conditional funding statutes that require states to create compliant programs. See Engstrom, *supra* note 225, at 1206, 1240 (suggesting that greater deference is owed to agencies for statutes that prohibit behavior rather than require program creation).

<sup>263</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24, 25 (1981); *infra* notes 264–282 and accompanying text.

<sup>264</sup> See *Dole*, 483 U.S. at 207–08; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 822–23, 826–27 (1998).

<sup>265</sup> See *Dole*, 483 U.S. at 207; Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 39 (2011).

<sup>266</sup> See *Pennhurst*, 451 U.S. at 17; Engstrom, *supra* note 225, at 1218; Zeitlow, *supra* note 184, at 202–04.

<sup>267</sup> See *New York*, 505 U.S. at 168 (noting that the state represents its residents’ desires in accepting or rejecting federal funds, and that “[i]f a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant” through

voters to know whether to place blame for an undesired result on the federal government, for being unclear, or on the state, for accepting terms its voters dislike.<sup>268</sup>

FERPA complicates the consent question because its structure does not necessarily require active consent by a politically accountable state official.<sup>269</sup> Some conditional funding statutes, like the No Child Left Behind Act of 2001, require state legislatures to implement compliant programs in exchange for funds.<sup>270</sup> In these situations, the executive and legislative branches are aware of their obligations because they are actively implementing programs.<sup>271</sup> In contrast, conditional funding statutes like FERPA prohibit certain behaviors on the part of universities as fund recipients.<sup>272</sup> As such, FERPA does not necessarily require any program creation or legislative action.<sup>273</sup> As a result, it is possible

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the legislature); Dennis Murashko, Comment, *Accountability and Constitutional Federalism: Reconsidering Federal Conditional Spending Programs in Light of Democratic Political Theory*, 101 NW. U. L. REV. 931, 933–34, 939 (2007) (defining political accountability).

<sup>268</sup> See Engstrom, *supra* note 225, at 1281; Murashko, *supra* note 267, at 933–34.

<sup>269</sup> Cf. Engstrom, *supra* note 225, at 1240 (describing the difference between conditional funding statutes that require state program creation and those that require merely state acknowledgment of funding conditions).

<sup>270</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). These statutes usually require states to operate programs that comply with certain federal requirements or meet minimum federal standards. See Engstrom, *supra* note 225, at 1240. As a result, such statutes condition the receipt of federal funds on states actively enacting certain regulatory schemes, as opposed to simply not engaging in certain behavior. Compare Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (2006) (indicating that “[a] State is eligible for assistance . . . if the State submits a plan that provides assurances to the Secretary [of Education] that the State has in effect policies and procedures to ensure that the State meets . . . the following conditions”), with 20 U.S.C. § 1232g(b) (2006 & Supp. IV 2010) (indicating that “[n]o funds shall be made available under any applicable program to any educational agency or institution . . . which has a policy or practice” but not requiring states to submit a compliant plan for federal approval).

<sup>271</sup> See Engstrom, *supra* note 225, at 1240–42.

<sup>272</sup> See Zeitlow, *supra* note 184, at 174 (describing such Spending Clause legislation as “regulat[ing] directly how recipients of federal funds treat individuals”). Prohibited behavior statutes, such as Title VI of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972, condition the receipt of federal funds on the recipient’s not engaging in certain behavior, such as prohibiting discrimination. See *About OCR*, U.S. DEPARTMENT OF EDUC. OFF. FOR CIV. RIGHTS, <http://www.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Mar. 23, 2005) (describing a number of the nondiscrimination statutes). Prohibited behavior statutes thus may not require state involvement, because a fund recipient may not be under direct state control. See Zeitlow, *supra* note 184, at 174. For example, private universities make the decision to accept federal funds independent of the state, and in so doing are bound by the conditions of FERPA and other conditional funding statutes. See *Grove City*, 465 U.S. at 575–76; BERNSTEIN, *supra* note 15, at 143.

<sup>273</sup> See 20 U.S.C. § 1232g(b).

that the actor consenting to FERPA's conditions is not the state legislature or even a high-ranking state official in the executive branch but a public university itself.<sup>274</sup> Thus, by accepting federal funds, a university could realign its obligations under state law without any notice to the state officials who retain political liability for such consequences.<sup>275</sup>

In practice, however, this potential separation between the university as the federal fund recipient and the state officials accountable to the public for the consequences is not common.<sup>276</sup> In most states, state legislatures have some oversight of the budgets for public university systems, even if financial decisions are generally delegated to the universities or to a state agency overseeing them.<sup>277</sup> Further, because state legislatures create the public university systems in many states, they at a minimum impliedly consent to universities' financial decisions through

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<sup>274</sup> See *id.*; Hills, *supra* note 264, at 860–61. This is particularly true when FERPA and other prohibited behavior statutes have conditions that attach even when just one student attends the university and uses a federal student loan to pay tuition. See *Grove City*, 465 U.S. at 575–76; cf. *Pell and Direct Loan Data Flows*, U.S. DEPARTMENT OF EDUC., <http://www.direct.ed.gov/pelldlflowchart.pdf> (last visited May 14, 2012) (demonstrating how universities are involved in transferring federal financial aid funds from the federal government to students).

<sup>275</sup> Cf. Hills, *supra* note 264, at 827, 860–61 (noting that communication and consent problems can arise when more than one branch of the state government is involved in making decisions about conditional funding statutes); Laura A. Jeltema, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 227 (2004) (indicating that public universities may have distinct priorities from the legislative and executive branches). Another way of looking at this is through the contract metaphor. See Engdahl, *supra* note 14, at 530. The contract analogy of the offer of federal funds and the state's acceptance of the accompanying conditions is at its weakest for a conditional funding statute like FERPA. See 20 U.S.C. § 1232g(b); Engdahl, *supra* note 14, at 530. This is because it is not clear that the state legislature, which is ultimately responsible for the impact of FERPA on existing regulatory schemes, is the party actually entering into the contract. See Engdahl, *supra* note 14, at 528; cf. Hills, *supra* note 264, at 860–61 (discussing the role a negotiating state official would play). If a university accepts the funds without consulting the state legislature, but in turn takes less funding from the state because of the federal contribution, then the state is in essence a third-party beneficiary of the contract, and may or may not have a right to bring an enforcement action. See Engdahl, *supra* note 14, at 528.

<sup>276</sup> See Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 271 & n.3 (2009).

<sup>277</sup> See *id.*; see also STATE HIGHER EDUC. EXEC. OFFICERS, STATE TUITION, FEES, AND FINANCIAL ASSISTANCE POLICIES FOR PUBLIC COLLEGES AND UNIVERSITIES 2010–11, at 7–9 (2011) (demonstrating the varied ways in which state legislatures are involved in tuition-setting and thus impliedly in university system financial decisions); cf. OHIO REV. CODE ANN. §§ 3333.021, 3333.03, 3333.04 (2005 & Supp. 2011) (empowering a governor-appointed chancellor to make decisions about state-funded colleges and universities, but requiring the chancellor to file a financial report with the state legislature prior to taking any action that could have an impact on a university's "revenue or expenditures").

delegated authority.<sup>278</sup> Even in states with constitutionally autonomous universities, which operate independent of the state government, the state executive and legislative branches often have some input into the university system's budget.<sup>279</sup> The state legislature or high-ranking state officials in the executive branch thus presumably have some, albeit potentially minimal, awareness of the federal funds' offsetting the need for state expenditures and could intervene if desired.<sup>280</sup>

Thus, most if not all public university governance structures allow for sufficient consent by "the state" under *Dole*, because the state officials who are responsible for preserving federalism values have some knowledge of a public university's decision to accept federal funds.<sup>281</sup> As a result, FERPA passes muster under *Dole*'s consent requirement, even if it may not fully achieve the principles underlying the requirement of voluntary acceptance by state actors who are held accountable to state residents in their decisions to accept federal funding conditions and their consequences.<sup>282</sup>

In sum, FERPA's conditions attach to spending in furtherance of the general welfare, have a nexus to an important federal interest in privacy, are free of any requirements of unconstitutional behavior on the part of the state, and are unambiguous to the extent required by

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<sup>278</sup> See, e.g., COLO. REV. STAT. ANN. § 23-1-101 (West 2011) (indicating legislative intent to create public postsecondary programs and delegating such authority to a commission on higher education, but reserving "ultimate authority" to the state legislature); OR. REV. STAT. § 351.011 (2011) (establishing a public university system); cf. Thro, *supra* note 14, at 953 & n.17 (noting that courts perceive public universities as "an arm of the State").

<sup>279</sup> See Hutchens, *supra* note 276, at 274–75 (identifying at least seven states as having constitutionally autonomous public university systems); STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9 (demonstrating that the same seven states take different approaches to involving the state legislative and executive branches in financial decision making). In theory, in states with constitutionally autonomous university systems, the state legislative and executive branches could be unaware of universities' decisions to accept federal funds. See STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9. In this situation, the state government would not fulfill its role of making the choice state residents would want of whether to accept limitations on the state's autonomy in exchange for the federal funds. See *New York*, 505 U.S. at 168. Despite this theoretical possibility, states with constitutionally autonomous university systems tend to preserve some role for the state government in university oversight. See Hutchens, *supra* note 276, at 274–75; cf. PRIMER, *supra* note 246, at 6–7 (describing the involvement of the various branches of state government in setting the California public university system's budget); Hutchens, *supra* note 276, at 272 (recognizing California as a state with constitutionally autonomous public universities).

<sup>280</sup> See STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9.

<sup>281</sup> See *Dole*, 483 U.S. at 207; *Pennhurst*, 451 U.S. at 17; STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9.

<sup>282</sup> See *New York*, 505 U.S. at 168; *Pennhurst*, 451 U.S. at 17.

*Dole*.<sup>283</sup> FERPA's conditions raise some concerns because the decision to accept them has the potential to bypass the state legislature, thereby compromising the premise underlying *Dole* that state legislatures actively consent to FERPA's terms.<sup>284</sup> Nonetheless, given the laxity with which courts currently apply the *Dole* criteria, coupled with the involvement by state legislatures through delegating decision-making power, FERPA in most states will survive the *Dole* analysis as a constitutional use of Congress's spending power.<sup>285</sup>

## V. TESTING VALIDITY AND APPLYING SUPREMACY: HOW COURTS SHOULD RESOLVE THE CONFLICT

After Part IV's conclusion that FERPA will survive scrutiny as a constitutional conditional funding statute, this Part proposes an analytical framework for courts to utilize in reviewing a potential conflict between FERPA and a state open records law.<sup>286</sup> As a preliminary matter, a court should determine whether both FERPA and a state open records law present conflicting requirements regarding the disclosure of the requested information.<sup>287</sup> In many situations, records that redact personally identifiable information will fulfill the open records request without violating FERPA's privacy protections.<sup>288</sup> But if both laws apply and simultaneously require and prohibit disclosure, the court should determine whether FERPA easily falls within one of the state open records law's exemptions, such as an exemption specifically accommodating FERPA.<sup>289</sup>

If there is no clear exemption for FERPA, and both FERPA and the state open records law apply to the requested information, the court should assess FERPA's validity using the *Dole* criteria and other developments in the unconstitutional conditions doctrine to determine

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<sup>283</sup> See *supra* notes 234–262 and accompanying text.

<sup>284</sup> See *supra* notes 263–282 and accompanying text.

<sup>285</sup> See Hutchens, *supra* note 276, at 271 & n.3; Zeitlow, *supra* 184, at 173–74; *supra* notes 276–282 and accompanying text.

<sup>286</sup> See *infra* notes 287–305 and accompanying text.

<sup>287</sup> See KAPLIN & LEE, *supra* note 13, at 273; Gardbaum, *supra* note 169, at 42. Supremacy analysis requires assessing the requirements of the federal and state laws and considering how they interact. Gardbaum, *supra* note 169, at 42. If there is no conflict, then supremacy need not be used to determine the outcome. Cf. *id.* at 41–42 (providing an example of a California statutory scheme).

<sup>288</sup> See Peltz, *supra* note 20, at 185 (noting that often FERPA and the state open records law can be complied with simultaneously).

<sup>289</sup> See, e.g., ALASKA STAT. § 40.25.120(a)(5) (2010) (specifically exempting FERPA); MICH. COMP. LAWS ANN. § 15.243(2) (West Supp. 2011) (same); see also *supra* notes 95–105 and accompanying text (describing state open records laws' student records exemptions).



whether the Supremacy Clause should dictate the outcome.<sup>290</sup> A *Dole* analysis is necessary because the Supremacy Clause can resolve a direct conflict between state and federal law only if the federal law is valid.<sup>291</sup> Although there is a presumption that Congress acts constitutionally and a doctrine guiding courts to avoid constitutional questions, it is appropriate to reach the question of constitutionality when a court is faced with reconciling state and federal laws in conflict.<sup>292</sup> Courts thus should not assume that FERPA constitutes a requirement, or that it is so critical that it must apply, or that it is “just money.”<sup>293</sup> Instead, courts should conduct a reasoned analysis of whether FERPA is valid.<sup>294</sup>

The *Dole* analysis will likely vary by state, in part because courts in different jurisdictions may apply the *Dole* analysis differently and in part because the precise public university decision-making structures in

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<sup>290</sup> See Clark, *supra* note 171, at 91, 100 (urging that the Supremacy Clause requires this constitutionality analysis prior to conducting a supremacy analysis); Seligmann, *supra* note 213, at 1071 (noting that *Dole* defines the constitutional limits of conditional funding statutes); see also Daggett, *supra* note 17, at 99 (noting that FERPA sometimes does not fall within an exemption).

<sup>291</sup> See Clark, *supra* note 171, at 101.

<sup>292</sup> See *id.* at 100, 101 (stating that courts can and should engage in a review of both the state law and the constitutionality of the federal law when a conflict of laws arises); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836, 842–43 (2001) (describing the presumption of constitutionality and the constitutional avoidance doctrine). The constitutional avoidance doctrine instructs courts to avoid deciding difficult constitutional questions by choosing a “plausible interpretation” of a contested statute. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 181–82. At least one scholar has suggested that federal courts too frequently address constitutional questions regarding issues that can be decided on other grounds. See Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 850, 851, 858 (2005). But see Kelley, *supra*, at 835 (arguing that the avoidance canon is unnecessary and intrudes upon the Executive’s role); Note, *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1798, 1800 (2002) (arguing that the presumption that Congress acts constitutionally is unwarranted because Congress is subject to political pressures that raise questions about whether it acts constitutionally). This Part’s proposal recognizes that constitutional issues should be adjudicated only when necessary by emphasizing that a court should not turn to the analysis of FERPA’s constitutionality unless the court has concluded that both FERPA and the state open records law apply to the requested information, and the state open records law provides no clear exception to accommodate FERPA. See *supra* notes 287–290 and accompanying text.

<sup>293</sup> See, e.g., *United States v. Miami Univ.*, 294 F.3d 797, 809 & n.11 (6th Cir. 2002) (concluding that FERPA constituted a binding requirement on universities receiving federal funds); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991) (concluding that FERPA was merely a federal funding condition, not a binding law); *Osborn v. Bd. of Regents of the Univ. of Wis. Sys.*, 647 N.W.2d 158, 167, 168 (Wis. 2002) (concluding that the federal funds attached to FERPA were so significant that FERPA must be binding).

<sup>294</sup> See Clark, *supra* note 171, at 101.

each state impact the voluntary and knowing acceptance element of the analysis.<sup>295</sup> Although FERPA passes *Dole's* low bar for constitutional spending conditions on first glance, a more nuanced reading of FERPA in a state-specific context or a change in the *Dole* jurisprudence could lead to a different result.<sup>296</sup> Because of the variation in states' approaches to overseeing public university financial decisions, courts should pay particular attention to the notice and consent requirement.<sup>297</sup> Given the potential for fluctuation in the analysis of conditional funding statutes' validity, it is important that a court either conducts its own analysis of FERPA's constitutionality as applied to the state or rely on controlling precedent establishing FERPA's validity under *Dole*.<sup>298</sup>

If a court concludes that FERPA is a valid exercise of Congress's power to place conditions on federal funds, then a court should interpret an "otherwise prohibited" exemption to the state open records law as encompassing FERPA's terms, or else it should use the Supremacy Clause to displace the contrary state law requirement.<sup>299</sup> In states where the open records law does not contain an "otherwise prohibited" exemption, FERPA must trump contrary state law because it is a valid conditional funding statute and therefore the Supremacy Clause dictates its relationship with state law.<sup>300</sup> Thus, when a public university receives federal funds, a reviewing court must enforce FERPA as federal

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<sup>295</sup> Cf. Baker & Berman, *supra* note 191, at 465–66 (acknowledging some variation in courts' interpretations of the *Dole* requirements); STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9 (depicting the variety of state approaches to involving different branches of government in university financial decisions).

<sup>296</sup> See Baker & Berman, *supra* note 191, at 524–25 (advocating for a change in the jurisprudence); Engstrom, *supra* note 225, at 1202 (suggesting the need for new, "reasonable constraints on the spending power without unduly preferencing state autonomy interests"); *supra* notes 283–285 and accompanying text (concluding that FERPA survives a *Dole* analysis); *supra* notes 269–280 and accompanying text (discussing differences in state public university governance structures that may impact *Dole's* consent requirement).

<sup>297</sup> See Seligmann, *supra* note 213, at 1071, 1080; cf. STATE HIGHER EDUC. EXEC. OFFICERS, *supra* note 277, at 7–9 (illustrating the variability in states' approaches to public university finances).

<sup>298</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987); Clark, *supra* note 171, at 100–01.

<sup>299</sup> See Merrill, *supra* note 162, at 759, 779; cf. Brief for Ohio Legal Rights Service et al. as Amici Curiae at 12–13, 21–22, *ESPN, Inc. v. Ohio State Univ.*, 958 N.E.2d 575 (Ohio 2011) (No. 2011-1177) (arguing that FERPA should fall within an "otherwise prohibited" exemption to the Ohio Public Records Act, or else FERPA must trump the Public Records Act via the Supremacy Clause).

<sup>300</sup> See Gardbaum, *supra* note 169, at 41; *supra* notes 283–285 and accompanying text (concluding that FERPA is valid).

law so long as the court concludes that FERPA's conditions are valid as applied to that university under *Dole*.<sup>301</sup>

Courts are the appropriate venue for determining the relationship between FERPA and state open records laws.<sup>302</sup> With important constitutional principles at stake, such as the Supremacy Clause and state sovereignty, the courts stand in the best position to mediate between these principles.<sup>303</sup> Further, courts have the power to review the validity of conditional funding statutes and a duty to do so under the Supremacy Clause.<sup>304</sup> Additionally, judicial resolution of the conflict between state open records laws and FERPA is critical for facilitating uniformity in FERPA's interpretation and ensuring Congress's goal of achieving minimum student privacy protections in states that have accepted the contingent funds.<sup>305</sup>

### CONCLUSION

The dual requirements of FERPA and state open records laws are a source of strife for public universities across the country. In attempting to resolve conflicts between the two requirements, some courts have only exacerbated it. Swayed by the argument that FERPA compliance is optional because it is a conditional funding statute, these courts have exposed public universities to dual liability by refusing to recognize FERPA nondisclosure requirements as an exemption from state open records laws.

A stronger understanding of the relationship between the Supremacy Clause and the constitutionality of conditional funding statutes authorized by the Spending Clause must guide judicial review of

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<sup>301</sup> See Clark, *supra* note 171, at 130; cf. Gaubatz, *supra* note 242, at 598 (indicating that states must comply with RLUIPA because RLUIPA is valid and the states accepted the funds on which RLUIPA places conditions).

<sup>302</sup> See Merrill, *supra* note 162, at 759, 779 (analyzing institutional capacity for appropriate decision making regarding preemption, and concluding that courts are the most well suited for deciding whether a federal law displaces a state law). Both state and federal courts may assess whether a federal law is a valid exercise of Congress's enumerated powers, such that the Supremacy Clause can apply. See Clark, *supra* note 171, at 102–03, 105.

<sup>303</sup> See Clark, *supra* note 171, at 124; Merrill, *supra* note 162, at 759, 779.

<sup>304</sup> See *Rosado v. Wyman*, 397 U.S. 397, 420, 422–23 (1970); Clark, *supra* note 171, at 119; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24, 53–54 (1981) (White, J., dissenting in part) (emphasizing that the burden of withdrawing funding for noncompliance with conditions does not fall exclusively to the administrative agency enforcing the statute and noting instead that the Court holds certain powers, such as issuing injunctions or ordering specific performance, until the state chooses to no longer accept the federal funds).

<sup>305</sup> See Joint Statement, *supra* note 53, at 39,863; Daggett, *supra* note 17, at 112–13.

conflicts between FERPA and state open records laws. When a conflict between FERPA and a state open records law arises, courts must determine whether FERPA constitutes a valid conditional funding statute, using the *Dole* criteria and the unconstitutional conditions doctrine. If it does, courts must engage in traditional supremacy analysis to determine if FERPA displaces the contrary state law.

Despite the criticisms of the propriety of the *Dole* test, this approach more adequately considers the principles of federalism and state sovereignty than courts' current approaches. The result should be more consistent implementation of Congress's policy goals, and an encouragement for states to think more comprehensively about the relationship between federal funding and their own regulatory schemes. Although FERPA and state open records laws will remain in constant tension because they promote competing goals, courts can help universities, the media, and state legislatures understand their rights and obligations under both through careful application of constitutional conditional funding and supremacy analysis in succession.

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