FOIA VS. FERPA/SCALIA VS. POSNER

Kristin Knotts*

I. INTRODUCTION

In recent years, the University of Illinois-Springfield (UIS) and the University of Illinois at Urbana-Champaign (UIUC) have been sued by two different Illinois newspapers for the release of documents pursuant to Illinois' Freedom of Information Act (FOIA). In each case, the universities have relied on the Family Education Rights and Privacy Act (FERPA) to defend their choices not to release the requested information. The State Journal-Register (SJ-R) sued UIS to obtain documents related to the resignation of a coach based on sexual assault allegations,[1] and the Chicago Tribune sued UIUC for documents related to admission practices at the college.[2] (From hereafter, the two cases will be referred to as the UIS and UIUC cases, respectively). Although the incidents that prompted such FOIA requests are quite different, the legal issues are ultimately the same: Are universities obligated to provide information, i.e., these newspapers, to the public under Illinois' state FOIA, or can they protect themselves and their students' privacy rights by claiming that FERPA prevents disclosure? Do state FOIA laws trump requirements under FERPA to protect student privacy rights, or does the fact that FERPA, as a federal law and thus supreme (Supremacy Clause),[3] automatically circumvent any requests for information under FOIA?

The main section of FERPA that applies in these cases, as well as others that have been tried in the last several years, provides that public educational institutions who are receiving funding from the federal government shall not disclose or release the educational records or personally identifiable information of students without the written consent of the students' parents to any individual, agency, or institution.[4] On the

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* Ms. Knotts has a B.A. in Political Science from the University of Michigan, a J.D. from the University of Denver College of Law, and will soon graduate from the University of Illinois-Springfield with a Masters in Legal Studies. Special thanks to Associate Professor Kathryn Eisenhart and Illinois Innocence Project Legal Director, John Hanlon.

1. Bruce Rushton, *Attorney's Letter Indicates UIS Coach Assaulted Players*, ST. J.-REG. (Apr. 1, 2011), http://www.sj-r.com/x910657281/Letter-reveals-more-details-of-UIS-softball-team-incident.
2. Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs. (*UIUC Dist. Court*), 781 F. Supp. 2d 672 (N.D. Ill. 2011); Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill. (*UIUC Appeals Court*), 680 F.3d 1001 (7th Cir. 2012).
3. U.S. CONST. art. VI, § 2.
4. 20 U.S.C. § 1232g(b)(1) (2012).

one hand, if universities throughout the country do in fact release this kind of information without consent, they are subject to losing their federal funding.[5] Illinois' FOIA, on the other hand, states, "Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act."[6] Section 7 allows for certain exemptions to disclosure, the first of which is "information specifically prohibited from disclosure by federal or state law or rules and regulations implementing federal or state law."[7] Thus, it would seem that since FERPA is a federal law, it would easily fit within the exception to the rule and the universities' defense of student privacy would remain unfettered. However, in addition to the fact that the Illinois Supreme Court has given considerable leeway to requests under FOIA and has even ruled that exceptions be "construed narrowly,"[8] courts across the country remain divided over issues involving FOIA laws and FERPA.[9] There has been no definitive answer to the questions posed above and there have been very few factually similar cases reviewed, until now.

The UIS and UIUC cases present somewhat new, interesting, and developing problems in the law. If these universities are ordered to release the documents requested and thus are forced to violate FERPA, or if the newspapers appeal a negative decision and file for certiorari, their cases could end up in front of the Supreme Court and Justice Scalia. This is particularly fascinating since the UIUC case has already been before Scalia's recently established or characterized foe, Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit. Although the Seventh Circuit only handled an initial civil procedure question in the UIUC case, given Scalia and Posner's so-called feud, it is curious how Justice Scalia would decide the substantive issues and how Judge Posner would respond. Ultimately, despite their rather heated exchanges and differences of opinion, on this issue, Posner and Scalia would likely agree; FERPA, as written, does not prohibit the release of student information in the face of state freedom of information laws, thus subjecting public university students to an unforeseen lack of privacy.

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5. *See id.*
6. 5 ILL. COMP. STAT. 140/3(a) (2010).
7. 5 ILL. COMP. STAT. 140/7(1)(a) (2010).
8. Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65, 538 N.E.2d 557, 559 (Ill. 1989); So. Illinoisan v. Ill. Dep't of Pub. Health, 844 N.E.2d 1, 15 (Ill. 2006).
9. *See, e.g.*, Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill. (*UIUC Appeals Court*), 680 F.3d 1001 (7th Cir. 2012); United States v. Miami Univ. (*Miami Univ. I*), 294 F.3d 797 (6th Cir. 2002); Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991); E.W. v. Moody, No. C06-5253, 2007 WL 445962, at *2 (W.D. Wash. Feb. 7, 2007). *See also* Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Law Must Yield to FERPA*, 53 B.C. L. REV. 1045, 1048 (2012).

Prior to any discussion surrounding how Justices Scalia and Posner would view the issues involved in these cases or even how they would decide, one must understand the cases themselves, the current relative and varying case law, all of the Constitutional implications involved, and how others have perceived the controversy. Thus, Part A of this Note covers these foregoing topics. Part B examines Justice Scalia's philosophy on interpreting the law and how he views the Constitutional issues involved. Part C reviews Judge Posner's legal philosophy and his differences with Scalia, including the most recent quarrel. Finally, Section II assesses how both Justices Scalia and Posner would decide the UIUC case in particular and provides a resolution to the FOIA-FERPA conflict.

A. The FOIA-FERPA Conflict

1. The UIS Case

The UIS case stems from alleged incidents of sexual impropriety that took place during the women softball team's trip to Florida in 2009.[10] Following the trip, which was cut short, the head and assistant male softball coaches resigned from the University, stating they had other opportunities.[11] The SJ-R, a Springfield-based newspaper, requested documents from the school relating to the trip and the coaches' resignations under the Illinois FOIA.[12] The university, however, declined these requests, citing the need to maintain student privacy as required under FERPA.[13] In March 2011, after several declined requests, the paper filed suit against UIS to force the release of the requested documents.[14]

Since the suit's filing in the fall of 2011, Jersey County Circuit Court Judge Eric Pistorius heard arguments from both sides, much of which involved student privacy concerns and the university's unwillingness to violate FERPA.[15] Despite the fact that the newspaper indicated it would not release any student names and that it was much less interested in the names of the students involved than it was in what the school knew about the coaches' actions prior to their resignations, the university remained unconvinced and undeterred; UIS's main concern appeared to be the

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10. Rushton, *supra* note 1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *See id.*; Samantha Raphelson, *Illinois Paper Continues Fight for Records Related to Coach Resignations*, STUDENT PRESS L. CENTER (Sept. 21, 2012), http://www.splc.org/news/newsflash.asp?id=2454.
15. Chris Dettro, *Judge Considers UIS Student Privacy Rights*, ST. J.-REG. (Sept. 16, 2011), http://www.sj-r.com/x827638075/Judge-considers-UIS-student-privacy-rights.

students' privacy rights as afforded under FERPA.[16] In August of 2012, Judge Pistorious ordered the release of only twelve pages of documents.[17] The documents consisted of the coaches' formal letters of resignation and e-mails sent by then Chancellor Richard Ringeisen to the university in general.[18] According to the newspaper's attorney, Don Craven, these documents were insignificant to the paper and it already possessed the documents in one form or another.[19] Thus, the newspaper has since appealed.[20]

2. The UIUC Case

The UIUC case, while different in terms of the incident from which it stems, deals with the same legal issues as the UIS case. The Chicago Tribune filed suit against the UIUC under Illinois' FOIA for documents related to the university's admission policies.[21] The newspaper had written a series of articles titled, "Clout Goes to College," where it revealed that the university had a special category of students who, based on their relation or association with influential Illinoisans, allegedly received special consideration during the admissions process.[22] When the paper, through FOIA requests, attempted to obtain the names and addresses of the parents whose students had been placed within this so-called Category I, as well as the identity of those persons involved in the students' applications, the university denied the requests.[23] University officials stated that section 7(1)(a) of FOIA exempted them from disclosure requirements; the information the paper requested was "information specifically prohibited from disclosure by federal or State law."[24] Since FERPA is a federal law and discourages the release of personally identifying information, the university felt it was well within FOIA's exception.[25] Additionally, in a letter sent to the Tribune explaining the university's position behind

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16. *Id.*
17. *See* Chris Dettro, *Newspaper to Continue Court Fight to See UIS Documents*, ST. J.-REG. (Sept. 7, 2012), http://www.sj-r.com/x1298139304/Newspaper-to-continue-court-fight-to-see-UIS-documents; Raphelson, *supra* note 14.
18. Dettro, *supra* note 17.
19. *Id.*
20. *Id.*
21. Press Release, Univ. of Ill., Appeals Court Cites "Legitimate Privacy" of Students, Families in Victory for Students, University of Illinois (May 24, 2012), http://www.uillinois.edu/our/news_releases/2012_news_releases/may_24_appeals_court/.
22. Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs. (*UIUC Dist. Court*), 781 F. Supp. 2d 672, 674 (N.D. Ill. 2011).
23. Ada Meloy, *Legal Watch: FOIA in the States*, AM. COUNCIL EDUC. (Winter 2012), http://www.acenet.edu/the-presidency/columns-and-features/Pages/Legal-Watch-0112.aspx; Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill. (*UIUC Appeals Court*), 680 F.3d 1001 (7th Cir. 2012).
24. *UIUC Appeals Court*, 680 F.3d at 1002; 5 ILL. COMP. STAT. 140/7(1)(a) (2010).
25. *UIUC Dist. Court*, 781 F. Supp. 2d at 674.

denying the request, a university official named sections 7(1)(b) and 7(1)(f) as other FOIA exemptions that could apply depending on the information contained within the requested records.[26] These exemptions refer to "unwarranted invasions of privacy" and "deliberative" communications.[27] UIUC believed that a violation of FERPA's privacy obligations would lead to the loss of federal funding and, as such, an inability to continue operating as it had been.[28] As with the UIS situation, UIUC was subsequently sued by the Tribune under Illinois' FOIA in 2010, despite the fact that the university provided the newspaper with over 5000 pages of information regarding its admissions policies and the names of "public figures, elected officials, and university employees."[29]

The newspaper filed suit in the Northern District of Illinois, Eastern Division,[30] and sought a declaratory order declaring that FERPA did not bar the release of the materials requested.[31] None of the parties asked the court to consider the FOIA exemptions mentioned in the university's letter to the Tribune or to even discuss whether the Tribune's request was reasonable.[32] Both the Tribune and UIUC filed cross-motions for summary judgment.[33] District Judge Joan B. Gottschall found in favor of the Tribune.[34] She did not agree that FERPA fit within Illinois' FOIA exemption section 7(1)(a) for state and federal laws.[35] She reasoned, "Section 7(1)(a) of FOIA applies only when a federal or state law 'specifically prohibit[s]' a certain disclosure."[36] Therefore, since FERPA only places a condition on the receipt of funds, it does not fit within the exception.[37] The university is not prohibited per se from releasing the information requested; it is just subject to a decision by the federal government on whether to enforce its conditions and refuse to give the university any funds.[38] For Judge Gottschall, universities have the option of accepting the funding and abiding by the privacy condition, but they are in no way obligated.[39] Furthermore, while FERPA was passed under Congress' Constitutional Spending Clause powers, it does not prevent Illinois officials from choosing to reject the

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26. *Id.*
27. STAT. 140/7(1)(b), (f).
28. Meloy, *supra* note 23.
29. Press Release, Univ. of Ill., *supra* note 21.
30. *See generally UIUC Dist. Court*, 781 F. Supp. 2d 672.
31. *Id.* at 674.
32. *Id.*
33. *Id.*
34. *Id.* at 677.
35. *Id.* at 675.
36. *Id.*
37. *Id.*
38. *Id.* at 676.
39. *Id.*

funding and the conditions that go with it.[40] Although the Sixth Circuit held very differently in a similar case involving a FERPA and FOIA conflict,[41] Judge Gottschall diverged, claiming that the Sixth Circuit's case and opinion was primarily based on the federal government seeking to enforce FERPA, not a party interested in what it believes to be public information.[42] She placed a great deal of emphasis on the fact that the Illinois Supreme Court has clearly set limits to the FOIA exemptions; FOIA exemptions are to be read very narrowly.[43] Furthermore, it was apparent from the opinion that the judge was mainly concerned with the words implemented in each statute; the FOIA exemption uses the words "specifically prohibits" compared with the applicable FERPA section, which does not say anything of the kind.[44]

UIUC subsequently appealed Judge Gottschall's ruling to the Seventh Circuit Court of Appeals.[45] The university and its supporters, like the American Council on Education (ACE), the Electronic Privacy Information Center (EPIC), and the U.S. Department of Justice, who all filed amicus briefs in the case, continued to maintain that permitting the release of the requested material violates the university students' privacy and the conditions of FERPA.[46] Nonetheless, while the court made some interesting statements regarding the substantive issues entailed, Chief Judge Easterbrook and his fellow judges, Williams and Posner, were more concerned with the procedural problems in the case. Since the Tribune originally filed the case as a claim to documents under the Illinois FOIA and federal courts must have subject-matter jurisdiction in the form of a federal question,[47] the judges were not convinced that UIUC's federal

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40. *Id.* at 675.
41. *See generally* United States v. Miami Univ. (*Miami Univ. I*), 294 F.3d 797 (6th Cir. 2002).
42. *UIUC Dist. Court*, 781 F. Supp. 2d at 676.
43. *See* cases cited *supra* note 8.
44. 5 ILL. COMP. STAT. 140/7(1)(a) (2010) ("[I]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."); 20 U.S.C. § 1232g(b)(1) (2012). Section 1232g(b)(1) reads:

> 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 . . .) of students without the written consent of their parents to any individual, agency or organization . . . .

Id.

45. Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill. (*UIUC Appeals Court*), 680 F.3d 1001 (7th Cir. 2012).
46. *See Chicago Tribune v. University of Illinois: Concerning the Privacy of Education Records Under FERPA*, EPIC.ORG (Sept. 30, 2011), http://epic.org/amicus/tribune/; *ACE Files Amicus Brief in University of Illinois FERPA Case*, AM. COUNCIL EDUC. (July 21, 2011), http://www.acenet.edu/news-room/Pages/Amicus-Brief-Illinois-FERPA-Case.aspx; Brief for the United States as Amicus Curiae in Support of Appellant, Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill., 680 F.3d 1001 (7th Cir. 2012) (No. 11-2066), 2011 WL 3283768, at *4-11.
47. 28 U.S.C. § 1331(a) (2012); U.S. CONST. art. III, § 2.

FERPA defense satisfied the necessary conditions for federal court jurisdiction.[48] In fact, despite the supplemental briefs filed by the parties, both claiming that the court had proper jurisdiction,[49] Judge Easterbrook and his fellow judges vacated Judge Gottschall's judgment and "remanded with instructions to dismiss for want of subject-matter jurisdiction."[50] The Tribune commenced the suit, and, as the plaintiff, it must state a federal question claim; it cannot depend on the defendant using a federal statute as a defense even though section 7(1)(a) of the state's FOIA avers that a federal law "specifically prohibiting" disclosure could create an exemption from compliance.[51] As a result, if the newspaper is to continue in its pursuit of the students' parents' names included in this Category I admissions group, it must do so at the state court level. The day after the Seventh Circuit vacated the case, the Chicago Tribune ran a story indicating that it would continue to pursue the case and file suit in state court.[52]

The Seventh Circuit and Judge Posner, by concurrence, made it clear that an Illinois state court must determine the meaning of exemption section 7(1)(a) of the state's FOIA before addressing the question of whether the university's FERPA defense is valid. In particular, what does "information specifically prohibited from disclosure by federal or state law"[53] actually mean? The Seventh Circuit asked whether FERPA fit within this exception since it "does not by itself forbid any state to disclose anything."[54] The court seems to indicate that, whereas FERPA funding is conditional, it is not obligatory, and that the onus is actually on the Secretary of Education, who must refuse funding when the institution's policies allow for disclosure of student documentation. "The most one can say about federal law is that, *if* a state takes the money, *then* it must honor the conditions of the grant, including nondisclosure."[55] The question, therefore, comes down to whether "specifically prohibited" in the Illinois FOIA exception 7(1)(a) means that a federal law must explicitly state that the requirements are "unconditional."[56] Ultimately, the court equivocates by claiming that Illinois cannot avoid its "commitment" to the federal government by narrowly reading 7(1)(a) of its FOIA, since in the end the Supremacy

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48. *UIUC Appeals Court*, 680 F.3d at 1003.
49. *Id.*
50. *Id.* at 1006.
51. *See id.* at 1003-04; Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) (federal question).
52. Dahleen Glanton, *Federal Appeals Court Kicks Tribune's Lawsuit Against U. of I. to State Court, Newspaper Seeks to Identify Parents of Applicants Who Got Preferential Treatment*, CHI. TRIB., May 25, 2012, http://articles.chicagotribune.com/2012-05-25/news/ct-met-u-of-i-ruling-0525-20120525_1_federal-appeals-court-ferpa-state-court.
53. 5 ILL. COMP. STAT. 140/7(1)(a) (2010).
54. *UIUC Appeals Court*, 680 F.3d at 1003.
55. *Id*. (emphasis added).
56. *Id.*

Clause of the Constitution would trump any order of a state court to release these documents.[57]

3. *Previous Relevant Cases*

As previously mentioned, there are very few cases of record that deal specifically with FOIA requests and FERPA defenses. The published cases that do handle such issues have varying factual bases and varying decisions. For instance, one of the most similar cases to those examined in this Note is *United States v. Miami University*.[58] The Federal Department of Education (DOE) ultimately sued Miami of Ohio University and Ohio State University for releasing records under FERPA.[59] The editor-in-chief of Miami University's student newspaper sought the release of student disciplinary records from the school's disciplinary board in order to research crime trends on campus.[60] Although the school initially refused to disclose the records, school officials reluctantly released the documents after the editors made a written request pursuant to the Ohio Public Records Act.[61] The school redacted the records to hide the identity of the students involved, but the editors of the paper were dissatisfied and filed an original mandamus action in the Ohio Supreme Court.[62] The Ohio Supreme Court ruled in favor of the newspaper, stating that unless the records fell within one of Ohio's public record exceptions, they had to be released.[63] The court found that the disciplinary records were not education records under FERPA and that FERPA could not act as the federal law exception under Ohio's FOIA law.[64] The U.S. Supreme Court denied certiorari and thus never determined the ultimate question of whether the Supremacy Clause could prevent enforcement of FOIA disclosure requirements.[65]

Ohio State University had a similar situation occur and the DOE stepped in and sued both schools (consolidated cases) for violating FERPA.[66] On appeal, the Sixth Circuit compared conditional funding statutes, like FERPA, to a contract between the parties where the federal government can sue when conditions are violated.[67] Once a school accepts the funds, it is in fact prohibited from releasing the records, because it is a

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57. *Id.*
58. (*Miami Univ. I*) 294 F.3d 797 (6th Cir. 2002).
59. *Id.* at 804.
60. *Id.* at 802.
61. *Id.*
62. *Id.* at 803.
63. *Id.*
64. *Id.*
65. *Id. See also* Miami Univ. v. The Miami Student, 522 U.S. 1022 (1997) (order denying certiorari).
66. *Miami Univ. I*, 294 F.3d at 803.
67. *Id.* at 808.

violation of the conditions of the contract established by FERPA.[68] The court did not discuss whether a state public records law could trump FERPA because it agreed with the district court that student disciplinary records were in fact "education records" as intended by FERPA and therefore fit within the exception of federal statutes of the FOIA law.[69] Since there is an exception in Ohio's public records law for federal laws that prevent the release of certain records, under these provisions both FERPA and FOIA may co-exist.[70] FERPA protects students' educational and disciplinary records from those types of demands.

However, a court in Missouri reached the opposite conclusion. In *Bauer v. Kincaid*,[71] the Security Department of Southwest Missouri State University issued a policy statement indicating that it would not release incident reports or other reports concerning crimes occurring on campus to the public or media.[72] The plaintiff, a student and editor of the school's newspaper, filed suit, in part based upon Missouri's open records law, claiming that she should in fact have access to these reports, just as she had in the past.[73] Section 610.011.2 of the Missouri Open Records Act, or the "Sunshine Law," provides that all public records of public governmental bodies shall be open to the public for inspection and copying, except as otherwise provided by law.[74] All records shall be open except those "[r]ecords which are *protected* from disclosure by law."[75] The Security Department claimed it was part of the university and that FERPA prohibited disclosure of these incident reports because they more often than not involve students as either suspects or victims.[76] The court found that, since the Department was commissioned by the actual town police, the incident reports involved criminal information that should be accessible to the public, and thus, FERPA did not apply; the security officers had to disclose the reports.[77] To the court, these records did not qualify as "education records" as the disciplinary records had in the *Miami* court.[78]

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68. *Id.* at 809.
69. *Id.* at 812.
70. Ohio's Public Records Act has the same exception as Illinois, stating that it excludes from the definition of public records those records "the release of which is prohibited by state or federal law." OHIO REV. CODE ANN. § 149.43 (West 2002).
71. 759 F. Supp. 575 (W.D. Mo. 1991).
72. *Id.* at 577.
73. *Id.* at 576.
74. MO. REV. STAT. §§ 610.011-610.021(14) (2013).
75. *Id.* (emphasis added).
76. *Bauer*, 759 F. Supp. at 577.
77. *Id.* at 575.
78. United States v. Miami Univ. (*Miami Univ. I*), 294 F.3d 797 (6th Cir. 2002).

While judges in cases like the UIUC district court case[79] and *Bauer*[80] did not perceive an outright obligation in FERPA compelling universities to comply with its provisions, and others have viewed FERPA requirements as contract conditions,[81] other courts have found the pre-requisites to funding completely prohibitive of document release, including the U.S. District Court for New Hampshire.[82] In the *Belanger* case, the court stated:

> To be eligible for federal funds the educational agency or institution must provide parents with access to the education records of their children. This is not merely a congressional preference for a certain action but rather a congressional requirement imposing a mandatory obligation on the educational units to provide such access.[83]

The case involved parental access to their child's educational records and is thus somewhat different from the UIS and UIUC situations. The case still involved the eligibility to receive funds, however, and the obligations of universities to either maintain privacy or to release educational records to the appropriate persons or authorities.[84]

Finally, in dicta from the Supreme Court opinion in *Owasso Independent School District v. Falvo*,[85] the Court seemed to indicate that it too would find FERPA's conditions on funding to be a prohibition on educational document disclosures.[86] Justice Kennedy delivered the opinion of the Court, stating:

> Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. One condition specified in the Act is that sensitive information about students may not be released without parental consent. The Act states that federal funds are to be withheld from school districts that have "a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents."[87]

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79. Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs. (*UIUC Dist. Court*), 781 F. Supp. 2d 672 (N.D. Ill. 2011).
80. 759 F. Supp. 575.
81. *Miami Univ. I*, 294 F.3d at 808.
82. *See* Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994).
83. *Id.* at 46.
84. *See generally Belanger*, 856 F. Supp. 40.
85. 534 U.S. 426 (2002).
86. *Id.* at 428-29.
87. *Id.*; E.W. v. Moody, No. C06-5253, 2007 WL 445962, at *2 (W.D. Wash. Feb. 7, 2007) (referencing *Owasso* and *Miami University I* when it denied a motion to compel discovery, claiming that schools who accept funding under FERPA are "prohibited" from releasing education records without consent).

4. Constitutional Issues and Viewpoints

As seen from the cases examined above and the UIUC case that is still in progress, there are a multitude of issues, constitutional or otherwise, that are involved when it comes to FOIA versus FERPA. At least one scholar has offered her opinion on how courts should resolve altercations between state FOIA requests and universities' attempts to protect student privacy under FERPA.[88] Mathilda McGee-Tubb claims that, based upon cases like *United States v. Butler*,[89] the U.S. Supreme Court has affirmed Congress' ability to use the Spending Clause[90] to place conditions upon receiving federal funds.[91] According to McGee-Tubb, FERPA, as a federal statute supported by the Spending Clause, and the Supreme Court's recognition of conditional funding, would essentially displace any state laws regarding access to public information because of the Supremacy Clause.[92]

The Supremacy Clause states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[93] As such, McGee-Tubb argues that a law like FERPA, which often conflicts with state laws on access to public information, should be given priority.[94] More often than not, challenges by the states to federal funding conditions have failed because the Supreme Court has held that Congress and the federal government can, through the Spending Clause, use these kinds of statutes to achieve widespread policy goals.[95] The conditions must be for the general welfare, expressly stated, and unambiguous.[96] According to McGee-Tubb, FERPA, which requires state actors, i.e., public universities, to protect student information, should be considered a valid federal funding statute that prioritizes privacy rights.[97] Therefore, courts should rule that it fits within FOIA exemptions for federal laws that prohibit disclosure.[98] Any perceived conflict between state laws for the release of supposed "public information" should cede to federal laws, like FERPA, that require universities to act as safeguards of student information.[99] However, the Spending and Supremacy Clauses are not the only issues involved in these situations.

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88. McGee-Tubb, *supra* note 9, at 1047.
89. 297 U.S. 1 (1936).
90. U.S. CONST. art. I, § 8, cl. 1.
91. McGee-Tubb, *supra* note 9, at 1049.
92. *Id.*; U.S. CONST. art. VI, § 2.
93. U.S. CONST. art. VI, § 2.
94. McGee-Tubb, *supra* note 9, at 1049.
95. *See, e.g.*, *id.*; United States v. Butler, 297 U.S. 1, 66 (1936); South Dakota v. Dole, 483 U.S. 203, 206-07 (1987).
96. McGee-Tubb, *supra* note 9, at 1070 (citing *Dole*, 483 U.S. at 203).
97. *Id.* at 1049.
98. *Id.* at 1070.
99. *Id.*

Following Judge Gottschall's decision, UIUC filed a motion asking for a stay of her order.[100] The decision required the university to release all documents previously requested by the Tribune, the concern thereby arising that such a release could cause an automatic failure to comply with FERPA; the decision could mean forfeiting DOE funding, which in 2010 amounted to $146 million dollars in financial aid and grants, as well as $449 million in student loans for attendees of UIUC.[101] Almost one quarter of the University of Illinois' "operating revenues comes from Pell Grants and other federal sources, the loss of which would be crippling if not fatal."[102] The Executive Director of the Student Press Law Center, Frank Lomonte, claims that 10.8 percent of the cost of primary education in the United States is provided by the federal government.[103] If the DOE were to withhold funding based upon an alleged violation of FERPA privacy protections, schools would struggle to survive. Although the direct support to post-secondary schools is technically less than the funding provided to primary schools, if the DOE were to withhold funding, colleges could lose $35 billion dollars a year in the form of federally funded Pell Grants alone.[104]

Besides the monetary effect, allowing state FOIA laws to force the release of "private information" would undercut the freedoms that public universities have become accustomed to and perhaps would steer many students towards private schools.[105] The UIUC records being requested are the names of students' parents; they are not disciplinary records, but the actual educational records of students' admissions. Therefore, funding and privacy rights, established by precedent[106] and through the Substantive Due Process Clauses of the Fifth and Fourteenth Amendments,[107] could be affected if the Supreme Court were to decide as Judge Gottschall did. Ada Meloy, General Counsel for the American Council on Education, fears that forcing educational institutions to release information "will alienate students and faculty."[108] "At the federal or state level—or perhaps at both—vigorous advocacy may be necessary to protect the free exchange of

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100. Paul Wood, *UI Asks for Hold on Tribune FOIA Ruling*, NEWS-GAZETTE, Apr. 13, 2011, 7:00 AM, http://www.news-gazette.com/news/courts-police-and-fire/2011-04-13/ui-asks-hold-tribune-foia-ruling.html.
101. *Id.*
102. Frank D. LoMonte, *Why FERPA is Unconstitutional*, INSIDE HIGHER ED (Sept. 13, 2012), http://www.insidehighered.com/print/views/2012/09/13/federal-privacy-law-shouldbe-deemed-constitutional-essay.
103. *Id.*
104. *Id.*
105. Meloy, *supra* note 23.
106. Roe v. Wade, 410 U.S. 113 (1973).
107. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
108. Meloy, *supra* note 23.

ideas on campus, safeguard student privacy, and keep public colleges and universities open and available to the public they serve."[109]

Finally, there are also those who feel that universities use FERPA as a shield for their own bad behavior.[110] They believe courts should not allow the free and unfettered use of FERPA in defense of public information requests.[111] Executive Director LoMonte claims that universities are using FERPA as an excuse to avoid their public obligations.[112] "FERPA went awry when it became the catch-all excuse for every school or college that finds disclosure inconvenient or embarrassing."[113] In his opinion, predominately based on the case of *National Federation of Independent Businesses v. Sebelius*,[114] the Supreme Court should follow its own reasoning in cases where universities use FERPA to try and avoid reasonable public inquiries.[115] If cases like UIUC's end up in the Supreme Court, FERPA, as a conditional funding statute, should be deemed unconstitutional because it does not merely "amount to 'relatively mild encouragement,'"[116] but it ends up being a "gun to the head."[117] Essentially, when a conditional funding statute becomes so bloated and the funding so necessary to the very survival of a state institution, then the conditional funding statute no longer becomes sponsorship of an overall policy goal through Congress' general welfare and Spending Clause powers;[118] rather, it encroaches on states' Tenth Amendment rights.[119]

Although no one can always accurately predict what the Supreme Court may do, if the UIUC case were to end up in the Supreme Court, and thus in front of Justice Scalia, FERPA may no longer be a shield for universities or a protection for students. However, in order to make any prediction and to properly analyze how a Justice like Scalia would view the issues involved, one must first examine his legal philosophy.

B. Justice Scalia's Philosophy

Justice Scalia has been a self-proclaimed textualist or originalist since the beginning of his tenure in 1986. Understanding textualism, especially

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109. *Id.*
110. *See, e.g.*, Mary Margaret Penrose, *Tattoos, Tickets, and other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555 (2012); LoMonte, *supra* note 102.
111. *See* Penrose, *supra* note 110.
112. LoMonte, *supra* note 102.
113. *Id.*
114. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).
115. LoMonte, *supra* note 102.
116. *Id.*; *NFIB*, 132 S. Ct. at 2604.
117. *NFIB*, 132 S. Ct. at 2604.
118. U.S. CONST. art. I, § 8, cl. 1.
119. U.S. CONST. amend. X.

as seen from Justice Scalia's standpoint, is important in determining how he may decide a case like the UIUC case.

Textualism, in general, is a philosophy of judicial interpretation of the law. It requires judges to look strictly at the original meaning of the text of the law and apply it to the current situation, as opposed to trying to determine the legislators' intent at the time the law was written.[120] While Scalia's views and decisions have come under scrutiny by a prominent array of legal minds, he seems most interested in arresting any kind of judicial decision-making process that involves judges making the law versus strictly interpreting it.[121] To Scalia, a judge's subjective intent and moral or political values have no place in the interpretation of law and the decision-making process, although some, including Judge Posner, have criticized that he does not follow his own prescription.[122] While the original meaning of the words used in a particular law may at times be difficult to discern, considering the multitude of meanings and interpretations possible, Scalia holds strong to his belief that textualism is the only defensible method for interpreting the law.[123] This is especially true when it comes to the U.S. Constitution; the document simply should not be treated as a living or evolving document, as some scholars propose.[124]

Textualism and Justice Scalia's approach to interpreting law have sometimes been confused with strict constructivism.[125] Strict constructivism or construction means "interpreting the Constitution based on a literal and narrow definition of the language without reference to the differences in conditions when the Constitution was written and modern conditions, inventions, and societal changes."[126] Scalia insists textualism, as his technique for interpreting law, is not so strict that it does not or cannot conceive of and consider the "broader social purposes" behind which the statutes were created to serve.[127] Furthermore, he claims that while judges should acknowledge how the law works within present times, they should not take it upon themselves to write new laws or take up the broader causes for which the legislators apparently passed these laws.[128] Textualism, according to Scalia, is not literalist because it recognizes the

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120. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW vii (Amy Gutmann ed. 1997).
121. *Id.* at viii.
122. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK (Harvard Univ. Press 2008).
123. SCALIA, *supra* note 120, at viii.
124. *Id.* at viii-ix.
125. *Id.* at 23.
126. Gerald N. Hill & Kathleen T. Hill, *Strict Construction (Narrow Construction)*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/strict+construction (last visited Apr. 2, 2014).
127. SCALIA, *supra* note 120, at 23.
128. *Id.*

broader context of the laws that come before the Court. Constructionists see nothing but the words on the page and do not look past their usage within the law, much less within the sentence provided.[129] Additionally, while Scalia maintains he is not a literalist or strict constructivist, he does profess to abhor the expansion of, or departure from, the text of a statute and, particularly, the Constitution.[130] "Words have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[131]

When it comes to the particular constitutional issues involved in cases such as UIUC, i.e., Spending Clause, Supremacy Clause, and privacy rights, Justice Scalia has made clear in his recent dissenting opinions[132] that he does not fully support Congress' spending powers or the supremacy of federal laws when there are conflicts with state laws that may or may not be matters more appropriately handled by the states themselves. In *Arizona v. United States*, where the state's recently enacted immigration policy conflicted with federal immigration powers, Scalia seemed to support states' endeavors to protect their borders and to choose the ways in which they protect their borders.[133] Justice Scalia emphasized a comprehensive reading of all powers enumerated in the Constitution to either the states or the federal government.[134] He justifies his dissent by claiming that a full reading of the Constitution and the powers endowed the federal government proves that Arizona's immigration law is well within the state's sovereignty.[135] The Supremacy Clause does not in fact trump a state's ability to exercise its power and interests granted it by the Constitution.

Additionally, in the rather controversial decision regarding national health care (*National Federation of Independent Business v. Sebelius*),[136]

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129. *Id.* at 24.

130. *See id.*; ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

131. SCALIA & GARNER, *supra* note 130.

132. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012); Arizona v. United States, 132 S. Ct. 2492 (2012).

133. *Arizona*, 132 S. Ct. at 2511 (Scalia, J., concurring in part and dissenting in part).

134. Per Scalia:

> Two other provisions of the Constitution are an acknowledgment of the States' sovereign interest in protecting their borders. Article I provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing it's* [sic] *inspection Laws*." This assumed what everyone assumed: that the States could exclude from their territory dangerous or unwholesome goods. A later portion of the same section provides that "[n]o State shall, without the Consent of Congress . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*." This limits the States' sovereignty (in a way not relevant here) but leaves intact their inherent power to protect their territory.

Id. at 2512 (emphasis added) (citations omitted).

135. *Id.*

136. *See NFIB*, 132 S. Ct. at 2643 (Scalia, J., dissenting).

Scalia's dissent again illustrated his unwillingness to extend Congress' spending powers, the federal government, and overly broad regulations enacted in the name of the Commerce Clause.[137]

> What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.[138]

Finally, in terms of privacy rights, Scalia has consistently reiterated his disagreement with the Court's rulings on privacy in the name of the Constitution.[139] In his article published within *A Matter of Interpretation*, Scalia discusses the Court's decisions, which he sees as the best (and thus the worst) examples of judicial lawmaking.[140] Nothing in the Constitution explicitly states that any citizen has a right to privacy, and therefore those court rulings that have expanded the Due Process Clause by including substantive rights beyond freedom of speech and religion are judge-made law inconsistent with the appropriate role of judges.[141]

C. Justice Posner Philosophy

For many, Scalia's opinions, like those discussed above, confirm their criticisms of him.[142] Although Scalia claims that he bases his case decisions on the language used in the statutes themselves and not his personal preferences, his written opinions and dissents, in cases involving what are viewed as rather controversial and political statutes, have been

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137. *See id.*; U.S. CONST. art. I, § 8, cl. 1, 3.
138. *See NFIB*, 132 S. Ct. at 2643 (Scalia, J., dissenting).
139. *See* Terry Baynes, *Fanning Furor, Justice Scalia Says Appeals Court Judge Lied*, REUTERS (Sept. 17, 2012), http://www.reuters.com/assets/print?aid=USBRE88H06X20120918 (paraphrasing that Scalia does not consider *Roe v. Wade* binding precedent because, in his opinion, the decision was wrong: "[T]he court's subsequent decisions on abortion are based on the judge-made theory of 'substantive due process' which guarantees certain fundamental rights like privacy. It's 'utterly idiotic,' Scalia said."); SCALIA, *supra* note 120.
140. SCALIA, *supra* note 120, at 24.
141. *Id.*
142. *See, e.g.*, Scott Lemieux, *Supreme Court Strikes Most of Arizona Immigration Law, Making Scalia Very Angry*, AM. PROSPECT (June 25, 2012), http://prospect.org/article/supreme-court-strikes-most-arizona-immigration-law-making-scalia-very-angry; POSNER, *supra* note 122; SCALIA, *supra* note 120.

portrayed as evidence of a more politically influenced judge.[143] Perhaps no one has been more vocal in criticizing Scalia than Judge Richard A. Posner.[144]

In his book, *How Judges Think*, Judge Posner disparages judges, especially those on the Supreme Court, for being more political than pragmatic.[145] He believes that the Justices are more concerned with the political consequences of their decisions than acting as the independent jurists the Constitution intended in the creation of the judicial branch.[146] According to Posner, the Supreme Court can no longer control the lower courts through the "incremental method of common law," and the Court has been reviewing fewer and fewer cases.[147] Posner bases his claims on empirical evidence of the number and kinds of cases the Court has been taking.[148] The cases the Court chooses to hear are those hot-button political issues, making the Justices appear more concerned with politics than questions of federal law.[149] Judge Posner supposes that the Court "has long emphasized that it is not in the business of correcting the errors . . . of the lower courts."[150] Thus, the Court will only be willing to hear those cases that establish rules controlling "a large number of cases."[151]

When it comes to the Constitution, Posner alludes to a belief that it is far too outdated and vague.[152] Along with the difficulties inherent in amending it, the document ultimately makes the Supreme Court far too powerful and political.[153] He asserts that because the Constitution is so vague and provides little guidance for judges, it is not all that surprising that judges use their own political preferences to make decisions.[154] Politically charged cases, and those in which neither the President nor Congress agree, end up in front of a Court that cannot help its predilection towards voting instead of independently deciding the cases strictly on the law.[155] Furthermore, the Justices, given the dynamics, make choices with the knowledge that such decisions could "evoke constitutional amendments, budgetary retaliation by Congress, or a refusal to enforce (them) by the

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143. *See generally* POSNER, *supra* note 122; SCALIA, *supra* note 120.
144. *See, e.g.*, POSNER, *supra* note 122; Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism.
145. POSNER, *supra* note 122, at 269.
146. *Id.* at 269-70.
147. *Id.*
148. *Id.* at 299.
149. *Id.* at 270-71.
150. *Id.*
151. *Id.*
152. *Id.* at 272.
153. *Id.*
154. *Id.* at 272-73.
155. *Id.*

President."[156] However, the most influential factor for the Court is public opinion. Regardless of the fact that judges were meant to be autonomous, Supreme Court Justices are constrained by the pressures of public opinion because of their visibility.[157]

Posner feels it is sensible for Justices to disregard the historical context in which the Constitution was written, because interpreting such a vague document with reference to current values is more practical.[158] Following precedent is not always prudent, first and foremost, because precedent should not be considered law per se and because times change. If the Court were to steadfastly follow all of its previous decisions, such a practice would prevent the law from adapting to new and changing circumstances.[159] Following precedent does not always make decisions correct, and justifying following precedent simply for the purpose of establishing Court legitimacy is unacceptable and inappropriate.[160]

In the last several months, Posner's criticism of Supreme Court Justices, and in particular Justice Scalia, has become more scathing. Once Justice Scalia published his book, *Reading Law: The Interpretation of Legal Texts*,[161] Posner "delivered the Madison Lecture on Judicial Engagement at Columbia Law School,"[162] where he publicly denounced the book as simply "not good."[163] He espoused that while Scalia claims to place his legal interpretation in textualism, he really only decides cases based upon his personal and political leanings.[164] Furthermore, Scalia's book, which emphasizes the "canons of construction,"[165] is not really a description of textualism.[166]

> They undermine textualism, insofar as so many of them are not purely textual. The canons give judges leeway to look at considerations extrinsic to the text which, according to textualists like Scalia and Garner, judges are not supposed to do. The canons can be manipulated to reach a judge's desired outcome for a case.[167]

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156. *Id.*
157. *Id.* at 274.
158. *Id.*
159. *Id.* at 275.
160. *Id.*
161. SCALIA & GARNER, *supra* note 130.
162. David Lat, *Judge Posner on Statutory Interpretation: This is How We Do It*, ABOVE L. (Oct. 19, 2012), http://abovethelaw.com/2012/10/judge-posner-on-statutory-interpretation-this-is-how-we-do-it-or-for-the-less-high-minded-moar-benchslaps/.
163. *Id.*
164. *Id.*
165. *See id.*; SCALIA & GARNER, *supra* note 130.
166. Lat, *supra* note 162.
167. *Id.*

Judge Posner insinuated that Scalia remains far too entrenched in interpreting law based on its legislative history, instead of interpreting it as it stands during the case in question.[168] Scalia responded by saying that Posner lied.[169] "To say that I used legislative history is simply, to put it bluntly, a lie."[170] Scalia claimed that the only way Judge Posner could get away with his critique of Scalia's latest book was to do so in a non-legal publication like *The New Republic*.[171]

II. THE FOIA/FERPA RESOLUTION

Ultimately, regardless of whether some, and especially Posner, believe that Justice Scalia makes decisions based upon his political leanings rather than following true textualism, when it comes to whether FERPA would protect public universities from reasonable state FOIA requests, the Posner and Scalia are likely to make the same decision. Based upon the way FERPA was written (in particular, the wording of the funding section), FERPA has no real teeth. It merely states that the Secretary of Education has the power to withhold funding based upon a university's "policy or practice of permitting the release of education records . . . or personally identifiable information contained therein."[172] Posner, by concurring with the written decision of Judge Easterbrook, would presumably agree that "[t]he most one can say about federal law is that, *if* a state takes the money, *then* it must honor the conditions of the grant, including nondisclosure."[173] If Scalia were to follow his prescription for judging,[174] then he too would identify with the fact that FERPA simply does not explicitly "prohibit" state universities from releasing documentation, as the Illinois FOIA law requires if institutions withhold alleged public information.[175]

The only way in which the two might differ slightly on a case such as UIUC is whether the Supremacy Clause defeats any real chance for states to enforce their freedom of information laws. Given Scalia's recent dissenting opinions, the Supremacy Clause and Congress' spending powers would not override states' interest in allowing the public access to information involving their public schools.[176] Judge Posner, by concurring with the

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168. Baynes, *supra* note 139.
169. *Id.*
170. *Id.* (quoting Justice Scalia in an interview with Reuters Editor-in-Chief, Stephen Adler).
171. *Id.*
172. *See* 20 U.S.C. § 1232g(b)(1) (2012); Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002).
173. Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill. (*UIUC Appeals Court*), 680 F.3d 1001, 1004 (7th Cir. 2012) (emphasis in original).
174. SCALIA & GARNER, *supra* note 130.
175. *See* § 1232g(b)(1) (2012); 5 ILL. COMP. STAT. 140/7(1)(a) (2010).
176. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012); Arizona v. United States, 132 S. Ct. 2492, 2511 (2012).

Seventh Circuit's opinion, might agree that Illinois' FOIA would not survive a Supremacy Clause challenge.[177] Ultimately, if Posner uses the same pragmatism he encourages all judges to rely on, he too will most likely see the inefficiency of FERPA's language and the haphazard way in which schools may use it to shield themselves from lawsuits.[178] In addition, Posner's lack of preference for using precedent in court decisions indicates an unwillingness to simply allow the Supremacy Clause to decide the issue.[179] This is not to say that student privacy is of no concern and that freedom of information laws would thwart all attempts to protect university students, but perhaps there is a more effective way in which FOIA requests and school denials of those requests could be handled.

Finally, regardless of Judge Posner's criticism of Scalia and what he reasons is hypocrisy between Scalia's books, articles, and case decisions, it is of no real concern to the Justice. In an interview with Fox News Sunday, Scalia said, "He's a court of appeals judge, isn't he? He doesn't sit in judgment of my opinions as far as I'm concerned."[180] What is ironic about Posner and Scalia's supposed feud is how they may use different methods and yet come to the same conclusions.

177. *UIUC Appeals Court*, 680 F.3d 1001.
178. POSNER, *supra* note 122.
179. *Id.*
180. David Lat, *Benchslap of the Day: Justice Scalia Pulls Rank on Judge Posner*, ABOVE L. (July 30, 2012), http://abovethelaw.com/2012/07/benchslap-of-the-day-justice-scalia-pulls-rank-on-judge-posner/.