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ARTICLES

Academic Bills of Rights: Conflict in the Classroom

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Academic bills of rights are being considered and adopted at federal, state, and institutional levels to address demands for political diversity in higher education. This article puts this movement in context by examining the historical and current legal status of institutions', faculties', and students' authority to direct the educational process. It highlights the possibility of a dramatic shift in the control of the classroom and curricular content from the institution and faculty to the students, legislatures, and courts. This is a serious issue that needs to be considered and monitored when academic bills of rights are proposed.

Title IX and Gender Equity in Science, Technology, Engineering and Mathematics Education: No Longer an Overlooked Application of the Law

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In the summer of 2004, the U.S. Government Accountability Office (GAO) released a report titled *Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX*—a look at the state of Title IX enforcement efforts at the four federal agencies that grant the most money to colleges and universities in the science, engineering, technology and mathematics (STEM) disciplines. This article looks at the participation of women in STEM disciplines at the collegiate level, discusses Title IX issues relevant to women in STEM disciplines, and explores the GAO Report to understand the current state of Title IX enforcement with regard to STEM education.

Sarbanes-Oxley in Higher Education: Bringing Corporate America's "Best Practices" to Academia

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By its terms, the Sarbanes-Oxley Act of 2002 does not

apply to non-profits, but there can be no doubt that its “best practices” are fast becoming the presumptive tests by which to assess the adequacy of corporate governance and oversight in all sectors. Drawn from the experiences of a “voluntary complier,” this article analyzes the Act with regard to the unique interests, needs, and constraints of higher education, and offers recommendations for how to adopt the “spirit” of the Act.

Cheers, Profanity, and Free Speech

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Offensive and profane cheers at college sporting events have prompted several universities to consider establishing fan codes of conduct at stadiums, in the stated interest of protecting the sensibilities of unwilling captive listeners at the game, especially children. The First Amendment renders such speech policies invalid at public university stadiums and arenas. Arenas are forums for what can be labeled "cheering speech," protected expression by fans about the game, the participants, and the surrounding circumstances.

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Peter Wood’s *Diversity: The Invention of a Concept* is an invaluable recounting of the intellectual, ideological, and legal history of the concept of “diversity” as it relates to race and ethnicity. This review summarizes and analyzes Wood’s book, with particular focus on the concept’s role in Justice Lewis Powell’s opinion in *Regents of the University of California v. Bakke*. Next, the reviewer adds some criticisms of his own about the diversity concept and, finally, discusses

how the Supreme Court might be persuaded to overturn its recent acceptance of the diversity rationale as “compelling” in *Grutter v. Bollinger* and *Gratz v. Bollinger*.

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ACADEMIC BILLS OF RIGHTS: CONFLICT IN THE CLASSROOM

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“If anybody has a mortarboard, you can move your tassels from right to left, right to left, which is what I hope happened to your politics in the last four years.”¹

INTRODUCTION

Without significant empirical basis, colleges and universities have historically been accused of being bastions of liberal, even radical, thought. Faculty are often accused of ultra-liberal leanings and being intolerant of students’ conservative positions in the classroom. Recent studies, attempting to measure liberal bias on campuses, indicate that Democrats outnumber Republicans on American college and university faculties.²

Nationwide there are efforts to promote “intellectual diversity” in the classroom.³ This movement is in response to students’ perception that their rights to academic freedom are being violated when their views (e.g., political, ideological, or religious) differ from those of their faculty. In an attempt to remedy this percep-

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1. *Perspectives*, NEWSWEEK, June 7, 2004, at 25. George Washington University President Stephen Trachtenberg made this comment in an address at the university’s commencement exercises.

2. Thomas Bartlett, *More Faculty Members are Democrats*, CHRON. HIGHER EDUC., Dec. 3, 2004, at A15 (“Increasingly, American academe behaves as if it were a church with a creed rather than a marketplace of ideas”) (quoting Stephen H. Balch, president of the National Association of Scholars). The pair of studies referred to in this article were conducted by the National Association of Scholars and will be published in the association’s journal, *Academic Questions*. The studies are currently available at http://www.nas.org/aa/klein_launch.htm. *But see*, Lionel Lewis, *The Academic Elite Goes to Washington, and to War*, ACADEME, Jan. 2005, at 22 (stating that “students . . . need not fear indoctrination by liberal faculty”).

3. Sara Hebel, *Patrolling Professors’ Politics: Conservative Activists and Students Press Campaign Against Perceived Bias on Campuses*, CHRON. HIGHER EDUC., Feb. 13, 2004, at A18.

tion, numerous legislative efforts have been initiated to enact student “bills of rights.”⁴ In May 2004, legislation that was introduced in the U.S. House of Representatives to reauthorize the Higher Education Act, a student bill of rights was included that provides as follows:

It is the sense of Congress that—

- (1) no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this Act, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution; and
- (2) an institution of higher education should ensure that a student attending such institution on a full- or part-time basis is—
 - (A) evaluated solely on the basis of their reasoned answers and knowledge of the subjects and disciplines they study and without regard to their political, ideological, or religious beliefs;
 - (B) assured that the selection of speakers and allocation of funds for speakers, programs, and other student activities will utilize methods that promote intellectual pluralism and include diverse viewpoints;
 - (C) presented diverse approaches and dissenting sources and viewpoints within the instructional setting; and
 - (D) not excluded from participation in, denied the benefits of, or subjected to discrimination or official sanction on the basis of their political or ideological beliefs⁵

In addition to federal legislative efforts, individual states are considering mechanisms to respond to these perceived political concerns. In Georgia, the general assembly adopted a resolution that recommends the observance of an academic bill of rights by public colleges and universities.⁶ Legislation has also been introduced in California⁷ and the State of Washington.⁸ Other states are following

4. This is a controversial movement that has received attention in the local press. *See, e.g., Challenges to Colleges: Higher Education Ought to Seek Greater Diversity of Viewpoints on Faculties*, COLUMBUS DISPATCH, Feb. 15, 2005, at 8A; Shirley A. Schatz, ‘Academic Bill of Rights’ Shocking, DAYTON DAILY NEWS, Feb. 11, 2005, at A11; Jeff Bruce, *Let no Student be ‘Left’ Behind; Legislators: Time to Take the ‘Liberal’ out of Liberal Arts*, DAYTON DAILY NEWS, Feb. 6, 2005, at B6; John W. Wenzel, ‘Academic Bills of Rights’ is an Assault on Constitution, COLUMBUS DISPATCH, Feb. 5, 2005, at 11A; Mark Fisher, *Bill Seeks Reins on Profs in Classroom*, DAYTON DAILY NEWS, Feb. 1, 2005, at A1.

5. H.R. 4283, 108th Cong. § 103 (2004). A harsher version of this resolution, H. Con. Res. 318, 108th Cong. (2003), was previously stalled in the House education committee although similar legislation is still viable in states such as Washington. *See* H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005).

6. S. Res. 661 (Ga. 2004).

7. S.B. 1335, Reg. Sess. (Ca. 2003–04); S.B. 5, Reg. Sess. (Ca. 2005–06). *See* AAUP of

suit.⁹ Washington's legislative language is more specific than the federal resolution and is closely modeled upon the academic bill of rights developed by activist David Horowitz.¹⁰ It focuses on both the criteria that colleges and universities may use in faculty employment decisions and the variety of viewpoints that students should be exposed to during their college education. It provides:

To secure the intellectual independence of faculty and students and to protect the principle of intellectual diversity, the following principles and procedures shall be observed. These principles apply only to public universities and to private universities that present themselves as bound by the canons of academic freedom. Private institutions choosing to restrict academic freedom on the basis of creed must explicitly disclose the scope and nature of these restrictions.

(1) All faculty shall be hired, fired, promoted, and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise and, in the humanities, the social sciences, and the arts, with a view toward fostering a plurality of methodologies and perspectives. No faculty may be hired, fired, or denied promotion or tenure on the basis of his or her political or religious beliefs.

(2) No faculty member may be excluded from tenure, search, and hiring committees on the basis of the member's political or religious beliefs.

(3) Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.

(4) Curricula and reading lists in the humanities and social sciences

California, *Response to the Academic Bill of Rights, Legislating Academic Freedom: The Larkin-Horowitz Debate*, available at <http://www.aaup-ca.org/abor.html> (last modified March 10, 2005) (stating that the academic bill of rights "pushes an agenda that is antithetical to the best traditions of American higher education").

8. H.B. 3185, 58th Leg., Reg. Sess. (Wash. 2004).

9. S.B. 24, 126th Reg. Sess. (Ohio 2005-06); H.B. 1531, 114th Reg. Sess. (Ind. 2005); H.B. 432 & S.B. 1117, 104th Gen. Assem., Reg. Sess. (Tenn. 2005). The Students for Academic Freedom ("SAF") *Year End Report 2003-2004*, announces that legislators in Missouri, Michigan, Oklahoma, Massachusetts and Utah are also moving to introduce legislation regarding academic bills of rights. See SAF, YEAR END REPORT 2003-2004 available at <http://studentsforacademicfreedom.org> (last visited Mar. 20, 2005). See also Sara Hebel, *Statehouse Digest: A Roundup of This Week's News From the State Capitols*, CHRON. HIGHER EDUC. DAILY, (Feb. 25, 2005), available at <http://chronicle.com/daily/2005/02/2005022505n.htm> (noting similar legislative efforts in California, Florida, Indiana, Ohio, and Tennessee); Mary Beth Marklein, *Proposed 'Academic Bill of Rights' Makes Inroads in a Handful of States*, USA TODAY, Mar. 17, 2004, at 7D (discussing the conservative legislative movement to create academic bill of rights for college and university campuses).

10. David Horowitz, president of the Center for the Study of Popular Culture, is a conservative columnist and civil rights activist who is encouraging Congress and state legislatures to adopt an academic bill of rights. He also founded SAF to promote the issue. SAF is planning to push about twenty states to enact academic bills of rights this year. See *Conservatives Ask Lawmakers to Restrain "Liberal Bias,"* FORT WAYNE SENTINEL, Dec. 21, 2004, available at <http://studentsforacademicfreedom.org/archive/2005/January2005/FortWayneSentinelAParticle010305.htm>.

should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate. While teachers are and should be free to pursue their own findings and perspectives in presenting their views, they should consider and make their students aware of other viewpoints. Academic disciplines should welcome a diversity of approaches to unsettled questions.

(5) Exposing students to the spectrum of significant scholarly viewpoints on the subjects examined in their courses is a major responsibility of faculty. Faculty will not use their courses for the purpose of political, ideological, religious, or antireligious indoctrination.

(6) Selection of speakers, allocation of funds for speakers' programs, and other student activities will observe the principles of academic freedom and promote intellectual pluralism.

(7) An environment conducive to the civil exchange of ideas is an essential component of a free university; the obstruction of invited campus speakers, destruction of campus literature, or other effort to obstruct this exchange is prohibited.

(8) . . . [A]cademic institutions and professional societies should maintain a posture of organizational neutrality with respect to the substantive disagreements that divide researchers on questions within, or outside, their fields of inquiry.¹¹

Some colleges and universities are voluntarily developing student bills of rights. In Colorado, the public universities subscribed to a memorandum of understanding in March of 2004 that provides:

Higher education in Colorado is a prized institution that fosters learning, culture and economic vitality. Colorado's institutions of higher education are committed to valuing and respecting diversity, including respect for diverse political viewpoints. No student should be penalized because of political opinions that differ from a professor's. Every student should be comfortable in the right to listen critically, and challenge a professor's opinions. Policies that protect students' rights should not cast doubt on professors' academic freedom. Academic freedom of faculty and academic freedom of students are essential and complementary elements of successful education. While the State of Colorado has a legitimate oversight role in state-sponsored higher education, the individual institutions and their governing bodies are in the best position to implement policies to respect the rights of students and faculty. Each institution will review its students' rights and campus grievance procedures to ensure that political diversity is explicitly recognized and protected. Each institution will ensure those rights are adequately publicized to students. Each institution will work with student leadership to ensure that the use of student activity fees meets standards articulated

11. H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005).

by the U.S. Supreme Court for an open forum that is fair to all viewpoints. We will have future discussions to share ideas and perspectives on a range of issues to ensure the campus environment is open and inviting to students of all political viewpoints.¹²

This movement presents the possibility of a dramatic shift in the control of the classroom and curricular content from the institution and its faculty to the students. This potential conflict could have enormous unintended effects on faculty and institutional autonomy. This article reviews the historical and current legal status of the institutions', faculties', and students' academic freedom¹³ in the classroom, and examines the potential shift in the authority relationship that could result from current and pending legislative interventions. Case law and the growing acceptance of education as a consumer product suggest that the judiciary has become more receptive to student breach of contract suits that allege specific, identifiable, and objective promises. Student bills of rights could provide students with an additional source on which to base breach of contract cases against colleges and universities.

Part I reviews the development of the concept of academic freedom and expression rights for faculty, institutions, and students with a focus on disputes developing in the classroom context where professors are teaching and students learning. The emphasis in the related case law is how a subject is taught, what is taught, which materials and textbooks are used, what kinds of expression are acceptable during class, and who has the authority to determine the parameters of these choices. Critical to the analysis is the respective authority positions of faculty, institutions, and students rather than the public and private institutional distinctions and constitutionality issues.

Part II discusses student contract rights and the trend to view education as a consumer product. Colleges and universities enjoy substantial judicial deference in most academic matters. The judiciary generally refuses to consider educational malpractice suits, even when disguised as breach of contract claims. Student

12. MEMORANDUM OF UNDERSTANDING, available at <http://www.studentsforacademicfreedom.org/reports/COMemorandumofunderstanding.htm> (last visited Mar. 20, 2005). The *Memorandum of Understanding* was supported by the Colorado legislature in April of 2004. See S.J. Res. 04-033, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004). Debate continues in Colorado regarding the appropriateness of the principles of student bills of rights. A new bill would supplement existing policies of Colorado colleges and universities by softening notions of academic freedom set forth in the *Memorandum of Understanding*. See S.B. 05-085, 65th Gen. Assem., 1st Reg. Sess. (Colo. 2005); Chris Frates, *Bill Would Protect College Faculty's Speech: A Democratic Senator Says He Hopes to Counter Any Bad Effects From Last Year's Debate on an Academic Bill of Rights*, DENVER POST, Jan. 16, 2005, at C-03.

13. The authors of this article use the phrase "academic freedom" as a term of art based more on the authority to direct the educational process rather than as a constitutional construct. As such, this ability to control the educational process generally applies in both public and private college and university contexts. Some authors argue that academic freedom is a constitutional right in the public university context. See, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79 (2004). Other authors argue that although courts should give deference to university autonomy based on public policy and educational missions that encompass academic freedom, public universities do not have institutional academic freedom or autonomy grounded in the First Amendment. See e.g., Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate that Confusion?* 30 J.C. & U.L. 531 (2004).

breach of contract claims succeed when specific, objective, identifiable promises are not honored. The courts recognize the need for students as consumers to hold colleges and universities accountable for their specific services. After reviewing student contract rights in general, the discussion focuses on disputes arising in the classroom context.

Part III takes into account concepts discussed in Part I and Part II and considers whether student academic bills of rights could allow students to bring breach of contract cases with “teeth” against colleges and universities that ultimately could alter the current authority relationship between faculty, institutions, and students.

I. AUTHORITY AND ACADEMIC FREEDOM IN THE CLASSROOM

Academic freedom has been part of the educational landscape for many years. Originally associated with teachers and professors, the concept of academic freedom is now also associated with educational institutions and students. There are three types of academic freedom recognized by both the judiciary and the educational system. First and foremost, academic freedom is deeply ingrained as a professional and cultural aspect in the educational realm. This type of academic freedom is a salient feature on most college and university campuses and is reflected in the American Association of University Professors’ (“AAUP”) statement on academic freedom.¹⁴ Although they are not generally legally enforceable, professional norms reinforce respect for inquiry, discourse, and the freedom to express academically related ideas. Dedication to professional academic freedom can vary from institution to institution. Second, academic freedom may become an explicit or implicit part of a faculty member’s contract, creating a judicially enforceable right. Academic freedom thus becomes defined by the terms of the contract. Third, notions of academic freedom can be used to limit state action. Constitutional academic freedom often draws on notions of cultural and professional academic freedom and is grounded in the First Amendment. Constitutional academic freedom can only be claimed by faculty at governmental institutions.

A. Faculty

The ability for faculty to direct their intellectual expression and generally run their classrooms as they choose is tied to the notion of academic freedom. Academic freedom is the philosophy, or set of norms and values, that protects a faculty member’s freedom of intellectual expression and inquiry. Although academic freedom is a somewhat amorphous concept,¹⁵ it generally encompasses a faculty member’s freedom of inquiry in research and publication, freedom of association, freedom to evaluate students and assign grades, freedom to determine classroom speech, and freedom of speech as a citizen.¹⁶

14. See AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001) [hereinafter AAUP, *1940 Statement*].

15. See Donald J. Weidner, *Academic Freedom and the Obligation to Earn it*, 32 J.L. & EDUC. 445, 445 (2003) (“Academic freedom is not defined nearly as much as it is discussed. Although many assume that academic freedom is based in law, no one is quite sure what that law is.”).

16. For additional information on academic freedom, see STEPHEN H. ABY & JAMES C.

The first statement regarding academic freedom in the United States was developed by representatives from several learned societies who formed the AAUP in response to the conflict between two opposing forces in the twentieth century.¹⁷ On one hand, new academic discoveries were warmly received with the expansion of scientific knowledge, free market theory, and American appreciation of pluralism. However, this transformation of academic freedom into a powerful force ran contrary to the traditional role of lay boards of trustees who, as “preservers of collegiate truth,” balked at the new social science theories as un-American. Furthermore, during this period, faculty terminations in the interest of the institution were considered justified. As a result of these opposing forces in 1916, the AAUP published its first statement on academic freedom, which focused on freedom of inquiry and research, freedom of teaching within the university, and freedom of extramural utterance and action.¹⁸ The main basis for this declaration of intellectual independence and autonomy stemmed from the asserted primary responsibility faculty had to the “public” and “profession,” rather than to institutional boards.¹⁹

University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of trustees than are judges subject to the control of the President with respect to their decisions; while, of course, for the same reasons, trustees are no more responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the President can be assumed to approve of all the legal reasonings by the courts.²⁰

Today, the AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure* is considered the authoritative statement regarding academic freedom for faculty in higher educational institutions, setting forth that “[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. . . .”²¹

Drawing upon these notions of cultural and professional academic freedom, courts have also reasoned that academic freedom is essential to the educational

KUHN IV, *ACADEMIC FREEDOM: A GUIDE TO THE LITERATURE* (2000).

17. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* (1962); WALTER P. METZGER, *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION* (1977); W.H. COWLEY & DONALD T. WILLIAMS, *INTERNATIONAL AND HISTORICAL ROOTS OF AMERICAN HIGHER EDUCATION* (1991).

18. AAUP, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1915, in 1 AAUP BULLETIN 17 (1916) [hereinafter AAUP, 1916 *General Report*].

19. See Charles M. Ambrose, *Academic Freedom in American Public Colleges and Universities*, 14:1 REVIEW OF HIGHER EDUC. 5 (Fall 1990); Robert K. Poch, *Academic Freedom in American Higher Education*, 1994 ASHE-ERIC HIGHER EDUCATION REPORTS; Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1 (1993); NEIL W. HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE* (1995).

20. AAUP, 1916 *General Report*, *supra* note 18, at 26.

21. AAUP, 1940 *Statement*, *supra* note 14, at 3. The AAUP draws no distinction between faculty at public and private universities, as faculty at both types of institutions benefit from professional autonomy in their teaching and scholarship endeavors. Byrne, *supra* note 13, at 108 (2004). Terms set forth by the AAUP may be binding on an institution depending on whether it is incorporated into university policies and contracts.

process:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'²²

This commitment to academic freedom was demonstrated in *Levin v. Harleston*,²³ which highlights the protections courts afford controversial expression, no matter how much the faculty, administration, and students object to its content. In *Levin*, a philosophy professor at City College of the City University of New York ("CCNY"), published several articles and made many professional speeches about his research, arguing that blacks are less intelligent than whites.²⁴ His work was very embarrassing to CCNY and prompted several student protests.²⁵ The college responded by creating an alternative Philosophy 101 section to allow students to transfer out of the professor's class and created an ad hoc committee to investigate whether the professor's conduct extended beyond the protections of academic freedom or constituted conduct warranting discipline.²⁶ The professor thereafter turned down several invitations to speak or write about his views for fear that he would be fired.²⁷ The professor sued the college and several college officials alleging that his First and Fourteenth Amendment rights were violated.²⁸ The district court found that the professor's due process and free speech rights were violated.²⁹ The college president and dean appealed.³⁰

The Second Circuit emphasized that although the judiciary is reluctant to intrude on academic decisions made by college and university officials, it will interfere if a First Amendment right is violated.³¹ Here, the professor's First Amendment rights were not outweighed by a legitimate educational interest.³² "[The College's] encouragement of the continued erosion in the size of Professor Levin's class if he [did] not mend his extracurricular ways [was] the antithesis of freedom of expression."³³ In addition, the court said the creation of the ad hoc committee, even though it did not find grounds for discipline, had the effect of indirectly chill-

22. *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

23. 966 F.2d 85 (2d Cir. 1992).

24. *Id.* at 87.

25. *Id.*

26. *Id.* at 87-89.

27. *Id.* at 89.

28. *Id.* at 88.

29. *Id.*

30. *Id.* at 87.

31. *Id.* at 88.

32. *Id.*

33. *Id.*

ing the professor's expression.³⁴

Even though First Amendment free speech and academic freedom are related, the rights that they offer are not coextensive.³⁵ While the First Amendment protects various types of expression from regulation by public institutions such as public colleges and universities, academic freedom as a cultural norm "addresses the rights within the educational contexts of teaching, learning, and research both in and outside of the classroom—for individuals at private as well as public institutions."³⁶ Faculty members, however, may use First Amendment protections related to academic freedom only in governmental institutions. In general, faculty may not be terminated for the content of their classroom speech, so long as it is consistent with the purpose of the course. Furthermore, an institution cannot limit a public faculty member's right to speech or terminate a faculty appointment for speech expressed in the context of the citizen role or about a public issue: "[A] teacher's exercise of his rights to speak on issues of public importance may not furnish the basis for his dismissal from public employment."³⁷

While academic freedom provides some safeguards to faculty expression, there are limits to its protection. When speech is disruptive of the educational environment, it is not protected by academic freedom and can be the basis for dismissal. Thus, "[a]cademic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the University or disruptive to the education[al] process."³⁸ In addition, academic freedom cannot be used to compromise a student's right to learn in a hostile-free environment since colleges and universities are legally required to provide such an environment.³⁹

34. *Id.* at 89. See also *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968,972 (9th Cir. 1996) (finding the college's new sexual harassment policy was unconstitutionally vague as applied to a professor's classroom speech and his longstanding confrontational teaching style); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994) (ruling that the application of the university's sexual harassment policy to the professor's classroom comments violated his First Amendment rights).

35. Donna Euben, *Legal Issues in the Classroom*, APPALACHIAN COLL. ASS'N TEACHING & LEARNING INST., at <http://www.aaup.org/Legal/info%20outlines/classroom.htm> (June 4, 2003). See Byrne, *supra* note 13; Hiers, *supra* note 13.

36. Euben, *supra* note 35.

37. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). Faculty at public institutions can enjoy expanded rights through First Amendment claims against their institutions and "protection against penalty for nonacademic speech on matters of public concern under doctrines encompassing all public employees." Byrne, *supra* note 13, at 108.

38. *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496, 504 (Wash. 1982).

39. *Bonnell v. Lorenzo*, 241 F.3d 800, 823–24 (6th Cir. 2001). See 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"). Claims of discrimination can also be reviewed by the Department of Education, Office of Civil Rights ("DED-OCR") in an effort to evaluate the appropriateness of an institutional response. See e.g., Letter from Alice B. Wender, director, DED-OCR Southern Division to Dr. James Moeser, chancellor, University of North Carolina-Chapel Hill, available at http://www.nacua.org/documents/UNC_OCR_Letter.pdf (Sept. 22, 2004) (regarding OCR Docket No. 11-04-6001 and DED-OCR's review of the university's compliance with Title VI and Title IX).

Academic freedom does not give faculty the right to say or do whatever they please in the classroom. Faculty need to relate their classroom speech to topics that are “germane to the subject matter;” otherwise, speech that is unrelated to the course or at variance with prescribed curriculum may not be protected by academic freedom and may be subject to discipline.⁴⁰ The 1940 AAUP Statement reiterates this point by cautioning teachers “not to introduce into their teaching controversial matter which has no relation to their subject.”⁴¹ Ultimately, academic freedom does not allow professors the freedom to use “uncontrolled expression at variance with established curricular contents and internally destructive [to] the proper functioning of the institution.”⁴²

It is not always easy to determine whether or not classroom speech is subject-related, an issue that is frequently disputed in public college and university settings. In *Bonnell v. Lorenzo*,⁴³ the professor’s gratuitous in-class use of vulgarity including the words “shit,” “damn,” “fuck,” and “ass” in an English composition class were deemed “not germane to the subject matter” of the class.⁴⁴ Thus, the professor had no constitutionally protected right to use such language in the classroom setting.⁴⁵ The court noted that, “[w]hile a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.”⁴⁶ However, in *Hardy v. Jefferson Community College*,⁴⁷ the court held that an adjunct faculty member’s use of words such as “nigger” and “bitch” in a course on interpersonal communications was germane to the subject matter of the course and limited to an academic discussion of the words.⁴⁸ The court refused to grant the college officials qualified immunity for removing his teaching contract, holding that “a teacher’s in-class speech deserves constitutional protection” as a matter of public concern, so long as it does not impede the teacher’s “proper performance of his daily duties in the classroom or [interfere] with the regular operation of the schools generally.”⁴⁹ The court noted that reasonable school officials should know that speech is protected by the First Amendment when it advances an academic message and is germane to the classroom subject matter.⁵⁰

In *Vega v. Miller*,⁵¹ a former, non-tenured English professor was not reappointed by the New York Maritime College because of his use of an offensive classroom word association exercise in a remedial, pre-freshman English class.⁵²

40. *Bonnell*, 241 F.3d at 820–21. See AAUP, *1970 Interpretive Comments*, in POLICY DOCUMENTS & REPORTS 5 (9th ed. 2001); *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986).

41. AAUP, *1940 Statement*, *supra* note 14, at 3.

42. *Clark v. Homes*, 474 F.2d 929, 931 (7th Cir. 1972).

43. 241 F.3d 800 (6th Cir. 2001).

44. *Id.* at 821.

45. *Id.* at 820, 824.

46. *Id.* at 823–24.

47. 260 F.3d 671 (6th Cir. 2001).

48. *Id.* at 679.

49. *Id.* at 681 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1986)).

50. *Id.* at 683.

51. 273 F.3d 460 (2d Cir. 2001).

52. *Id.* at 462–63.

The exercise was used to generate several different words with the same general meaning.⁵³ The students in the class chose the topic of sex and thereafter called out a variety of words associated with the topic.⁵⁴ Although none of the students complained, the college administrators decided not to reappoint the professor as his conduct could be considered sexual harassment.⁵⁵ The professor sued arguing that his First Amendment right of academic freedom was violated.⁵⁶ The court stepped around the issue concluding that the college could have reasonably believed at the time that not reappointing the professor did not violate the professor's First Amendment academic freedom rights.⁵⁷

Sometimes a professor's choice of course content clashes with the institution's or students' views regarding what is offensive or an extraneous interjection of religion or politics. In *Bishop v. Aronov*,⁵⁸ an assistant professor of health, physical education and recreation at the University of Alabama was asked to restrict his speech by the university administration⁵⁹ after stating his personal religious beliefs in class and holding an optional after-class discussion on "the evidence of God in human physiology or from a 'Christian perspective.'"⁶⁰ After ruling that the classroom was not an open forum because it was reserved for instructional time, the court addressed how much control a school can exert on a teacher's classroom instruction before intruding on the teacher's First Amendment rights.⁶¹ In regard to the professor's classroom comments, the court examined the in-class context, the university's position as a public employer with a teaching mission, and the concept of academic freedom, holding that the restriction of the professor's speech was reasonably related to legitimate pedagogical goals and that the university retained power to control curriculum.⁶² Interestingly, the court could not find support to conclude that academic freedom was an independent First Amendment right and chose not to override the university's discretion, trusting that the university would preserve both its own academic interests and the academic interests of its professors since it would not otherwise be able to attract quality teachers.⁶³ As for the "optional" after-class meetings, the court found that the university's demand to completely disassociate classroom instruction from his Christian perspective physiology meetings was also reasonable.⁶⁴

53. *Id.*

54. *Id.* at 463.

55. *Id.*

56. *Id.* at 464.

57. *Id.* at 470–71.

58. 926 F.2d 1066 (11th Cir. 1991).

59. Bishop was informed by a memo that he was to "separate his personal and professional beliefs and that he not impart the former to his students during 'instructional time' or under the guise of the courses he teaches in so-called optional classes." *Id.* at 1071. The restrictions placed on Dr. Bishop by the university were that he refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." *Id.* at 1069.

60. *Id.* at 1076.

61. *Id.* at 1071.

62. *Id.* at 1074.

63. *Id.* at 1075.

64. *Id.* at 1076.

In *Edwards v. California University of Pennsylvania*,⁶⁵ a tenured media studies professor sued the administration for violating his free speech rights by restricting his choice of classroom materials that emphasized issues of “bias, censorship, religion and humanism.”⁶⁶ The department had voted to use a common version of a course syllabus after a student complained that the professor used the class to advance religious ideas.⁶⁷ At trial, the jury found for the university on the professor’s First Amendment claim.⁶⁸ The professor appealed arguing that the district court inadequately instructed the jury by failing to clarify what “reasonably related to a legitimate educational interest” means by stressing the strength of a professor’s academic freedom rights.⁶⁹ The appellate court found it unnecessary to determine whether the jury instructions were appropriate because “a public university professor does not have a First Amendment right to decide what will be taught in the classroom” in contravention of the university’s policies.⁷⁰ The court stated that although the professor “has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom.”⁷¹ The professor’s reliance on academic freedom did not change the outcome since the concept of academic freedom is associated with university autonomy.⁷²

Professors generally enjoy the freedom to control classroom discussions, assignments, and texts. By relying on notions of academic freedom and First Amendment protections, professors have been successful in cases where their classroom actions clash with students or institutions. However, when classroom speech or coursework is at variance with prescribed curriculum, professors may be subject to discipline. Academic bills of rights could diminish professors’ classroom independence by placing academic decision-making authority into the hands of the legislature or students thereby altering the current student-professor-institution authority relationship.

B. Colleges and Universities

Courts have recognized that both the faculty and the institution have control over the classroom environment. To the extent that the topics covered by faculty are germane to the assigned course content parameters and are not conveyed in ways that are aggressively offensive so as to be measurably provocative, the faculty are left to their “academic freedom” to teach their classes as they deem proper. But institutional freedom is growing as a trump card, as a college or university can first decide, by job assignment, the course to be offered, and its content, and secondly, if the manner in which content is offered is beyond its standards of decency or relevancy. The current academic bill of rights movement could alter the profes-

65. 156 F.3d 488 (3d Cir. 1998).

66. *Id.* at 489.

67. *Id.* at 489–90.

68. *Id.* at 490.

69. *Id.* at 491.

70. *Id.*

71. *Id.*

72. *Id.* at 492.

sor-institution authority relationship by requiring colleges and universities to closely oversee classroom content and expression in order to avoid liability on either statutory or contractual claims.

To the extent that academic freedom has been recognized for faculty, the Fourth Circuit has held that the freedom actually inheres in the educational institution. In *Urofsky v. Gilmore*,⁷³ six professors from various state educational institutions challenged the constitutionality of a Virginia law that restricted state employees from accessing sexually explicit materials on the internet.⁷⁴ The professors argued that the Act violated their academic freedom rights. The court characterized their claim in another way:

In essence, [the professors] contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching. [They] maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of academic freedom above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.⁷⁵

Noting that the concept of academic freedom is not clearly defined, the court briefly examined its historical use, concluding that although academic freedom has strong roots as a professional practice, it has not become an established constitutional right.⁷⁶ In fact, the court stated that:

[T]he Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom . . . [and] to the extent it has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs."⁷⁷

The court rejected the professors' claim that *Sweezy v. New Hampshire*⁷⁸ adopted the concept of academic freedom, noting that although academic freedom was relied on in *Sweezy*, the right recognized was not an individual right, but rather an institutional right belonging to the university.⁷⁹ Language in *Sweezy* focused on the rights of the educational institution and not the academic freedom rights of individual faculty: "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be

73. 216 F.3d 401 (4th Cir. 2000).

74. *Id.* at 404.

75. *Id.* at 409–10.

76. *Id.* at 411.

77. *Id.* at 412.

78. 354 U.S. 234 (1957).

79. *Urofsky*, 216 F.3d at 412.

taught, and who may be admitted to study.”⁸⁰ The court, however, found analysis of past precedent inconsequential because regardless of whether teachers had at one time enjoyed additional protection under the First Amendment by virtue of academic freedom, the same First Amendment rights later became available to all public employees thereby invalidating the need for any additional academic safeguards.⁸¹

Through its analysis, the court highlighted a recent shift toward institutional academic freedom in Supreme Court jurisprudence and noted that the Court “has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so.”⁸² Interestingly, the court cited *Edwards v. Aguillard*,⁸³ a case involving an action to challenge the constitutionality of the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act.⁸⁴ The Act required that the theories of creationism and evolution be taught together, with “equal time” for opposing opinions, or not at all, in primary and secondary public schools.⁸⁵ In *Edwards*, the Supreme Court essentially brushed aside the Act’s purported purpose of protecting academic freedom to find that the Act violated the Establishment Clause by “requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.”⁸⁶ However, the Court noted that the Act did not protect the purported purpose of advancing academic freedom because it did not give teachers any more flexibility than they already possessed.⁸⁷ In fact, it limited teachers’ choices since the Act did not encourage the teaching of all scientific theories: “teachers who were once free to teach any and all facets of this subject are now unable to do so.”⁸⁸ Nevertheless, the Court did not seriously consider academic freedom in holding the Act unconstitutional.⁸⁹

Ultimately, the *Urofsky* court rejected the professors’ argument that academic freedom is an individual professor’s constitutional right and that the First Amendment provides special protection for academic speakers.⁹⁰ Aside from professional values and practice standards, the court stated that professors simply have the same First Amendment rights as any other public employee.⁹¹

80. *Id.* at 413 (quoting *Sweezy*, 354 U.S. at 263 (1957)). The language used by Justice Frankfurter in his concurring opinion in *Sweezy* derives from a South African text published in 1957. See ALBERT VAN DE SANDT CENTLIVRES ET AL., CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA at 10–12 (1957). See also Heirs, *supra* note 13, at 533–36 (discussing the origins and development of the concept of institutional academic freedom).

81. *Urofsky*, 216 F.3d 413–14.

82. *Id.* at 414.

83. 482 U.S. 578 (1987).

84. *Id.* at 580.

85. *Id.* at 588.

86. *Id.* at 596–97.

87. *Id.* at 587.

88. *Id.* at 589.

89. *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000).

90. *Id.* at 411–12.

91. *Id.* at 415. There is disagreement among scholars regarding the reasoning and outcome

The concept of institutional autonomy was addressed by the Supreme Court in *Grutter v. Bollinger*,⁹² where the admissions policy of the University of Michigan Law School was at issue.⁹³ A law school applicant who was denied admission sued the university alleging that the admissions policy, which considered race as a factor, violated her equal protection rights.⁹⁴ The district court held that the admissions policy was unlawful and enjoined the law school from using race as a factor.⁹⁵ The appellate court reversed and vacated the injunction.⁹⁶ In holding that the law school had a compelling interest in creating a diverse student body and that the admissions policy was narrowly tailored, the Court reaffirmed the judicial tradition of giving deference to university academic decisions:

Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.⁹⁷

The Court may have perpetuated the confusion of whether institutional academic freedom is a constitutional right by using language associated with institutional autonomy, but failed to clarify how academic freedom is linked to the First Amendment.⁹⁸

A recent case highlights the recognition of institutional academic freedom. In

of the *Urofsky* case. See Byrne, *supra* note 13, at 112 (stating that “*Urofsky* vividly illustrates the disasters that can flow from assessing college and university speech issues without sensitivity for academic values and the tradition of academic freedom”); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1065 (2003) (arguing that “the Fourth Circuit erred in automatically deferring to the state, in failing to ask the operative question of functional necessity, and in distinguishing between ‘individual’ and ‘institutional’ academic freedom”); Stacy E. Smith, Note, *Who Owns Academic Freedom: The Standard for Academic Free Speech in Public Universities*, 59 WASH. & LEE L. REV. 299, 351 (2002) (stating that “the Fourth Circuit stripped the core of academic freedom by ruling that academic freedom provides no protection to the academic inquiry and research of individual professors”); Doug Rendleman, *Academic Freedom in Urofsky's Wake: Post September Remarks on “Who Owns Academic Freedom?”* 59 WASH. & LEE L. REV. 361, 362 (2002) (stating that “*Urofsky* is a triumph for collectivism and conformity and a recipe for timidity”). But see Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?* 168 EDUC. LAW REP. 1, 17–18 (2002) (arguing that a professor's academic freedom flows from the professor-university employment relationship. He notes that the AAUP's statement on academic freedom is subject to the adequate performance of the professor at the university and that the four essential elements of academic freedom belong with the university); Weidner, *supra* note 15, at 448 (stating that *Urofsky* was a victory for deans, university managers, productive faculty, students, and state taxpayers).

92. 539 U.S. 306 (2003). For a comprehensive discussion regarding *Grutter v. Bollinger*, the development of the concept of institutional academic freedom and its tenuous association with the First Amendment, see Hiers, *supra* note 13.

93. *Grutter*, 539 U.S. at 306.

94. *Id.*

95. *Id.*

96. *Id.* at 306–07.

97. *Id.* at 328–29.

98. Hiers, *supra* note 13, at 573–77.

Yacovelli v. Moeser,⁹⁹ students challenged the use of a book about the Qur'an in a freshman orientation program.¹⁰⁰ The University of North Carolina at Chapel Hill had required all incoming students to read the book, write a paper, and discuss their responses to the book; an activity designed to examine current controversies in light of the September 11 terrorist attacks in an academic context.¹⁰¹ Students argued that the activity violated the Establishment Clause.¹⁰² The court disagreed.¹⁰³ While discussing the third prong of the *Lemon* Test,¹⁰⁴ the court reiterated the need for academic freedom at colleges and universities by quoting from *Sweezy*:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁰⁵

In an amended complaint,¹⁰⁶ the students also brought a Free Exercise claim against the university. They asserted that the university violated their constitutional freedoms by forcing them to read a positive portrayal of Muhammad and Islam and write about their personal religious beliefs.¹⁰⁷ The court disagreed, finding that the exercise was academic in nature, aimed at stimulating student debate about Islamic religion and did not punish or endorse any student opinion.¹⁰⁸ A similar result was reached in *Calvary Bible Presbyterian Church of Seattle v. University of Washington*,¹⁰⁹ where the Supreme Court of Washington also quoted from the above passage in *Sweezy* and found that the university's treatment of the class "English 390: The Bible as Literature," was objective, dealt with literary features of the Bible and did not advance any particular point of view and therefore did not violate the First Amendment.¹¹⁰

The *Urofsky* holding and its related progeny provide a controversial, even heretical, view of where academic freedom is vested. Its holding, that academic freedom is vested in the institution and not in faculty individually,¹¹¹ runs fundamentally and polarly opposite to AAUP doctrine and ingrained academic beliefs.

99. No. 1:02CV596, 2004 WL 1144183 (M.D.N.C. May 20, 2004).

100. *Id.* at *1.

101. *Id.*

102. *Id.* at *2.

103. *Id.* at *16.

104. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

105. *Yacovelli*, 2004 WL 1144183 at *14 (quoting *Sweezy*, 354 U.S. 234, 250 (1957)).

106. *Yacovelli v. Moeser*, 324 F. Supp. 2d 760 (M.D.N.C. 2004).

107. *Id.* at 762.

108. *Id.* at 763–64.

109. 436 P.2d 189 (Wash. 1967).

110. *Id.* at 192–94.

111. *Urofsky v. Gilmore*, 216 F.3d 401, 411–12 (4th Cir. 2000).

This interpretation, forced as it is on constitutional First Amendment doctrine, does not override the contractual rights to such freedoms that colleges and universities may vest in their faculty by contract. It does, however, suggest that institutional authority may trump faculty authority in a showdown.

Universities frequently exercise authority when confronted with questions of the appropriateness of a faculty member's classroom content. When a faculty member injects sexual content into lectures, institutions and students have responded strongly. Courts have supported claims that faculty academic freedom cannot be used to compromise a student's right to learn in a hostile-free environment.¹¹² Sexual harassment is a form of sex discrimination that is prohibited by laws protecting employees and students under Title VII of the Civil Rights Act of 1964¹¹³ and Title IX of the Education Amendments of 1972,¹¹⁴ respectively. Title IX prohibits sex discrimination in educational programs and activities.¹¹⁵ Sexual harassment is defined as:

Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the bases for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment."¹¹⁶

Sexual harassment cases stemming from teaching-related incidents often also involve a determination of whether the faculty speech or conduct is germane to the subject matter being taught.¹¹⁷ The AAUP has issued a statement that addresses the type of speech or conduct that equates to sexual harassment in the teaching context:

Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.¹¹⁸

112. See, e.g., *Bonnell v. Lorenzo*, 341 F.3d 800, 823–24 (6th Cir. 2001).

113. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

114. Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2000)).

115. 20 U.S.C. § 1681(a) (2000).

116. 29 C.F.R. § 1604.11 (2004). This definition, promulgated by the EEOC, was upheld by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

117. See *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994); *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996).

118. AAUP, *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, in *POLICY DOCUMENTS & REPORTS* 208 (9th ed. 2001).

Judicial review of faculty classroom speech and its relevancy to course subject matter was illustrated in *Silva v. University of New Hampshire*.¹¹⁹ In *Silva*, a communications professor used sexual imagery as a way to convey the concept of “focusing a thesis statement” in writing, and illustrated the concept of “metaphor” by comparing a belly dancer to a plate of Jell-O on top of a vibrator.¹²⁰ After a number of students in his class complained, the university determined that the professor violated the school’s sexual harassment policy, initiated disciplinary procedures against the professor and created “shadow classes” so students could transfer.¹²¹ The professor was thereafter suspended without pay for one year.¹²² On review, the court found that his classroom comments were not “of a sexual nature,” and therefore were protected classroom speech.¹²³ The court stated that his expressions “advanced his valid educational objective of conveying certain principles related to the subject matter of his course,”¹²⁴ and that it was wrong for the university to rely on the subjective reactions of adult students as the indicator of what speech is impermissible or inappropriate:

[T]he court concludes that the [University System of New Hampshire] Sexual Harassment Policy as applied to Silva’s classroom speech is not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation’s interest in academic freedom.¹²⁵

Finding that the professor’s interest in academic freedom outweighed the University’s interest in proscribing offensive speech, Dr. Silva was reinstated with back pay and damages.¹²⁶

Similarly, in *Cohen v. San Bernardino Valley College*,¹²⁷ the Ninth Circuit determined that a remedial English professor was inappropriately disciplined for using vulgar and obscene language during class and requiring students to write on the topic of pornography.¹²⁸ Although the court did not analyze the speech at issue, it found that the discipline violated the professor’s due process rights because the sexual harassment policy was unconstitutionally vague.¹²⁹ Since the professor had used these teaching methods for many years and was not warned that they violated the policy, he was entitled to infer that his techniques were “pedagogically sound and within the bounds of teaching methodology permitted at the college.”¹³⁰

119. 888 F. Supp. 293 (D.N.H. 1994).

120. *Id.* at 298–99.

121. *Id.* at 303.

122. *Id.* at 307.

123. *Id.* at 312–13.

124. *Id.* at 313.

125. *Id.* at 314.

126. *Id.* at 316–17. See Sonya G. Smith, *Cohen v. San Bernardino Valley College: The Scope of Academic Freedom within the Context of Sexual Harassment Claims and In-Class Speech*, 25 J.C. & U.L. 1 (1998).

127. 92 F.3d 968 (9th Cir. 1996).

128. *Id.* at 970–71.

129. *Id.* at 972.

130. *Id.*

Though the previous cases supported faculty speech, where that classroom speech rises to the level of sexual harassment and is unrelated to necessary pedagogy, courts support a institution's right to enforce its standards. Such an instance is demonstrated in *Rubin v. Ikenberry*,¹³¹ where Rubin, a professor of a class called "Methods of Teaching Social Studies in the Elementary Schools," made comments and inquiries about sexual preferences, cooking in the nude, what type of underwear women should wear, abortion, his unconditional love for a student, and his divorce settlement—among other things.¹³² Two students filed sexual harassment grievances against the professor based on his classroom comments and the professor was relieved from his teaching duties during the investigation.¹³³ The professor thereafter sued several university administrators alleging violations of procedural and substantive due process, First Amendment and academic freedom rights.¹³⁴ After considering whether the professor's First Amendment and academic freedom rights were violated by examining the nature of the professor's comments and their relevance to the course, the district court granted summary judgment to the university.¹³⁵ Noting that academic freedom is not an independent First Amendment right, the court determined that the university's characterization of the professor's conduct as harassment appropriately balanced the needs and objectives of the parties and was reasonable.¹³⁶

The court found that "Rubin's classroom comments which have a sexual focus do not appear connected to the course content and legitimate objective of teaching students how to teach elementary school social studies. The degree of departure from the expected course content to Rubin's comments appears extensive. Their relevance is quite attenuated."¹³⁷ The court also concluded that Rubin's speech was not protected by the First Amendment because it did not address a matter of public concern.¹³⁸

In *Hayut v. State University of New York*,¹³⁹ a political science professor's in-class comments to a female student were found to be sufficiently offensive, severe, and pervasive that a reasonable fact finder could conclude that a hostile academic environment was created.¹⁴⁰ The professor repeatedly called the student "Monica" because of a purported resemblance to Monica Lewinsky.¹⁴¹ During class, the professor would ask the student about "her weekend with Bill," and make other sexually suggestive remarks such as "[b]e quiet, Monica. I will give you a cigar later."¹⁴² Several months after the student complained, the professor resigned.¹⁴³

131. 933 F. Supp. 1425 (C.D. Ill. 1996).

132. *Id.* at 1440–41.

133. *Id.* at 1430.

134. *Id.* at 1431–32.

135. *Id.* at 1442.

136. *Id.* at 1441–42.

137. *Id.* at 1442.

138. *Id.* at 1444.

139. 352 F.3d 733 (2d Cir. 2003).

140. *Id.* 745–46.

141. *Id.* at 738.

142. *Id.* at 739.

143. *Id.* at 752.

But the student still sued the professor, university, and several other university personnel for violating her equal protection rights and Title IX.¹⁴⁴ Because the professor did not argue that his classroom comments were related to the curriculum or protected by academic freedom, the court did not express a view on whether or not such a defense would be available.¹⁴⁵

Colleges' and universities' obligations to ensure a safe classroom environment and to ensure that the topics of a course are what are actually taught by the faculty are enforceable rights that must be balanced against faculty classroom freedoms. But, when the faculty member strays off the course topic to reach into matters of the students' personal lives, courts tend to find that it violates the students' rights of privacy and goes beyond the academic freedom rights of the faculty, thereby reinforcing the institutional right of control. That students themselves have some control over the classroom freedoms and prerogatives of faculty members is itself important to review.

C. Students

The parameters of college students' free expression rights in the classroom are somewhat unsettled. With no Supreme Court ruling specifically addressing post-secondary freedom of expression rights, lower courts are grappling with how to apply primary and secondary education Supreme Court case law in the higher education setting.¹⁴⁶

In 1969, the Supreme Court famously noted in *Tinker v. Des Moines Independent Community School District*,¹⁴⁷ that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁴⁸ The *Tinker* case involved junior and high school students wearing black armbands to protest the Vietnam War in contravention of school district policy.¹⁴⁹ The Court distinguished the student expression in this case from "speech or action that intrudes upon the work of the schools or the rights

144. *Id.* at 752–53.

145. *Id.* at 745.

146. See Laura K. Schulz, A "Disacknowledgment" of Post-Secondary Student Free Speech—*Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS U. L.J. 1185, 1188 (2003) (noting the need for Supreme Court clarification of whether the *Hazelwood* standard applies to student expression in the post-secondary setting). See also Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the same as those of High School Students?* 45 B.C. L. REV. 173 (2003) (providing a comprehensive portrait of the development of college students' free speech rights and arguing what standard should be used in protecting those rights); Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002) (arguing that the *Hazelwood* standard should not apply to public colleges and universities). For an interesting discussion regarding the development of First Amendment expression rights of teachers in the primary/secondary school context, which is somewhat analogous to the development of free expression rights of students and teachers in the post-secondary setting, see Venessa A. Wernicke, *Teachers' Speech Rights in the Classroom: An Analysis of Cockrel v. Shelby County School District*, 71 U. CIN. L. REV. 1471 (2003).

147. 393 U.S. 503 (1969).

148. *Id.* at 506.

149. *Id.* at 504.

of other students,”¹⁵⁰ by characterizing the armband use as passive expression that was “akin to ‘pure speech.’”¹⁵¹ The Court emphasized that students enjoy constitutional rights of expression at school:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.¹⁵²

The decision granted to students First Amendment rights of expression in educational contexts as long as the expression did not “‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”¹⁵³ The mere desire of school officials “to avoid the discomfort and unpleasantness” associated with “unpopular viewpoint[s]” was not enough to prohibit the expression of a particular opinion.¹⁵⁴

The *Tinker* standard was applied in the post-secondary context in *Salehpour v. University of Tennessee*,¹⁵⁵ where a dental student sued the university for violating his First Amendment right to protest against a classroom rule prohibiting first year dental students from sitting in the last row of some classes.¹⁵⁶ The student argued that under federal law and the student handbook,¹⁵⁷ he had the right to protest the rule by sitting in the last row and expressing his displeasure to the faculty.¹⁵⁸ In regard to balancing students’ rights against teachers’ rights, the court noted that: “The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching.”¹⁵⁹

The court found that the student’s “sole purpose of advancing and pursuing his admitted ‘power struggle’ with the University, was not protected activity,” and that his actions appeared to have “no intellectual content” or “discernable purpose”

150. *Id.* at 508.

151. *Id.*

152. *Id.* at 511.

153. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

154. *Id.*

155. 159 F.3d 199 (6th Cir. 1998).

156. *Id.* at 201–03.

157. The student handbook stated: “It is the right and responsibility of the individual student or groups of students to be interested in and to question the policies, regulations, and procedures affecting them.” *Id.* at 207.

158. *Id.*

159. *Id.* at 208.

other than to disrupt class work under the *Tinker* standard.¹⁶⁰ Thus, the student's actions were not protected by the First Amendment. The court, however, stressed that the ruling should not deter "legitimate debate" in educational contexts even though the expression might be inconvenient.¹⁶¹

In 1988, the Supreme Court set forth a new standard in *Hazelwood School District v. Kuhlmeier*,¹⁶² which is now followed in most student expression cases, including several post-secondary cases.¹⁶³ The ruling provided school officials more leeway to direct student expression during curriculum related activities. In *Hazelwood*, student newspaper staff members sued their high school for violating their First Amendment rights when the principal deleted two pages of the newspaper based on concerns of privacy, age-appropriateness, and insufficient time to make necessary changes before publication.¹⁶⁴ The deleted pages were produced as part of a journalism class in the school's curriculum and included articles on student pregnancy and the impact of divorce on students.¹⁶⁵ The district court found that the students' First Amendment rights were not violated and denied their request for an injunction.¹⁶⁶ The students appealed and the Eighth Circuit reversed.¹⁶⁷

The Supreme Court began its examination of the case by noting that the "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.'"¹⁶⁸ After determining that the school newspaper was not a public forum, the Court drew a distinction between the type of personal student expression involved in *Tinker* and expressive activities that might reasonably be perceived to "bear the imprimatur of the school."¹⁶⁹ The Court reasoned that educators may exercise greater control over the latter to ensure that students learn what lessons are designed to impart, avoid exposure to age-inappropriate material, and avoid attributing individual views to the school,¹⁷⁰ ultimately holding that educators can regulate "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹⁷¹ Consequently, the Court found that the students' First Amendment rights had not been violated because the principal's actions were rea-

160. *Id.*

161. *Id.*

162. 484 U.S. 260 (1988).

163. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 947-49 (9th Cir. 2002); *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001). *But cf.* *Martin*, *supra* note 146 (arguing that the restrictive *Hazelwood* standard is inappropriate in a college or university setting).

164. *Hazelwood*, 484 U.S. at 263-64.

165. *Id.* at 263.

166. *Id.* at 264-65.

167. *Id.* at 265.

168. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

169. *Id.* at 271.

170. *Id.*

171. *Id.* at 273. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) ("The 'pedagogical' concept merely means that the activity is 'related to learning.'") (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002)).

sonable in light of the principal's legitimate pedagogical concerns.¹⁷² The Court did not address the applicability of the ruling in the college and university context, leaving open the question of whether college and university students might receive greater free expression rights: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."¹⁷³

Since *Hazelwood*, judges and scholars have wrestled with the question of what standard should be applied in post-secondary free expression cases.¹⁷⁴ A recent Ninth Circuit case, *Brown v. Li*,¹⁷⁵ held that the *Hazelwood* standard applies to curriculum-related questions in the college and university context, finding that a thesis committee's refusal to approve a graduate student's masters thesis did not violate the student's First Amendment rights.¹⁷⁶ In *Brown*, a master's degree candidate inserted an additional section into his thesis without the thesis committee's knowledge after the committee approved his original version.¹⁷⁷ The two-page addition was entitled "Disacknowledgements" and included the statement: "I would like to offer special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career"¹⁷⁸ The student then named the dean and staff of the graduate school along with several other individuals.¹⁷⁹ After discovery of the added section, the student met with the thesis committee and submitted an alternate version that eliminated the profanity.¹⁸⁰ The committee however believed that the "disacknowledgements" section did not meet the professional standards in the field and refused to approve the thesis unless the section was removed.¹⁸¹ Without committee approval, the student was denied his degree.¹⁸² The student sued, alleging violation of his First Amendment, procedural due process, and state constitutional rights.¹⁸³ The district court granted summary judgment in favor of the university and the student appealed.¹⁸⁴

The Ninth Circuit noted that there was no precedent directly on point but relied on the reasoning of *Hazelwood* and *Settle v. Dickson County School Board*¹⁸⁵ to reach its decision.¹⁸⁶ In *Settle*, the Sixth Circuit examined a similar fact pattern but at the secondary level.¹⁸⁷ There, a junior high school student changed her previ-

172. *Hazelwood*, 484 U.S. at 260–61.

173. *Id.* at 273 n.7.

174. See, e.g., Martin, *supra* note 146; Schulz, *supra* note 146; Tom Saunders, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295 (2003).

175. 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).

176. *Id.* at 941.

177. *Id.* at 943.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 944.

183. *Id.* at 945–46.

184. *Id.* at 946.

185. 53 F.3d 152 (6th Cir. 1995).

186. *Brown*, 308 F.3d at 947–49.

187. *Settle*, 53 F.3d at 153.

ously approved paper topic without the consent of her teacher.¹⁸⁸ The student argued that her First Amendment rights were violated when her teacher refused to approve her new paper topic on Jesus Christ and gave her a failing grade.¹⁸⁹ The court relied on *Hazelwood* to reject the student's argument, stating that "[t]he free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question."¹⁹⁰ The court continued:

So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology—but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech [I]t is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.¹⁹¹

Judge Batchelder's concurring opinion¹⁹² highlighted the need to balance students' free expression rights in the classroom against the "teacher's right to control and manage [the] classroom."¹⁹³ Interestingly however, Judge Batchelder believed that no First Amendment rights were implicated at all by characterizing the case as a dispute regarding whether a teacher could "determine what topic is appropriate to satisfy a research paper assignment," rather than the student's "right to express her views, opinions or beliefs, religious or otherwise, in the classroom."¹⁹⁴

Ultimately, the *Brown* court held that the *Hazelwood* principles do articulate a standard applicable to a university's assessment of a student's academic work:

[A]n educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. [T]he First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard. Rather,

188. *Id.* at 154.

189. *Id.* at 155.

190. *Id.* (internal citations omitted).

191. *Id.* at 155–56.

192. *Id.* at 156 (Batchelder, J., concurring). Judge Batchelder concurred only in the judgment.

193. *Id.*

194. *Id.* at 157.

as articulated by *Hazelwood*, ‘educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.’¹⁹⁵

The court determined that the more restrictive *Hazelwood* standard was appropriate in the case of the added thesis pages by distinguishing extracurricular speech from the curricular speech at issue,¹⁹⁶ noting that the curriculum of a public university is a way that the university expresses its policy and that others do not have a constitutional right to interfere with that policy.¹⁹⁷ In addition, the court suggested that “an institution’s interest in mandating its curriculum and in limiting a student’s speech to that which is germane to a particular *academic* assignment”¹⁹⁸ arguably expands with the student’s age as the “need for academic discipline and editorial rigor increases as the student’s learning progresses.”¹⁹⁹ The court bolstered its argument by mentioning Supreme Court cases²⁰⁰ recognizing professorial academic freedom that implied a university’s control over student academic related issues may be broader than in primary and secondary schools.²⁰¹ It reasoned that the *Hazelwood* standard appropriately balances the university’s academic freedom and the student’s First Amendment rights, allowing the university to use its “expertise in defining academic standards and teaching students to meet them.”²⁰²

The Ninth Circuit concluded that the student’s First Amendment rights were not violated, noting that the thesis assignment was part of the curriculum and that the paper was designed to teach the student how to research and present his results in a way that was acceptable in the field.²⁰³ In addition, the court rejected the student’s argument that he had a First Amendment right to write the section from any viewpoint because under the First Amendment, as explained in *Hazelwood* and *Settle*, teachers have the ability to require students to complete “a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.”²⁰⁴

Not only do college and university students expect certain free expression rights in the classroom, they also object when other people’s beliefs are forced upon them. Students have sought relief through the courts for controversies involving

195. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

196. *Id.* at 950. (“The Supreme Court has suggested that core *curricular* speech—that which is an integral part of the classroom—differs from students’ *extracurricular* speech and that a public educational institution retains discretion to prescribe its curriculum.”).

197. *Id.* at 950–51.

198. *Id.*

199. *Id.*

200. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237–39 (2000). Although *Southworth* involved students suing a university over mandatory student activity fees, the *Brown* court used language from Justice Souter’s concurrence in *Southworth* to summarize “the current state of ‘academic freedom.’” *Brown*, 308 F.3d at 951.

201. *Brown*, 308 F.3d at 951.

202. *Id.* at 952.

203. *Id.*

204. *Id.* at 953.

student fees that fund groups advocating opposing views,²⁰⁵ compelled classroom speech,²⁰⁶ and indoctrination in the classroom.²⁰⁷ In *Axson-Flynn v. Johnson*,²⁰⁸ a Mormon theatre student in the University of Utah's Actor Training Program sued the university for violating her free speech and free exercise rights when she was required to say words that she found offensive such as "fuck" and "goddamn" in classroom acting exercises.²⁰⁹ During the student's audition, she told departmental instructors that she would not take off her clothes, say God's name in vain, or say the word "fuck."²¹⁰ The student was admitted to the program and a few weeks later omitted the words "goddamn" and "shit" from a monologue without informing her instructor.²¹¹ She later asked to modify the language of a scene from a different play and was denied, beginning a series of disagreements between the student and the department.²¹² The student thereafter withdrew from the department with the belief that she would be forced out of the program if she did not acquiesce and sued for violation of her First Amendment free speech and free exercise rights.²¹³ The district court granted summary judgment to the defendants and the student appealed.²¹⁴

The appellate court first determined that the *Hazelwood* standard (restrictions on student expression must be reasonably related to a legitimate pedagogical concern) applied because the actor's training program was a nonpublic forum, the expression involved "school sponsored speech"²¹⁵ and the compelled speech was part of the school-mandated curriculum in a classroom context.²¹⁶ Furthermore, the *Hazelwood* standard requires only that the restrictions on student expression are reasonable, and that anything more "would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers

205. The Supreme Court granted a student religious group equal access to university facilities since the university had essentially created an open forum by allowing most student groups to use the facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). The Supreme Court subsequently ruled a university's denial of student fees to a student organization that published a religiously based magazine amounted to viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

206. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

207. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

208. *Axson-Flynn*, 356 F.3d at 1277.

209. *Id.* at 1280.

210. *Id.* at 1281.

211. *Id.*

212. *Id.* at 1282.

213. *Id.* at 1282-83.

214. *Id.* at 1281-82.

215. The court concluded that "speech which is prescribed as part of the official school curriculum in connection with a classroom exercise is school-sponsored speech." *Id.* at 1286. See also *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177 (6th Cir. 1993):

Ohio State's curriculum was not intended to prohibit any particular religious practice or belief. The record contains no evidence that Ohio State used its curriculum to attack or exclude any individual on the basis of his or her religious beliefs. To the contrary, the record indicates that the College required Operative Practices and Techniques for purely pedagogical purposes.

Id. at 179.

216. *Axson-Flynn*, 356 F.3d at 1280.

to the whims of what a particular student does or does not feel like learning on a given day.”²¹⁷ Here, the proffered reasons for script adherence were to help prepare students for careers in professional acting, assume character roles that might be foreign to a student’s own values, preserve the integrity of an author’s script, and convincingly portray different characters.²¹⁸ Even though the judiciary generally gives educators deference in academic matters, courts will, however, override a professor’s judgment if it is a substantial departure from accepted academic norms²¹⁹ or “where the proffered goal or mythology was a sham pretext for an impermissible ulterior motive.”²²⁰ The Tenth Circuit remanded the case as there was a genuine issue of material fact as to whether the department’s strict script adherence was truly pedagogical or if it was a pretext for religious discrimination.²²¹

Although the concept of academic freedom is most often associated with professors and universities, the academic freedom of students has also been recognized. In *Piarowski v. Illinois Community College District 515*,²²² the court stated that academic freedom encompasses “the freedom of the individual teacher” and “the student.”²²³ In addition, the importance of student expression and participation in the educational process has been recognized by the Supreme Court:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and write and learn The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation’s intellectual life, its college and university campuses.²²⁴

In 1967, the AAUP published a *Joint Statement on Rights and Freedoms of Students*, which outlined minimal standards for the academic freedom of students.²²⁵ The AAUP notes that the academic freedom to teach and learn are intertwined, and that the ability for students to realize their freedom to learn “depends upon appropriate opportunities and conditions in the classroom”²²⁶ Consequently, it is the responsibility of all the members in an academic community to ensure that

217. *Id.* at 1292.

218. *Id.* at 1291.

219. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

220. *Axson-Flynn*, 356 F.3d at 1293. *See also Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155–56 (6th Cir. 1995) (noting that in order to “encourage speech germane to the topic at hand,” teachers may limit classroom speech as long as the limitations are not “a pretext for punishing . . . student[s] for [their] race, gender, economic class, religion or political persuasion”).

221. *Axson-Flynn*, 356 F.3d at 1295.

222. 759 F.2d 625 (7th Cir. 1985).

223. *Id.* at 629.

224. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

225. AAUP, *1967 Joint Statement on Rights and Freedoms of Students*, in *POLICY DOCUMENTS & REPORTS* 261 (9th ed. 2001).

226. *Id.*

each student's right to learn is preserved and protected,²²⁷ including "the duty [of the college or university] to develop policies and procedures which provide and safeguard this freedom."²²⁸

The AAUP statement sets forth numerous academic rights for students such as the right to "examine and discuss all questions of interest to them, and to express opinions publicly and privately."²²⁹ One section specifically addresses the rights of students in the classroom context:

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

1. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

2. Protection against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

3. Protection against Improper Disclosure

Information about student views, beliefs, and political associations which professors acquire in the course of their work as instructors, advisors, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.²³⁰

Other AAUP publications and statements offer additional support for some student freedoms, stating that teachers "should be careful not to introduce into their teaching controversial matter which has no relation to their subject,"²³¹ avoid forcing students "to make particular personal choices as to political action or his own part in society,"²³² evaluate students on academic performance rather than irrelevant matters such as "personality, race, religion, degree of political activism, or personal beliefs,"²³³ and encourage the free pursuit of learning by their students,

227. *Id.*

228. *Id.*

229. *Id.* at 263.

230. *Id.*

231. AAUP, *1940 Statement*, *supra* note 14, at 3 (internal citations omitted).

232. AAUP, *A Statement of the Association's Council: Freedom and Responsibility*, in 56 AAUP Bulletin 375 (1970).

233. *Id.*

including protecting notions of academic freedom.²³⁴

Free expression rights for students in classroom contexts have been established through both academic freedom and First Amendment case law for students in public colleges and universities. However, those rights are not absolute and may be restricted by faculty or the institution during curriculum related classroom instruction as long as the limitations are not a pretext for unrelated matters such as political or religious discrimination. Student academic freedom rights, barring statutory authority and contract rights, do not overrule faculty or institutional academic freedom.

II. STUDENT CONTRACT RIGHTS

Students are actively participating in their education and demanding more accountability from colleges and universities as tuition and student fees are skyrocketing.²³⁵ Students are becoming savvy educational service consumers, paying colleges and universities to provide them with a post-secondary education and expecting a quality education in return. Consequently, as an accountability mechanism students have sued colleges and universities under consumer protection laws, educational malpractice theories, and breach of contract theories arguing that these educational institutions have misrepresented their services, provided inadequate services or failed to provide promised services.²³⁶ A student academic bill of rights could build on the concepts of consumerism and accountability by opening the door to additional breach of contract cases inviting judicial determination and reevaluation of the student-faculty-institution authority relationship. Furthermore, courts have proven willing to hold colleges and universities liable for violating promises to students in certain circumstances under breach of contract theories.

Contract theory, framed within the reciprocity of obligations between institution and student, fits nicely into current popular models of the relationship between colleges and universities and their enrollees, and complements the characterization of American post-secondary students as consumers of goods and services.²³⁷

Balanced against these contract rights, courts generally remain reluctant to step into the educational realm and are deferential to educational institutions and faculty regarding academically related issues.²³⁸ This reluctance may rest on the col-

234. *Id.* at 135; AAUP, *Statement on Graduate Students*, in POLICY DOCUMENTS & REPORTS 268 (9th ed. 2001).

235. Clara M. Lovett et al., *How Can Colleges Prove They're Doing Their Jobs?*, CHRON. HIGHER EDUC., Sept. 3, 2004 at B6.

236. See WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 373 n. 1 (3d ed. 1995) (stating that breach of contract claims are the main theory that students use to demand legal recourse beyond those rights provided in the Constitution and state and federal statutes).

237. K.B. Melear, *The Contractual Relationship Between Students and Institution: Disciplinary, Academic and Consumer Contexts*, 30 J.C. & U.L. 175, 208 (2003) (discussing the current status of the student-university contractual relationship in disciplinary, academic and consumer contexts).

238. See KAPLIN & LEE, *supra* note 236, at 227–229 (3d ed. Supp. 2000); Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 183–84 (2000) (arguing that courts abrogate their judicial authority to

lege or university's lauded role as a revered cultural necessity²³⁹ and vestiges of the traditional student-university in loco parentis relationship.²⁴⁰

Much of the student-university relationship can be defined in contractual terms, either express or implied, with some terms of the contract found strewn among several different university publications.²⁴¹ These publications can include catalogues, bulletins, circulars, and the regulations of the institution.²⁴² In addition, a

protect students by according too much deference to educational institutions). *See also* Melear, *supra* note 237, at 188 ("Due to the traditional deference of the courts to the judgment and expertise of members of the academy, decisions concerning academic matters are typically made with a relative degree of insulation from judicial scrutiny except in cases of the overt abuse of authority or arbitrary and capricious institutional action.").

239. Beh, *supra* note 238, at 186. *See* Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (internal citations omitted)). *See also* Clements v. County of Nassau, 835 F.2d 1000 (2d Cir. 1987):

Allegations of improper conduct leveled against teachers in our university systems call into play fundamental questions of fairness. At times, however, they threaten to strike at the heart of institutions of higher learning. As Robert Maynard Hutchins once cautioned, "Freedom of inquiry, freedom of discussion, and freedom of teaching—without these a university cannot exist." This is particularly true where the charges are aimed at the core of a teacher's authority, the student's grade. In such cases of academic dismissals, summary judgment, when properly employed, can serve the laudable function of protecting our crucibles of knowledge from the vagaries of the judicial system.

Id. at 1001.

240. Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531 (2001); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999).

241. Beh, *supra* note 238, at 183. *See also* KAPLIN & LEE, *supra* note 236, at 373–377 (discussing the contractual rights of students). Traditional contract theory was applied in *Steinberg v. Chicago Medical School*, where a medical school applicant sued the school for breach of contract after the student was denied admission to the school. 371 N.E.2d 634, 639 (Ill. 1977). In this seminal case, the applicant alleged that the school failed to evaluate his application according to the school bulletin's stated criteria. *Id.* Recognizing a contractual relationship between the student and the university, the court noted that "[a] contract between a private institution and a student confers duties on both parties which cannot be arbitrarily disregarded and may be judicially enforced." *Id.* at 640 (quoting *DeMarco v. Univ. of Health Sciences*, 352 N.E.2d 356, 361 (Ill. App. 1976)). Some courts have taken various degrees of liberties in adjusting traditional contract principles to fit the unique student-institution relationship, finding that traditional contract law does not necessarily apply. *See* Robert L. Cherry, Jr. & John P. Geary, *The College Catalog as a Contract*, 21 J.L. & EDUC. 1, 9–11 (1992) (discussing to what extent contract law applies to the student-institution relationship).

242. *E.g.*, *Zumbrum v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10 (1972); *Raethz v. Aurora Univ.*, 805 N.E.2d 696 (Ill. App. 2004). *See also* Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 EDUC. LAW REP. 1 (2004):

Post-secondary institutions in general make promises in applications, brochures, other publications, and oral statements to students regarding their courses and programs, and when they do so and students rely upon these promises, courts examine the promises under applicable contract and tort law. Community college students, as for all students in higher education, have a reasonable expectation that courses will be delivered as promised.

student-university contractual relationship can arise from oral as well as written elements.²⁴³ The contractual relationship between students and universities was recognized in *Carr v. St. John's University, New York*,²⁴⁴ where the court stated that “[w]hen a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought.”²⁴⁵ Courts are now increasingly using contract theory to settle academic and disciplinary student-university disputes in both public and private post-secondary settings, with public institutions generally enjoying more defenses against such contract claims.²⁴⁶

Various forms of contract theory have now been applied in disputes involving admissions,²⁴⁷ tuition,²⁴⁸ course offerings,²⁴⁹ grades,²⁵⁰ specific promises and representations,²⁵¹ program eliminations,²⁵² discipline,²⁵³ expulsions,²⁵⁴ and degree

Id. at 2.

243. *Id.* at 9.

244. 17 A.D.2d 632 (N.Y. 1962).

245. *Id.* at 633.

246. KAPLIN & LEE, *supra* note 236, at 373. See also Michael Zolandz, *Storming the Ivory Tower: Renewing the Breach of Contract Claim by Students Against Universities*, 69 GEO. WASH. L. REV. 91, 93 (2000) (noting that “contractual principles provide the best basis for students to assert cognizable legal claims against their universities” and that contractual approaches to the student-university relationship “is both gaining acceptance and providing a well-reasoned solution to enforcing university promises to its students.”); *Driscoll v. Stucker*, No. 2004-C-0589, 2005 WL 106474 (La. Jan. 19, 2005); *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984); *Swartley v. Hoffner*, 734 A.2d 915 (Sup. Ct. Pa. 1999).

247. See, e.g., *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634 (Ill. 1977); *Elliott v. Duke Univ.*, 311 S.E.2d 632 (N.C. Ct. App. 1984).

248. See e.g., *Basch v. George Washington Univ.*, 370 A.2d 1364 (D.C. Ct. App. 1977); *Reynolds v. Sterling Coll., Inc.*, 750 A.2d 1020 (Vt. 2000).

249. See, e.g., *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155 (Idaho 1986). Junior college students were allowed to amend their complaint to state a cause of action for breach of contract when a school bulletin stated that completion of a maintenance course would qualify them for employment as “entry level journeymen,” when in fact, it did not. *Id.* at 158. In describing a valid cause of action, the court stated: “if certain fundamentals of the course necessary to attaining qualification as an ‘entry-level journeyman’ were not even presented in the course, such could be a breach of the implied contract between the college and the students” *Id.* at 157. Further, the cause of action would state objective criteria such as the number of days/hours required for the course and would not implicate policy concerns such as teaching methodology. *Id.* at 157 n.1.

250. See, e.g., *Davis v. Regis Coll.*, 830 P.2d 1098 (Colo. Ct. App. 1991).

251. See, e.g., *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997); *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

252. See, e.g., *Goode v. Antioch Univ.*, 544 A.2d 704 (D.C. 1988); *Eden v. Bd. of Trs. of Farleigh Dickinson Univ.*, 49 A.D.2d 277 (N.Y. App. Div. 1975); *Beukas v. Farleigh Dickinson Univ.*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992). For additional discussion of student rights during retrenchment, see Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155 (1998); Steven G. Olswang, Elsa Kircher Cole & James Wilson, *Program Elimination, Financial Emergency, and Student Rights*, 9 J.C. & U.L. 163 (1982); and Steven G. Olswang, Ellen M. Babbitt, Cheryl A. Cameron & Edmund K. Kamai, *Retrenchment*, 30 J.C. & U.L. 47 (2003).

conferrals.²⁵⁵

The application of contract theory to the educational context is often complicated as these cases require examination of the professional judgment of academic decision-makers in educational contexts. Consequently, courts generally avoid intruding upon academic matters by making distinctions between academic-related disputes and cases involving misconduct or express or implied objective promises to students, thus providing deference to institutions in matters that require professional academic evaluations.²⁵⁶ Judicial reluctance to interfere with professional academic decision-making is demonstrated in *Board of Curators of the University of Missouri v. Horowitz*,²⁵⁷ and *Regents of the University of Michigan v. Ewing*.²⁵⁸ In *Horowitz*, a medical student sued the University of Missouri-Kansas after she was dismissed from the school during her last year for failing to meet its academic standards.²⁵⁹ Without deciding whether students have a property or liberty interest in their education, the Supreme Court found that the due process required for such an interest had been provided to the student since the student had notice of the faculty's dissatisfaction with her academic progress and the school's ultimate decision was "careful and deliberate."²⁶⁰ The Court noted that an academically-based decision requires "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making," and thus "decline[d] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."²⁶¹ Ultimately, the court held that the university's decision to dismiss the student was not arbitrary and therefore did not violate any assumed due process right.²⁶²

Similarly, in *Ewing*,²⁶³ the Supreme Court assumed arguendo that students have a property interest in continued education that gives rise to a due process obligation, and again chose not to interfere with the university's academic decision-

253. See, e.g., *Swanson v. Wesley Coll.*, 402 A.2d 401 (Del. Super. Ct. 1979); *Russell v. Salve Regina Coll.*, 649 F. Supp. 391 (D.R.I. 1986); *James v. Wall*, 783 S.W.2d 615 (Tex. Ct. App. 1989); *Sharick v. S.E. Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. App. Dist. 2000).

254. See, e.g., *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 604 N.E.2d 783 (Ohio Ct. App. 1992); *Love v. Duke Univ.*, 776 F. Supp. 1070 (M.D.N.C. 1991), *aff'd*, 959 F.2d 231 (4th Cir. 1991); *Faigel v. Fairfield Univ.*, 815 A.2d 140 (Conn. App. Ct. 2003).

255. See, e.g., *Healy v. Larsson*, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 318 N.E.2d 608 (N.Y. 1974); *DeMarco v. Univ. of Health Scis.*, 352 N.E.2d 356 (Ill. App. Ct. 1971); *Dinu v. President & Fellows of Harvard Coll.*, 52 F. Supp. 2d 129 (D. Mass. 1999).

256. KAPLIN & LEE, *supra* note 238, at 229.

257. 435 U.S. 78 (1978).

258. 474 U.S. 214 (1985).

259. *Id.* at 215.

260. *Horowitz*, 435 U.S. at 84-85.

261. *Id.* at 90.

262. *Id.* at 92.

263. 474 U.S. 214 (1985). See also *Davis v. Regis Coll.*, 830 P.2d 1098 (Colo. Ct. App. 1992) (holding that even where assuming a property interest, the school's decision to award a failing grade was academic in nature and not arbitrary, capricious, or done in bad faith).

making since there was no “arbitrary state action.”²⁶⁴ Here, a medical student was dismissed from the University of Michigan after he failed an important examination and was not allowed to retake it even though other students had the opportunity to do so.²⁶⁵ The Court noted that the district court correctly decided that the school did not contractually bind itself to allow a second examination either expressly or through course of conduct.²⁶⁶ Furthermore, a university pamphlet which indicated that students would be allowed to retake the exam did not “amount[] either to an unqualified promise to him or [give] him a contract right to retake the examination.”²⁶⁷ The Court then examined whether the university’s refusal to allow the student to retake the exam was arbitrary in and of itself. In finding that the university’s action was not arbitrary since it was not “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment,”²⁶⁸ the Court reaffirmed the importance of academic freedom and the “hands off” practice generally used in the judicial review of academic matters:

Ewing’s claim, therefore, must be that the University misjudged his fitness to remain a student in the . . . program. The record unmistakably demonstrates, however, that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

. . . .

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.” If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.”²⁶⁹

These Supreme Court cases indicate that the judiciary is deferential to colleges and universities when matters such as the education and management of students

264. *Ewing*, 474 U.S. at 220.

265. *Id.* at 215, 219.

266. *Id.* at 223–24.

267. *Id.* at 220.

268. *Id.* at 225.

269. *Id.* at 225–26 (internal citations omitted).

are involved. The judicial deference demonstrated in *Ewing*, was recently followed in *Raethz v. Aurora University*,²⁷⁰ where a student challenged her dismissal from the master's in social work program.²⁷¹ The trial court found that the university had breached an agreement created by its handbook and field instruction manual.²⁷² The appellate court acknowledged that colleges and universities have a contractual relationship with their students but that the relationship cannot be strictly characterized in contractual terms in the unique, private post-secondary setting.²⁷³ In addition, judicial deference to academic decisions dictated that students should not be allowed remedies for breach of contract claims unless there was a complete lack of academic judgment or the decision in question was arbitrary, capricious, or made in bad faith.²⁷⁴ The court noted that no promises or requirements had been violated and refused to accept that the university's failure to follow its catalog amounted to per se arbitrary and capricious conduct; rather the university's faculty and agents had documented the student's failures and used their academic judgment to dismiss the student.²⁷⁵

Student use of consumer protection laws and educational malpractice theory is demonstrated in *Finstad v. Washburn University of Topeka*.²⁷⁶ In *Finstad*, several students sued the university for violating the Kansas Consumer Protection Act by falsely misrepresenting that the university court reporting program was accredited in its school catalogue.²⁷⁷ The year that the students entered the program, the program's written materials indicated that the school expected to have accreditation the year prior to their acceptance.²⁷⁸ After the students were admitted, the university's general catalogue stated that the program was accredited.²⁷⁹ The Kansas Supreme Court found that the students were consumers under the Act but had not been "aggrieved" because many, if not all students, were unaware of the statement in the catalogue, the catalogue was printed after their enrollment in the program, and that there was no injury or loss.²⁸⁰

270. 805 N.E.2d 696 (Ill. Ct. App. 2004). See *Mittra v. Univ. of Med. & Dentistry of N.J.*, 719 A.2d 693 (N.J. Super. Ct. App. Div. 1998) (stating that the student-institution relationship cannot be characterized in purely contractual terms and that in regard to academic decision-making, courts will defer to colleges and universities if students are given fair hearings and notice, and there is general conformity with the institution's rules and regulations).

271. *Raethz*, 805 N.E.2d at 697.

272. *Id.* at 698.

273. *Id.* at 699.

274. *Id.* at 699-700.

275. *Id.* at 700.

276. 845 P.2d 685 (Kan. 1993). See also *Rodi v. S. New England Sch. of Law*, 389 F.3d 5 (1st Cir. 2005) (dismissing a law student's consumer protection claim for failing to meet a procedural prerequisite set forth in the Massachusetts Consumer Protection Act, but allowing the student's fraudulent misrepresentation claim to proceed).

277. *Finstad*, 845 P.2d at 687.

278. *Id.*

279. *Id.*

280. *Id.* at 691.

A. Educational Malpractice and Breach of Contract

Educational malpractice cases can be brought as either a tort or breach of contract claim. Educational malpractice breach of contract cases that allege: (1) specific identifiable and objective promises that were not kept and do not involve an evaluation of the quality of services rendered or academic professional judgment, or (2) a fundamental failure of an educational program,²⁸¹ are more likely to be successful. Claims that allege that certain services were not of an acceptable standard, however, are frequently unsuccessful since they often attack the general quality of a student's educational experience, entail judicial imposition of additional duties on colleges and universities, and require courts to delve into the academic realm to evaluate the decisions of academic professionals. Academic bills of rights could open the door to more breach of contract cases by providing students the ability to add "teeth" to their claims. With statutorily and contractually based allegations to add to their arsenal, students may be able to reshape the current student-professor-institution authority relationship.

Though educational malpractice suits may be attractive to students, these cases are difficult for courts to evaluate:

Admittedly, the term "educational malpractice" has a seductive ring to it; after all, if doctors, lawyers, accountants and other professionals can be held liable for failing to exercise due care, why can't teachers? The answer is that the nature of education radically differs from other professions. Education is an intensely collaborative process, requiring the interaction of student with teacher. A good student can learn from a poor teacher; a poor student can close his mind to a good teacher. Without effort by a student, he cannot be educated. Good teaching method may vary with the needs of the individual student. In other professions, by contrast, client cooperation is far less important; given a modicum of cooperation, a competent professional in other fields can control the results obtained. But in education, the ultimate responsibility for success remains always with the student. Both the process and the result are subjective, and proof or disproof extremely difficult.²⁸²

In *Gally v. Columbia University*,²⁸³ a Jewish student seeking a Doctor of Dental Surgery degree sued the university for breach of contract alleging that the faculty did not address her concerns about "rampant cheating" going on among other students and that she was also subjected to animosity by one of her professors, a Muslim, based on her race, gender and ethnicity.²⁸⁴ The court began its analysis by noting that not all disputes between students and educational institutions fit into breach of contract claims and that claims for failing to provide an effective educa-

281. For a good framework for categorizing educational breach of contract claims, see *Cullen v. University of Bridgeport*, No. CV020396010, 2003 WL 23112678 (Conn. Super. Ct. Dec. 10, 2003) (categorizing education breach of contract claims) (unpublished opinion).

282. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1328. (N.D. Ill. 1982) (internal citation omitted).

283. 22 F. Supp. 2d 199 (S.D.N.Y. 1998).

284. *Id.* at 202.

tion, essentially educational malpractice, are not allowed.²⁸⁵ The court “recognizes that universities are empowered to set their own academic standards and procedures.”²⁸⁶ The student’s argument that the administration failed to adequately respond to her concerns about cheating as an educational malpractice claim was dismissed since the issue hinged on whether the program provided an effective education.²⁸⁷ “The application of contract principles to the student-university relationship does not provide judicial recourse for every disgruntled student.”²⁸⁸ The court also dismissed the student’s mistreatment claim noting that the program’s code of conduct statement was just a general reference to existing anti-discrimination laws and did not provide an enforceable promise; and even if it did set forth a promise, the student failed to allege sufficient facts to show it was breached.²⁸⁹ The court stated:

In short, while reasonable minds may differ as to the effectiveness of [the professor’s] style, the fact that [the professor] may have been harsh or even belittling to plaintiff does not create a valid cause of action. To hold otherwise would open the floodgates to a slew of claims by students who found their professors’ techniques personally offensive. Such claims are better left to the sound handling of school administrators.²⁹⁰

The court also dismissed the student’s argument that the university breached a contractual obligation to provide remediation for the student because the university had provided some remediation services to the student.²⁹¹ The adequacy of the services rendered was not a determination that the court wanted to make since it was a subjective evaluation that school administrators are better at addressing.

Courts have acknowledged that a contractually based breach of contract claim might be viable when “the pleadings or evidence demonstrate some specific, identifiable agreement for an educational institution’s provision of particular services to its students.”²⁹² Even in such cases where specific allegations are alleged and allowed to proceed, the reluctance to find educational institutions liable is illustrated in *Ross v. Creighton University*.²⁹³ In *Ross*, a former student sued the uni-

285. *Id.* at 206–07. One commentator has argued that *Gally v. Columbia Univ.* should have been analyzed from a contractual perspective rather than as a tort:

Perhaps the most unfortunate aspect of courts’ approach to contract claims is their frequent characterization of contract claims as educational malpractice claims. As a result, courts often dismiss valid claims sounding in contract. Dismissal in this manner is in clear contrast with the well-established principle that the “student-college relationship is essentially a contractual one.”

Zolandz, *supra* note 246, at 98.

286. *Gally*, 22 F. Supp. 2d at 207.

287. *Id.*

288. *Id.*

289. *Id.* at 208.

290. *Id.*

291. *Id.* at 209.

292. *Bittle v. Okla. City Univ.*, 6 P.3d 509, 514 (Okla. Civ. App. 2000).

293. 957 F.2d 410 (7th Cir. 1992). *See also* Zolandz, *supra* note 246, at 99 (“*Ross v. Creighton University* provides a baseline for a discussion of the most effective approach toward contract disputes between students and their universities.”).

versity under negligence and breach of contract theories alleging that the university recruited him to play basketball despite the fact that he was not prepared for the academic rigors of the university and failed to provide him any real access to the university's educational curriculum.²⁹⁴ The student-athlete struggled with the university's academics and later withdrew from the university with the "overall language skills of a fourth grader and the reading skills of a seventh grader."²⁹⁵ His complaint was dismissed for failure to state a claim and the student appealed.²⁹⁶ The appellate court began its analysis by examining the student's negligence claim of educational malpractice and rejected it, noting that a majority of states have rejected educational malpractice torts and that Montana, an exception to that general rule, allows such claims only because Montana statutes place a duty of care on educators.²⁹⁷ Several policy reasons against allowing educational malpractice suits were mentioned:

First, there is the lack of a satisfactory standard of care by which to evaluate an educator. Theories of education are not uniform, and "different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services." Second, inherent uncertainties exist in this type of case about the cause and nature of damages. "Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." Consequently, it may be a "practical impossibility [to] prov[e] that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student." A third reason for denying this cause of action is the potential it presents for a flood of litigation against schools. As the district court noted, "education is a service rendered on an immensely greater scale than other professional services." The sheer number of claims that could arise if this cause of action were allowed might overburden schools. This consideration also suggests that a common-law tort remedy may not be the best way to deal with the problem of inadequate education. A final reason courts have cited for denying this cause of action is that it threatens to embroil the courts into overseeing the day-to-day operations of schools. This oversight might be particularly troubling in the university setting where it necessarily implicates considerations of academic freedom and autonomy.²⁹⁸

In *Ross*, the student's breach of contract claim alleged "that Creighton agreed, in exchange for Mr. Ross' promise to play on its basketball team, to allow him an opportunity to participate, in a meaningful way, in the academic program of the University."²⁹⁹ The court was careful to point out that the contractual nature of the

294. *Ross*, 957 F.2d at 412.

295. *Id.*

296. *Id.* at 413.

297. *Id.* at 414.

298. *Id.* at 414–15 (internal citations omitted).

299. *Id.* at 415–16.

student-university relationship has certain limits when academic judgments are made.³⁰⁰ Thus, in order to avoid simply “repackage[ing] an educational malpractice claim as a contract claim,” the student must meet certain objective and specific requirements:

To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor. Thus, as was suggested in *Paladino*, if the defendant took tuition money and then provided no education, or alternately, promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available. Similarly, a breach of contract action might exist if a student enrolled in a course explicitly promising instruction that would qualify him as a journeyman, but in which the fundamentals necessary to attain that skill were not even presented. In these cases, the essence of the plaintiff’s complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.³⁰¹

Ultimately, the only actionable claim that met these requirements and did not require supervision of the student-university relationship was the very specific claim that the student “was barred from *any* participation in and benefit from the University’s academic program.”³⁰² Such a narrow focus avoided determining whether the academic services provided were deficient, but rather whether “the University had provided any real access to its academic curriculum at all.”³⁰³

A similar analysis and outcome occurred in *CenCor, Inc. v. Tolman*,³⁰⁴ where the Supreme Court of Colorado found that summary judgment in favor of CenCor Career Colleges, Inc. was improper because several students sufficiently alleged that the school breached specific contractual obligations to provide services such as supervision by qualified faculty, up-to-date equipment and advanced training at no additional cost.³⁰⁵ The students based their claim on provisions of their enrollment agreement and CenCor’s catalog.³⁰⁶ The court distinguished specific, viable contract claims from other more general negligence claims alleging unreasonable conduct:³⁰⁷

Contract claims that in fact attack the general quality of educational experiences . . . raise questions concerning the reasonableness of conduct by educational institutions in providing particular educational services

300. *Id.* at 417.

301. *Id.* at 416–17 (internal citations omitted).

302. *Id.* at 417.

303. *Id.*

304. 868 P.2d 396 (Colo. 1994).

305. *Id.* at 399.

306. *Id.*

307. *Id.* at 400.

to students—questions that must be answered by reference to principles of duty, standards of care, and reasonable conduct associated with the law of torts.

However, when students allege that educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, such claims have been upheld on the basis of the law of contracts.³⁰⁸

Ultimately, the students' claim that they had paid for certain services that the institution allegedly failed to provide was specific enough to move forward.³⁰⁹

A breach of contract claim was also successfully stated by a medical resident in *Ryan v. University of North Carolina Hospitals*.³¹⁰ Noting that the *Ross* court “recognized certain narrow circumstances under which a plaintiff could allege a *reviewable* breach of contract,” the court found that the former medical resident stated a claim for breach of contract when he alleged that the university breached the “Essentials of Accredited Residencies” by failing to provide a month of gynecology rotation.³¹¹ This case was allowed to proceed because the medical resident alleged “specific aspects of the contract that would not involve an ‘inquiry into the nuances of educational process and theories.’”³¹²

A similar conclusion was reached in *Alsides v. Brown Institute, Ltd.*,³¹³ where students at a for-profit trade school sued the school based on misrepresentations made in the school's brochure.³¹⁴ Although the court rejected claims of educational malpractice on policy grounds, it ruled that “a student may bring an action against an educational institution for breach of contract, fraud or misrepresentation, if it is alleged that the institution failed to perform on specific promises it made to the student” and review does not require analysis of educational-related nuances mentioned in *Ryan* above.³¹⁵ Some of the claims dismissed by the district court fell into this category and therefore were allowed to proceed. These claims included allegations that: (1) the institute failed to provide instruction on installing and upgrading software; (2) instructors were frequently late or absent and wasted class time by discussing personal issues; (3) the institute represented that students would have “hands on” training; (4) the institute did not provide enough operational computers to teach the course; (5) computer hardware and software was not modern; and (6) the institute did not provide enough hours of instruction as set

308. *Id.* at 398–99.

309. See Mawdsley, *supra* note 242, at 2–4 (discussing community colleges and contracts to educate). The author notes, “The contractual relationship between students and their colleges forms the basis not only for treating students as participants in a contract, but also as consumers of educational services.” *Id.* at 4.

310. *Ryan v. Univ. of N.C. Hosp.*, 494 S.E.2d 789 (N.C. Ct. App. 1998).

311. *Id.* at 791.

312. *Id.* at 794 (internal citation omitted).

313. 592 N.W.2d 468 (Minn. Ct. App. 1999). See also Peter F. Lake, *Higher Education and the Courts: 1999 in Review, Tort Litigation in Higher Education*, 27 J.C. & U.L. 255, 308–310 (2000) (discussing the possible implications of *Alsides*).

314. *Alsides*, 592 N.W.2d at 470.

315. *Id.* at 473.

forth in student materials.³¹⁶ One author notes that these claims illustrate the trend to view education as a product in a business sense:

These types of complaints, which survived the educational malpractice rule, are in fact the kinds of allegations that students could typically make in other areas with a little tailoring. It is particularly interesting that the allegation relating to tardiness and absenteeism and the wasting of class time survived, given that courts have typically been unwilling to examine how class time is used by instructors and generally give wide latitude to academic freedom. Moreover, students could typically allege in an educational malpractice action that equipment is not cutting edge or adequate or readily available, or that particular matters that were promised to be taught were not taught (I shudder to think how many professors fail to cover material on syllabi that are handed out at the beginning of the semester and how frequently hard-wired classrooms crash or become inoperable, etc.).

In short, the kinds of allegations that the Minnesota Court of Appeals permitted to survive as being specific enough to defeat an issue of educational malpractice are the types of allegations that could be routinely made in any other type of suit. Will we see a day when the long disfavored educational malpractice tort rears its head as a different type of claim made with more specificity, but potentially raising many of the same public policy issues? Moreover, the *Alsides* case deliberately and overtly treats education as a 'product' for purposes of the consumer acts in Minnesota. Once again, this is illustrative of a growing trend to view universities in a business category, as selling a product to students as "consumers."³¹⁷

The court also ruled that the students' consumer fraud claim was improperly dismissed and that the Consumer Fraud Act allowed for recovery since the school was a private, for-profit institution and the students had paid for its educational services.³¹⁸

Although many educational breach of contract cases have been unsuccessful for lack of specificity and judicial deference to educational matters, there is an area where successful claims have emerged. *Cullen v. University of Bridgeport*,³¹⁹ distinguished the tort of educational malpractice and breach of contract and further defined the kinds of breach of contract cases that would be allowed to proceed. Here, a graduate student who was unhappy with his professors, administrators, and course work, alleged that the university breached its contract by failing to adequately provide the educational services set forth in the course catalog.³²⁰ The student also alleged that the university had violated the Connecticut Unfair Trade Practices Act by inducing the student to enroll in its Naturopathic Medicine Pro-

316. *Id.* at 474.

317. Lake, *supra* note 313, at 309.

318. *Alsides*, 592 N.W.2d at 474-75.

319. No. CV020396010, 2003 WL 23112678 (Conn. Super Ct. Dec. 10, 2003) (unpublished opinion).

320. *Id.* at *1.

gram based on several misrepresentations made to the student.³²¹ The court relied on *Gupta v. New Britain General Hospital*,³²² which designated two types of instances where a breach of contract for educational services would be allowed: first, where an objectively measurable, “fundamental failure” of an educational program occurs, as demonstrated in *Ross*³²³ and *Wickstrom v. North Idaho College*,³²⁴ and second, where a breach of a specific contractual promise occurs, as demonstrated in *CenCor*.³²⁵ Ultimately, the student in this case failed to meet the requirements of either instance since he had not provided any “concrete evidence such as a failure to offer required courses or clinics . . . [or] that it was impossible to obtain a degree” in his program that would indicate a “fundamental failure” of the program;³²⁶ nor had he shown any “identifiable written or oral promise (other than the course catalog which was not submitted),” that would show a breach of a specific contractual promise.³²⁷

B. Breach of Contract Cases Arising in the Classroom Context

Within the confines of the classroom context, student breach of contract cases have been less successful. This distinction appears somewhat intuitive given that classroom activities are generally viewed to be within the faculty member’s professional discretion. If state and national legislation provide students with enforceable classroom rights, however, these forms of student breach of contract claims could become more successful. In *Andre v. Pace University*,³²⁸ two students sued Pace University for tuition and textbook refunds under a breach of contract theory.³²⁹ The students enrolled in a beginning sequence graduate level computer science course and consulted with the chair of the computer science department about whether their mathematical background was sufficient for the course; the chairman assured them that it was.³³⁰ The students began having difficulties with the math during the second class meeting when they were assigned problems from a course textbook that was mathematically dense.³³¹ The students informed the professor and department chair about their difficulties, and withdrew from the course after

321. *Id.*

322. 687 A.2d 111 (Conn. 1996).

323. 957 F.2d 410 (7th Cir. 1992).

324. *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155 (Idaho 1986). In this case, several students sued their college after discovering that upon completion of a maintenance mechanic course, they were not qualified to be entry level journeymen as was indicated in the school bulletin. *Id.* at 156. The district court granted summary judgment for the college and the students appealed. *Id.* The Supreme Court of Idaho held that the students’ tort claims were barred by the state Tort Claims Act and that the students failed to state a cause of action for breach of contract. *Id.* The court provided the students the opportunity to amend their complaint. *Id.* at 158.

325. *See supra* notes 304–308 and accompanying text.

326. *Cullen*, 2003 WL 23112678, at *10.

327. *Id.* at *13.

328. *Andre v. Pace Univ.*, 655 N.Y.S.2d 777 (N.Y. App. Term 1996).

329. *Id.* at 778.

330. *Id.*

331. *Id.*

the fifth class.³³² At trial, the court found the university liable for breach of contract, breach of fiduciary duty, negligence or educational malpractice, and violation of General Business Law § 349 and awarded each student \$885 in damages plus interest and costs, \$115 pursuant to General Business Law § 349, and \$1,000 in punitive damages.³³³ The New York Supreme Court, Appellate Term, reversed the judgment and directed judgment in favor of the university against each student for the remaining \$800 of tuition due.³³⁴ The court held that the students' allegations amounted to an unactionable claim of educational malpractice and that the trial court improperly evaluated the adequacy of the textbook and the pedagogical methods used by the professor:

It is clear that the essence of plaintiffs' breach of contract claim necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen by the professor to teach the graduate Pascal programming class. In order to determine whether "Condensed Pascal" was inappropriate because of its focus on math and science based problems, this court would be required to examine not only "Condensed Pascal", and its earlier, allegedly simpler version, but also other possible available textbooks on Pascal programming language, and to conduct a comparative analytical review in order to ascertain their relative merits and appropriateness for this particular course. Additionally the court would be engaged in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable, for a graduate level course in Pascal programming language leading up to a Graduate Certificate in Programming. Such inquiry would constitute a clear "judicial displacement of complex educational determinations" that is best left to the educational community. A different situation might be presented if defendant were to provide "no educational services" or failed to meet its contractual obligation to provide certain specified services, such as a designated number of hours of instruction.³³⁵

Another student was unsuccessful in challenging the adequacy of a professor's teaching practices in *Bittle v. Oklahoma City University*,³³⁶ where an Oklahoma court found that a law student did not have a viable tort or contract claim against the university when the student was unable to maintain a minimum grade point average.³³⁷ In this case, the student alleged that the university failed to provide an adequate education when a law professor arrived late for class, left early and cancelled classes without rescheduling, and failed to provide implied academic assis-

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 779–80 (internal citations omitted).

336. *Bittle v. Okla. City Univ.*, 6 P.3d 509 (Okla. Civ. App. 2000).

337. *Id.* at 517.

tance.³³⁸ The court affirmed the lower court's dismissal since the student's lawsuit was basically an educational malpractice claim.³³⁹ Since the student did not allege any specific identifiable agreement for particular services, there was also no viable breach of contract claim.³⁴⁰

In *Lemmon v. University of Cincinnati*,³⁴¹ several students enrolled in a Computerized Court Reporting program ("CCR"), accredited by the National Court Reporter's Association ("NCRA"), sued the university under breach of contract, fraud, and negligence claims for allegedly representing to the students that they would achieve certain levels of typing speed when in fact they did not.³⁴² The complaint stemmed from concerns regarding teaching methods and testing used by one of the instructors.³⁴³ Under the breach of contract claim, the court found that the terms of the contract between the NCRA and the university setting forth the standards for the program and its certificate/degree conferral extended to the students.³⁴⁴ The court did not, however, find that the contract was breached because: (1) the teaching method used by the instructor, though determined unacceptable by the NCRA, was not unreasonable as there were no specific requirements that were not met;³⁴⁵ (2) the college "made every effort to fulfill its contractual obligation, to allay plaintiffs' concerns regarding the validity of the testing and the CCR program in general, and to assist the students in achieving their educational goals;"³⁴⁶ and (3) the court concluded that none of the plaintiffs would have passed the program regardless of whether the alternative testing method was used.³⁴⁷ "[T]he court finds from the evidence that plaintiffs' dissatisfaction with [the instructor's] teaching methods, and with the [University of Cincinnati] program overall, was a way to rationalize their own inability to meet demanding course requirements."³⁴⁸ The court also found that no fraud had been committed for the same reasons as above and noted that the evidence did not show the instructor, who had been teaching for many years, knew or should have known that the testing method was not acceptable.³⁴⁹

A more recent case stemming from a student's dissatisfaction with his classroom educational experience might provide a hint at the future of educational

338. *Id.* at 511.

339. *Id.* at 517.

340. *Id.* at 514–15.

341. *Lemmon v. Univ. of Cincinnati*, 750 N.E.2d 668 (Ohio Misc. 2d 2001).

342. *Id.* at 669–70.

343. *Id.* at 669.

344. *Id.* at 670.

345. *Id.* at 670–71.

346. *Id.* at 671.

347. *Id.*

348. *Id.*

349. *Id.* at 672. *See also* *Harris v. Alder Sch. of Prof'l Psychology*, 723 N.E.2d 717, 720 (Ill. App. Ct. 1999) (refusing to rule on the academic issue of whether the content of a student exam tested students on appropriate subject matter); *Elliot v. Univ. of Cincinnati*, 730 N.E.2d 996 (Ohio Ct. App. 1999) (finding that the university breached provisions in its bulletin requiring doctoral oral qualifying exams to be conducted by five faculty members, but refusing to address the content of the oral examinations because it was an academic matter requiring deference by the court).

breach of contract allegations and the growing desire to hold colleges and universities accountable to their students as consumers. In *Miller v. Loyola University of New Orleans*,³⁵⁰ a law student sued Loyola alleging that his legal profession course was incomplete and unsatisfactorily taught, thus breaching the school's obligation to him.³⁵¹ He also asserted that Loyola was negligent for providing an unqualified professor and failing to have the appropriate number of professors to teach the law school courses.³⁵² Interestingly, a review committee found that the law professor was deficient in several aspects including: violating the faculty handbook for randomly changing class times without approval, failing to request course books in a timely manner, giving a final exam that contained errors and was copied from other materials, inadequately communicating material to students, providing ineffective answers to questions asked, and generally being ineffective as a professor.³⁵³ The professor was thereafter sanctioned.³⁵⁴

After examining several policy reasons against recognizing educational malpractice claims, including those listed in *Ross*,³⁵⁵ the court declined to recognize an educational malpractice claim under either tort or contract theories,³⁵⁶ explaining:

Universities must be allowed the flexibility to manage themselves and correct their own mistakes. . . . It is not the place of the court system to micromanage the adequacy of the instruction or management at institutions of higher learning, even if it were feasible, which we feel it is not. This is a task best handled by the universities themselves.³⁵⁷

The court continued its analysis by finding that the law school had not been unjustly enriched since the law student had received instruction, though unsatisfactory, and credit for the course in return for the student's payment.³⁵⁸ Furthermore, the student had not detrimentally relied on the course listings because course descriptions are informative in nature and not intended to be inflexible and binding in the face of changing educational needs.³⁵⁹

Although the court's majority opinion follows the general tendency to step back from educationally related matters, Judge Plotkin's dissent provides some interesting personal insight regarding the potential legal implications of growing consumerism in higher education.³⁶⁰ Judge Plotkin, distinguished educational malpractice cases rooted in breach of contract claims and those rooted in tort. He argued that the current conditions in higher education, along with notions of equity and justice, necessitate judicial recognition of a breach of contract claim.³⁶¹ In advocating that

350. *Miller v. Loyola Univ. of New Orleans*, 829 So.2d 1057 (La. Ct. App. 2002).

351. *Id.* at 1057.

352. *Id.* at 1059.

353. *Id.* at 1058–59.

354. *Id.* at 1059.

355. *Ross v. Creighton Univ.*, 957 F.2d 410, 414–15 (7th Cir. 1992).

356. *Miller*, 829 So.2d at 1060–61.

357. *Id.* at 1061.

358. *Id.* at 1061–62.

359. *Id.* at 1062.

360. *Id.* at 1063 (Plotkin, J., dissenting).

361. *Id.* at 1064.

a narrow cause of action in certain breach of contract cases should be recognized based on the principles of good faith and fair dealing, as in *Ross*, Judge Plotkin stated:

In this day and age, with the ever increasing price of higher education, universities now aggressively market themselves to would be consumers. Students should have some form of remedy available to them when they are specifically promised something, which is not delivered. With the use of marketing tactics by universities, comes added responsibility and accountability to the consuming public. Therefore, public policy and sentiments of equity and justice require Louisiana law to allow for a limited cause of action for educational malpractice involving breach of contract claims.³⁶²

Furthermore, Judge Plotkin noted that the judiciary's traditional deference to colleges and universities has led to an abdication of its duty to students in some instances, "resulting in a continued and prolonged lack of oversight and accountability."³⁶³ Judge Plotkin also stated that the contractual notions of good faith and fair dealing could be used as a structure to appropriately address and protect both institutional autonomy and student rights while providing some accountability in higher education.³⁶⁴

Case law suggests that there are some areas of "educational malpractice" contract law that are viable. Both academics and courts are starting to acknowledge the need to balance institutional autonomy and the academic freedom of professors and institutions against student demands in an increasingly consumer driven context. This conflict becomes ripe when states or the federal government begin to pass laws giving students statutory rights to enforce curricular choices made by their professors and institutions.

III. STUDENT BILL OF RIGHTS AS A CONTRACT

Recent legislative efforts may push the evolution of academic freedom for educational institutions, faculty, and students in new directions, thus potentially shifting the balance of rights involved. As institutions and state legislatures consider adopting academic bills of rights, it is critical to consider the ramifications when the principles that are set forth are allegedly not met. How will perceived failures be measured and enforced? Although precedent suggests that courts will be reluctant to become involved in academic disputes, academic bills of rights may invite

362. *Id.*

363. *Id.*

364. *Id.* at 1064–65. For an examination of the changing student-university relationship and the need for a more constructive judicial role in regulating the relationship, see Beh, *supra* note 238 (advocating the use good faith and fair dealing principles as a workable method to regulate educational contract disputes). This article, referred to by Judge Plotkin in his dissent, states that "when courts accord too much deference to the institution, they abrogate judicial responsibility to protect students." *Id.* at 184. See also Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002) (stating that notions of good faith and fair dealing are limited upon terms contemplated in student-university contracts and that fiduciary relationships may offer more protection).

judicial involvement and thus judicial evaluation of educational matters.³⁶⁵

Academic bills of rights have been designed to “‘protect students from one-sided liberal propaganda’ and to ‘safeguard a student’s right to get an education rather than an indoctrination.’”³⁶⁶ Cases such as *Brown*³⁶⁷ and *Axson-Flynn*³⁶⁸ indicate that student freedom of expression in classroom related activities can be limited to ensure that faculty may teach the lessons that the curriculum is designed to impart so long as the limitations follow the prescribed curriculum and are not used to punish students for their race, gender, economic class, religion, or political persuasion. Student academic bills of rights have been drafted to ensure that those established rights are protected and that the principles set forth by the AAUP are expanded. Under these new principles, universities have the duty to provide “curricula and reading lists . . . [that] provide students with dissenting sources and viewpoints” and a faculty that “foster[s] a plurality of methodologies and perspectives.”³⁶⁹ What will happen when students think these provisions have been violated and try to enforce them as a breach of contract? Courts recognize the contractual relationship between institutions and students and may become increasingly willing to enforce them in educationally-related matters. Presumably, under *Ross*, suits against colleges or universities might be allowed in cases where a professor failed to provide any diverse or dissenting viewpoints in a course or if a college or university failed to provide its designated procedural processes to address student allegations of indoctrination. These new statutory or contractual privileges could empower courts to evaluate the adequacy of courses, curricula, and professorial performance to determine whether students’ rights have been infringed, altering traditional patterns of institutional deference.

The additional protections provided to students may in turn limit faculty academic freedom by dictating how professors present educational concepts. Although some proposed legislation purports to protect faculty freedom by emphasizing that employment decisions cannot be based on the faculty member’s “political, ideological, or religious beliefs,” the AAUP has noted that principles of neutrality are already in place and that the new rights would ironically infringe on the very academic freedoms that they purport to protect.³⁷⁰ Ultimately, the AAUP believes that classroom management and student evaluation, traditionally considered educationally based determinations measured by pedagogical standards, could shift away from the faculty to college and university administrators and courts.³⁷¹ Further-

365. For a discussion involving professional liability, changes in educational policy, and possible statutory liability regarding instructional practices in primary and secondary settings under the theory of educational malpractice as a tort for negligence, see Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice been Opened?* 2003 B.Y.U. EDUC. & L.J. 485 (2003).

366. Alyson Klein, *Worried on the Right and the Left*, CHRON. HIGHER EDUC., July 9, 2004 at A22 (quoting U.S. Representative Jack Kingston).

367. 308 F.3d 939 (9th Cir. 2002), *cert denied*, 538 U.S. 908 (2003).

368. 356 F.3d 1277 (10th Cir. 2004).

369. See H. Con. Res. 318, 108th Cong. (2003).

370. AAUP, *Academic Bills of Rights*, available at <http://www.aup.org/statements/SpchState/Statements/billofrights.htm> (Dec. 2003) [hereinafter AAUP, *Bill of Rights*].

371. *Id.*

more, if institutions must ensure that a variety of viewpoints are expressed in the classroom, the institution might wield greater supervision over faculty teaching methods and curriculum choices to ensure these student rights are not infringed. The American Civil Liberties Union states that academic bills of rights “would censor . . . colleges and universities . . . because [they] could be used to curtail academic freedom and to encourage thought policing in our institutions of higher education.”³⁷² The “academic bill of restrictions” would “shift the responsibility for course content and student evaluation from highly trained faculty to the state government or the courts.”³⁷³

On a broader level, academic bills of rights may force some educational institutions to re-evaluate their missions and employment practices. Colleges and universities with missions aimed at providing students with a particular type of education would be particularly affected. The president of the Appalachian Bible College recently cautioned that legislation requiring presentation of diverse viewpoints would undermine his college’s faith-based mission³⁷⁴ and thus the intellectual freedom of the college. Furthermore, the AAUP alleges that by requiring colleges and universities to make employment decisions aimed at developing a plurality of perspectives and methodologies, notions of campus diversity might be measured by political standards rather than traditional academic criteria³⁷⁵ thus limiting institutional control.

CONCLUSION

Absent legislative authority or expressions of legislative intent, courts will not interfere with academic-related matters such as textbook selection and classroom exercises, assignments, and discussions. Academic bills of rights have the potential to create a new framework by providing students with enforceable statutory or contractual rights to challenge these curricular matters.³⁷⁶

In the classroom, academic bills of rights give students: (1) the ability to demand that institutions and professors provide them with texts and readings that cover dissenting viewpoints; (2) the ability to challenge grading based on the belief that political, ideological, or religious beliefs factored into the grade assignment; (3) the ability to demand that professors who share personal viewpoints also make students aware of other viewpoints; (4) the expectation that classes will provide a spectrum of significant scholarly viewpoints; and (5) the right to be free from indoctrination.³⁷⁷ Although current guidelines already protect some of these princi-

372. ACLU of Ohio, *Ohio Senate Bill 21*, available at http://www.acluohio.org/issues/free_speech/sb24.htm (Feb. 2005).

373. *Id.*

374. Klein, *supra* note 366, at A22.

375. AAUP, *Bill of Rights*, *supra* note 370.

376. See H.R. 4283, 108th Cong. §103 (2004); H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005). There are other examples of congressional intrusion in dictating educational curriculum at colleges and universities such as Sen. Bryd’s insertion of a requirement that all institutions receiving federal funding aid offer instruction on the Constitution each September 17. See Karin Fischer, *Bill May Force Many Colleges to Teach About the Constitution*, CHRON. HIGHER EDUC., Dec. 10, 2004, at A19.

377. H.R. 4283. This legislation, though not binding, “encourages all public and private col-

ples, they are not yet elevated to statutory rights or contract terms. Legislative enactments that strengthen students' academic rights may result in increased conflict as institutions', professors', and students' academic freedoms clash for control in the classroom.

The historical reliance by faculty and institutions on the authority given to them over students by their assertions of academic freedom in the classroom are likely to fall on deaf judicial ears if statutory or contractual academic bills of rights are provided to students, particularly since courts have given great deference to the authority of states to legislate the behavior of state institutions and employees and are receptive to both public and private breach of contract claims. Enforceable rights are likely to shift the balance of academic decision-making in higher education; a serious issue that needs to be considered when such bills or compacts are proposed.

Ultimately, academic bills of rights could create unrecognized shifts in established norms and institutional control, possibly providing students with a statutory or contractual basis to hold academic institutions and individual faculty liable for representations or promises set forth in institutional bulletins and catalogues based on perceived or biased efforts in the classroom.

Historically, academic freedom in the classroom resided with the faculty. Current case law indicates that academic freedom may actually inhere in the educational institution. Academic bills of rights may take the authority to control the classroom away from professional educators and into the hands of the students, government, or courts regardless of whether the authority resides with the faculty or the institution.

leges and universities in the United States to adopt an academic bill of rights and to observe the principles and procedures" set forth in the legislation. Depending on the academic bill of rights adopted by a college or university or state or federal legislature, provisions therein could be enforceable.

TITLE IX AND GENDER EQUITY IN SCIENCE, TECHNOLOGY, ENGINEERING AND MATHEMATICS EDUCATION: NO LONGER AN OVERLOOKED APPLICATION OF THE LAW

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INTRODUCTION

In June of 1972, Congress enacted Title IX of the Education Amendments of 1972¹ to ensure that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”² In the three decades since, and in the 1990s in particular, Title IX enforcement actions, including investigations by the U.S. Department of Education (DED) and lawsuits brought by, or on behalf of, students to challenge decisions made by educational institutions at every level, have focused primarily on whether educational institutions have provided equitable athletic opportunities for male and female student-athletes,³ or on whether educational institutions have properly addressed charges of sexual harassment to ensure that inappropriate conduct by employees or other students does not inhibit access to educational opportunities.⁴ Rarely have courts examined gender equity in the academic

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1. Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2000)).

2. 20 U.S.C. § 1681(a) (2000).

3. For a review of Title IX in the athletics context, see, for example, Symposium, *Title IX at Thirty*, 14 MARQ. SPORTS L. REV. 1 (2003); Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003); and Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not Reached the Finish Line*, 13 S. CAL. REV. L. & WOMEN’S STUD. 3 (2003).

4. For a review of Title IX in the sexual harassment context, see, for example, Catherine Pieronek, *Discrimination Against Students in Higher Education*, 26 J.C. & U.L. 307, 309–17 (1999); Catherine Pieronek, *Discrimination Against Students in Higher Education*, 27 J.C. & U.L. 367, 369–81 (2000); Catherine Pieronek, *Discrimination Against Students in Higher Education*, 28 J.C. & U.L. 387, 388–96 (2002); and Catherine Pieronek, *Discrimination Against Students in Higher Education*, 29 J.C. & U.L. 359, 402–12 (2003). To understand the development of the law with regard to peer-on-peer sexual harassment, see Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. LAW REP. 1 (2004). For discussions of the law with regard teacher/employee-on-student sexual harassment, see Charles J. Russo et al.,

context, as distinct from athletics or sexual harassment.

At the dawn of the twenty-first century, however, the focus of Title IX enforcement has begun to shift toward examining the under-representation of women in science, technology, engineering and mathematics (STEM) disciplines and academic careers. While women comprise a growing majority of all college students, they remain a minority in most of the STEM disciplines, with the most extreme under-representation in engineering and in select science fields such as physics.⁵

In 2001, the latest year for which the National Science Foundation (NSF) has published statistics, women earned 721,625 of the 1,257,648 bachelor's degrees granted in all fields (57.4%), but only 11,914 of the 59,258 bachelor's degrees granted in engineering (20.1%).⁶ This disparity continues at all levels of higher education, as shown in Tables 1–4, which present the percentages of various college degrees awarded to women since the advent of Title IX in 1972.

As Table 1 shows, women now comprise a majority of all bachelor's degree earners, and a majority of those earning bachelor's degrees in the natural sciences,⁷

Guidelines for Addressing Sexual Harassment in Educational Institutions, 182 EDUC. LAW REP. 15 (2003), and Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J. L. & EDUC. 411 (2003).

5. A number of theories attempt to explain the disproportionately low representation of women in STEM fields. Some researchers subscribe to a “nurture” theory, which identifies the societal behaviors that discourage women from attempting to succeed in STEM disciplines. For example, some researchers posit that, in underperforming in mathematics and science, women merely live up to society's expectations that they cannot perform as well as men in those fields. *See, e.g.*, VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 192 (1998). On the other hand, some researchers posit that typical adolescent pressures to conform may discourage girls from distinguishing themselves among their schoolmates by succeeding in mathematics and science. *See, e.g.*, JANE MARGOLIS & ALLAN FISHER, *UNLOCKING THE CLUBHOUSE: WOMEN IN COMPUTING* 33–48 (2002).

Still other researchers subscribe to a “nature” theory. One such study has suggested that women's and men's brains are wired differently, with women tending toward empathy and men toward understanding and building systems. *See, e.g.*, SIMON BARON-COHEN, *THE ESSENTIAL DIFFERENCE: MEN, WOMEN AND THE EXTREME MALE BRAIN* 1 (2004). Harvard president Lawrence H. Summers recently stirred up controversy when he suggested that “innate differences between men and women might be one reason fewer women succeed in science and math careers.” Marcella Bombardieri, *Summers' Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1. Still other research has identified brain differences that could explain why women tend to have better communication skills while men tend to have better spatial-orientation skills. Natalie Angier & Kenneth Chang, *Gray Matter and the Sexes: Still a Scientific Gray Area*, N.Y. TIMES, Jan. 24, 2005, at A1.

No research has yet yielded a definitive answer to the question of why women comprise a disproportionately small segment of engineers and scientists. Quite possibly, this occurs due to a combination of many factors. Nevertheless, environmental or cultural factors in academic settings can influence the persistence of women in STEM disciplines. Title IX cannot correct for the personal choices—whether inspired by nature or nurture or something else—that cause women to seek careers in fields other than STEM, nor should it. The law can, however, eliminate the environmental or cultural factors that affect men and women differently, metaphorically leveling the academic playing field.

6. NSF, *Science and Engineering Degrees: 1966-2001* at 13, Table 5; 17, Table 9 (2004) [hereinafter NSF Report].

7. The term “natural sciences,” as used in this article, encompasses: physical sciences

psychology, social sciences, and non-STEM fields.⁸ Yet, in 2001, women earned only 20.1% of all engineering bachelor's degrees, comprised a shrinking segment of students earning mathematics and computer science bachelor's degrees and, despite the growth in the proportion of women across all of the natural sciences, comprised a disproportionately small segment of some natural-sciences fields such as physics.⁹

TABLE 1¹⁰
BACHELOR'S DEGREES GRANTED TO WOMEN
1972 vs. 2001

	1972	2001	% Growth
All Fields	43.7%	57.4%	31.4%
Engineering	1.1%	20.1%	1768.0%
Mathematics & Computer Science	35.9%	31.8%	-11.3%
Natural Sciences	21.6%	54.4%	151.9%
Psychology & Social Sciences	39.5%	63.7%	61.5%
Other	51.1%	60.5%	18.4%

Although the growth rates in Table 1 look phenomenal, these numbers also hide some trends that raise concerns. In 1972, only 492 women nationwide earned a bachelor's degree in engineering.¹¹ In 1987, 11,404 women earned bachelor's degrees in engineering, growing to 15.3% of all engineering graduates.¹² Since 1987, however, the number of women earning engineering bachelor's degrees has remained essentially the same, despite the tremendous growth in the number of women earning bachelor's degrees in all fields since that time.¹³ And, since 1985, the number of men earning engineering bachelor's degrees has decreased steadily, so at least part of the increase in the proportion of women among engineering

including astronomy, chemistry and physics; earth, atmospheric and ocean sciences; and biological and agricultural sciences. It excludes the social sciences and psychology.

8. NSF Report, *supra* note 6, at 13, Table 5; 17, Table 9.

9. Women earned only 19.3% of all bachelor's degrees granted in physics in 1998. NSF, WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2002, at 148, Appendix C, Table 3-6, (2002) [hereinafter NSF Diversity Report].

10. NSF Report, *supra* note 6, at 13, Table 5; 17, Table 9.

11. *Id.*

12. *Id.* at 13, Table 5; 17, Table 9. This reflects a growth rate of 2217.9%.

13. *Id.* at 17, Table 9. Between 1987 and 2001, the number of women earning a bachelor's degree in any field grew from 518,529 to 721,625, for a growth rate of 39.2%. *Id.* In contrast, over that same period, the number of women earning a bachelor's degree in engineering grew from 11,404 to 11,914, for a growth rate of 0.8%. *Id.* Overall, from 1987 to 2001, the number of women earning an engineering bachelor's degree has varied from a low of 9,636 in 1992 to a high of 12,216 in 2000. *Id.*

graduates actually results from a decrease in the number of men in the pool.¹⁴ Thus, looking at the numbers shown in Table 1 does not provide a complete picture of women's progress in earning engineering bachelor's degrees: It is not as good as the numbers themselves indicate.

Table 2 presents the same data for master's degree recipients, and shows trends similar to those in Table 1 for bachelor's degree recipients.¹⁵ Again, women comprised a growing share of master's degree recipients in non-STEM fields, earning nearly 60% of all master's degrees in 2001.¹⁶ But that year, women earned less than a quarter of all master's degrees in engineering, only about a third of all master's degrees in mathematics and computer science, and just under half of all master's degrees in the natural sciences, although under-representation also persists at the master's degree level in certain natural-sciences fields such as physics.¹⁷

TABLE 2¹⁸
MASTER'S DEGREES GRANTED TO WOMEN
1972 vs. 2001

	1972	2001	% Growth
All Fields	40.6%	58.6%	44.4%
Engineering	1.6%	21.2%	1212.6%
Mathematics & Computer Science	24.7%	35.2%	42.1%
Natural Sciences	21.2%	48.6%	128.9%
Psychology & Social Sciences	28.7%	62.4%	117.5%
Other	47.4%	62.6%	32.1%

Table 3 presents the same data for doctoral degree recipients.¹⁹ While the percentage of female Ph.D. degree recipients has grown tremendously, women still earn less than half of all doctoral degrees.²⁰ While women earned more than half of the Ph.D. degrees granted in psychology, social sciences and non-STEM fields in 2001, they earned considerably less than half of all Ph.D. degrees in STEM fields.²¹

14. *Id.* at 16, Table 8. Since peaking in 1985 at 66,326, the number of engineering bachelor's degrees awarded annually to men has decreased steadily, almost every year, to 47,344 in 2001. *Id.* at 15, Table 7. Between 1987 and 2001, the period of no growth among women in engineering, the number of men earning an engineering bachelor's degree dropped from 63,021 to 47,344, or by 24.9%. *Id.*

15. *Id.* at 20, Table 12; 24, Table 16.

16. *Id.* at 10, Table 2. Women earned 273,639 of the total 466,642 master's degrees awarded in 2001. *Id.*

17. In 1998, women earned only 18.2% of all master's degrees in physics. NSF Diversity Report, *supra* note 9, at 201, Table 5-2.

18. NSF Report, *supra* note 6, at 20, Table 12; 24, Table 12; 24, Table 16.

19. *Id.* at 27, Table 19; 31, Table 23.

20. *Id.* at 33, Table 25. Women earned 17,935 of the total 40,790 doctoral degrees awarded in 2001. *Id.* at 31, Table 23.

21. In 1999, women earned only 12.6% of all Ph.D. degrees in physics. NSF Diversity Report, *supra* note 9, at 212, Table 5-7.

TABLE 3²²
DOCTORAL DEGREES GRANTED TO WOMEN
1972 vs. 2001

	1972	2001	% Growth
All Fields	16.0%	44.0%	174.8%
Engineering	0.6%	16.9%	2587.8%
Mathematics & Computer Science	7.5%	23.5%	213.8%
Natural Sciences	10.8%	36.6%	237.3%
Psychology & Social Sciences	18.6%	54.0%	189.7%
Other	22.9%	56.4%	146.6%

Finally, for comparative purposes, the data in Table 4 show that women have also made strong gains in professional studies, with equivalent growth in both health and non-health fields.²³

TABLE 4²⁴
FIRST PROFESSIONAL DEGREES GRANTED TO WOMEN
1972 vs. 2001

	1972	2001	% Growth
All Professional Degrees	6.3%	46.2%	633.3%
Non-health Professional Degrees	6.1%	45.4%	644.3%
Health Professional Degrees	6.5%	47.2%	626.2%

Together, the data presented in these tables indicate that women, as a growing majority of all college students, can achieve at the highest levels of education, including in such demanding fields as medicine and law. Yet women do not engage in the similarly demanding STEM disciplines to the same degree. Comparing the percentages of women in engineering at all degree levels highlights specific areas of concern.

First, the under-representation of women among engineering Ph.D. recipients has repercussions throughout the educational process. While women comprise 16.9% of those earning a Ph.D. in engineering, only about half (8.4%) find their way onto engineering faculties.²⁵ Moreover, those who do pursue careers in higher education comprise a disproportionately large segment of the lower-status faculty ranks: 27.1% of instructors/lecturers; 13.9% of adjunct faculty; and 10.6% of non-tenure track faculty.²⁶ Thus, many women who do complete the engineering Ph.D.

22. NSF Report, *supra* note 6, at 27, Table 19; 31, Table 23.

23. *Id.* at 66–68, Tables 58–60. These data reflect the “first professional degree,” defined by NSF as a degree that requires at least six years of college work for completion and two years of pre-professional training. *Id.* Professional health fields include chiropractic, dentistry, medicine, optometry, osteopathic medicine, pharmacy, podiatry, and veterinary medicine. *Id.* Professional non-health fields include law, divinity/ministry, and rabbinical/Talmudic studies. *Id.*

24. *Id.*

25. See WOMEN’S ENG’G PROGRAM ADVOCATES NETWORK, at http://www.wepan.org/documents/by_rank_broad_field_and_gender_1991_2001.pdf (last visited Feb. 25, 2005).

26. *Id.*

either do not pursue or do not secure full-time, tenure-track faculty positions.²⁷

Second, the percentage of women who earn a master's degree in engineering is higher than the percentage who earn a bachelor's degree in engineering—a statistic with many possible explanations. The increase in the percentage of master's degree recipients over bachelor's degree recipients could result from any of the following positive factors: some women in non-engineering fields such as chemistry may choose to earn a master's degree in engineering to enhance their marketability for employment, thus increasing the percentage of engineering master's degree recipients over the percentage of bachelor's degree recipients; women, to a greater extent than men, might see the value in a master's degree; or earning a master's degree might provide a way for women who have left the work force temporarily to raise a family, for example, to re-enter industry. On the other hand, the drop-off between the percentage of master's degree earners and the percentage of Ph.D. degree earners could point to a negative trend such as an increased number of women leaving Ph.D. programs before completing that final degree. Whatever the case, the numbers alone over-simplify reality. Despite the amazing growth in the numbers of women graduating with M.S. and Ph.D. degrees in engineering since 1972, these numbers still might mask concerns about equity issues in both the education and employment processes.

The gender gap in STEM education has, finally, caught the attention of the federal government. During the summer and fall of 2002, the U.S. Senate Subcommittee on Science, Technology and Space, of the Committee on Commerce, Science and Transportation, held hearings to gather information on the under-representation of women “studying and working in math, technology, engineering and the so-called hard sciences such as physics and chemistry.”²⁸ In June of 2002, the subcommittee challenged Sean O’Keefe, then-Chief Administrator of the National Aeronautics and Space Administration (NASA), to develop a plan “to help triple the number of women graduating college with degrees in science, math and engineering by the year 2012.”²⁹ And in July 2002, the subcommittee heard testimony from leading educators that encouraged the use of gender-equity legislation such as Title IX to achieve the same progress for women in traditionally male-dominated academic disciplines as has been achieved for women in athletics.³⁰

27. See also Robin Wilson, *Where the Elite Teach, It's Still a Man's World*, CHRON. HIGHER EDUC., Dec. 3, 2004, at A8 (noting that “the more prestigious the institution, the fewer women it has [across all disciplines]. In 2001, women made up 48 percent of the professoriate at two-year colleges, compared with 38 percent at baccalaureate-granting institutions, and 28 percent at research institutions . . .”).

28. *Title IX and Science: Hearing on SR-253 Before Senate Subcomm. on Sci., Tech., and Space of Senate Comm. On Commerce, Sci., and Transpo.*, 107th Cong. (statement of Senator Ron Wyden (D-OR)), available at <http://commerce.senate.gov/hearings/100302wyden.pdf> (Oct. 10, 2002).

29. *NASA and Education: Hearing Before Subcomm. on Sci., Tech., and Space of Senate Comm. on Commerce, Sci., and Transpo.*, 107th Cong. (Statement of Senator Ron Wyden (D-OR)), available at <http://commerce.senate.gov/hearings/061902wyden.pdf> (June 19, 2002). Senator Wyden, who chaired the subcommittee, also “want[ed] to see the overall number of graduates in math and the hard sciences triple as well.” *Id.* (emphasis added).

30. *Women in Science and Technology: Hearing Before Subcomm. on Sci., Tech., and*

In response to congressional concerns,³¹ the United States Government Accountability Office (GAO) published a “report to congressional requesters” entitled *Women’s Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX*.³² The report focused on three questions:

- (1) How do the DED, the Department of Energy (DOE), NASA, and the NSF ensure that federal grant recipient institutions comply with Title IX in STEM fields?
- (2) What do the data show about women’s participation in STEM fields?
- (3) What promising practices exist to promote the participation of women in STEM fields?³³

Ultimately, the report concluded that federal agencies, by and large, have neglected their responsibilities to enforce Title IX to ensure equity in academics in general, and in STEM disciplines in particular.³⁴

This article discusses how to enforce Title IX in academics, concentrating on issues relevant to women in STEM disciplines.³⁵ Part I presents a history of Title IX, discusses how Title IX differs between the academic and athletic contexts, and reviews the Title IX implementing regulations that create the framework for enforcement in the academic context. Part II discusses current Title IX enforcement efforts as described in the GAO report. Part III summarizes the current state of Title IX monitoring and compliance efforts by the four federal agencies that fund most STEM-based research. The article concludes with a look to the future of Title IX enforcement in STEM education.

I. TITLE IX—AN OVERVIEW

Discrimination in athletic programs, sexual harassment and other forms of gender-based discrimination, on the surface, appear to have little in common. The Title IX statute, with its broad proscription of gender-based discrimination, encompasses each of these different types of discrimination. But the implementing regulations, various policy interpretations and case law together explain how the Title IX statute operates differently depending on the type of discrimination at issue.

Title IX compliance and enforcement activities occur in a number of ways.

Space of Senate Comm. on Commerce, Sci., and Transp., 107th Cong. (Statement of Dr. Kristina M. Johnson, Dean of the Pratt School of Engineering at Duke University), available at <http://commerce.senate.gov/hearings/072402johnson.pdf> (July 24, 2002).

31. Senators Ron Wyden (D-OR) and Barbara Boxer (D-CA) requested the report. See Piper Fogg, *Science Agencies Urged to Ensure that Grant Recipients Don’t Discriminate*, CHRON. HIGHER EDUC., Aug. 13, 2004, at A10.

32. U.S. G.A.O., *Women’s Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX*, GAO-04-639 (July 2004) available at <http://www.gao.gov/new.items/d04639.pdf> [hereinafter GAO Report].

33. *Id.* at 1.

34. *Id.* at 28.

35. Similar issues affect men in fields traditionally dominated by women, such as nursing. This article focuses only on women in STEM fields, however, because it addresses the issues raised in the recent GAO Report.

Federal funding agencies and grant-recipient institutions all have certain obligations under the law. Additionally, individuals also have the right to enforce the law, either through complaints directed toward funding agencies or through lawsuits filed in court. This section discusses both of these enforcement mechanisms, to provide a full picture of the rights and responsibilities of all involved in granting and benefiting from the expenditure of federal money on higher education.

Part I.A of this article provides a history of Title IX, reviewing legislative history, discussing agency actions to interpret the statute and exploring judicial decisions that have shaped the contours of individual rights under the statute. Part I.B discusses the significant ways in which athletics and academics differ for the purposes of Title IX enforcement, and thereby creates a context for understanding the Title IX implementing regulations relevant to everything other than athletics. Part I.C examines the Title IX implementing regulations, to explain the obligations of both federal funding agencies and grant recipients, using cases and other examples where appropriate to illustrate the applicability of the regulations.

A. History and Development

The Title IX statute, as enacted, presents a simple mandate:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .³⁶

This subsection of the statute concludes with several exceptions to this general rule including exemptions for military schools,³⁷ traditionally single-sex institutions,³⁸ fraternities and sororities,³⁹ and father-son or mother-daughter activities.⁴⁰

The next subsection provides:

Nothing contained in [20 U.S.C. § 1681(a)] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of,

36. 20 U.S.C. § 1681(a) (2000).

37. *Id.* § 1681(a)(4).

38. *Id.* § 1681(a)(2), (5).

39. *Id.* § 1681(a)(6).

40. *Id.* § 1681(a)(8).

any such program or activity by the members of one sex.⁴¹

Thus, the statute neither requires nor prohibits quotas. For the purpose of proving discrimination against members of the under-represented gender, however, the statute does permit the fact-finder—whether the judge or jury in a trial, or a federal funding agency in an investigation—to consider evidence of a proportional imbalance in male-female participation in a particular educational program or activity.

Implementing regulations written by the Department of Health, Education and Welfare⁴² (HEW) and approved in 1975 by President Gerald R. Ford provide guidelines for enforcing the law.⁴³ The regulations address such topics as nondiscrimination in financial assistance provided to students,⁴⁴ nondiscrimination on the basis of the marital or parental status of students,⁴⁵ guidelines for dealing with pregnant students,⁴⁶ and nondiscrimination issues specific to athletic programs.⁴⁷

As a statute enacted pursuant to congressional authority under the Spending Clause of the Constitution,⁴⁸ the law creates a contract that conditions the receipt of federal funds on a grant recipient's commitment not to discriminate on the basis of gender.⁴⁹ Thus, an institution that violates Title IX breaches its contract with the federal government and, as a result of that breach, could lose access to federal funding in its many forms, including student loans, building funds and research grants. The implementing regulations do, however, require that the government gives the institution the opportunity to "take such remedial action as . . . necessary to overcome the effects of such discrimination."⁵⁰ Consequently, the government cannot automatically terminate funding upon finding a breach of the funding contract, but must first inform the recipient institution of the violation and allow the recipient institution to implement corrective actions.

Cases in the sexual harassment context have underscored this point. In *Gebser v. Lago Vista Independent School District*,⁵¹ for example, the United States Supreme Court refused to hold a school district liable under Title IX for teacher-on-student sexual harassment when the school district had no knowledge of the

41. 20 U.S.C. § 1681(b) (2000).

42. In 1979, the U.S. Congress transferred HEW responsibilities for Title IX to the DED through the Department of Education Organization Act of 1979. 20 U.S.C. § 3441 (2000). DED adopted the original HEW policies as its own. *Id.*; 20 U.S.C. § 3505(a) (2000). *See also* 45 Fed. Reg. 30,802 (May 9, 1980) (establishing Title 34 of the C.F.R.). When referring to general enforcement authority under Title IX, this article refers to HEW and DED, as its successor agency, collectively as DED.

43. *See* 34 C.F.R. § 106 (2004).

44. 34 C.F.R. § 106.37.

45. *Id.* § 106.40.

46. *Id.*

47. *Id.* § 106.41.

48. U.S. CONST. art. I, § 8, cl. 1.

49. *See, e.g.,* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: . . . the States agree to comply with federally imposed conditions.").

50. 34 C.F.R. § 106.3(a) (2004).

51. 524 U.S. 274 (1998).

high school teacher's inappropriate behavior. As the Court explained:

[A] central purpose of requiring notice of the violation . . . and an opportunity [to come into] voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses [in instances in which] a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.⁵²

The Court further noted that the Title IX enforcement scheme:

presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference.⁵³

Otherwise, a recipient institution "would be liable in damages not for its own official decision but instead for its employees' independent actions."⁵⁴ Thus, liability under Title IX requires a finding that the educational institution⁵⁵ knew about the gender-based discrimination and deliberately failed to take actions aimed at stopping it.⁵⁶

While the statute and implementing regulations spell out the details of the contract between a federal funding agency and a recipient educational institution, courts have also defined the contours of the rights of individuals who allege discrimination and choose to sue and recover damages under Title IX. In 1979, in *Cannon v. University of Chicago*,⁵⁷ the Court determined that private plaintiffs could bring suit to enforce the mandates of the statute.⁵⁸ The *Cannon* Court explained that, while "[t]he statute does not . . . expressly authorize a private right of action,"⁵⁹ Congress had patterned Title IX after Title VI of the Civil Rights Act of 1964,⁶⁰ fully aware that Title VI provided for a private right of action.⁶¹ The

52. *Id.* at 289.

53. *Id.* at 290.

54. *Id.* at 290–91.

55. Actually, an "appropriate person" at the educational institution—a person "with authority to take corrective action to end the discrimination"—must receive notice. *Id.* at 290.

56. At least one commentator has pointed out, however, that this notice requirement does not make sense in cases other than sexual harassment claims, because "non-harassment sex discrimination lies at the heart of Title IX's prohibition of sex discrimination in federally funded educational institutions." David S. Cohen, *Limiting Gebser: Institutional Liability for non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 311 (2004). This article points out that lower courts have inconsistently applied the "notice" standard to non-harassment claims under Title IX, and argues for the consistent application of an "agency" standard in all but sexual harassment claims.

57. 441 U.S. 677 (1979) (involving female medical school applicant who was denied admission to two schools who charged that schools discriminated against her on the basis of sex).

58. *Id.* at 693–94.

59. *Id.* at 683.

60. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

61. 441 U.S. at 694–96. As the Court stated:

Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the

Court thus concluded that Congress had similarly intended to allow Title IX enforcement through a private right of action.⁶² In contract terms, then, the *Cannon* Court gave individual plaintiffs, essentially as third-party beneficiaries of the contract between the federal government and the educational institution, the right to sue to enforce the terms of the contract.

In 1984, in *Grove City College v. Bell*,⁶³ the Court ruled that Title IX applied only to the specific educational programs or activities that directly received federal financial assistance.⁶⁴ If, for example, a university biology department received a federal research grant, the biology department's activities had to comply with the mandates of Title IX; but if that university's athletic department did not receive federal funds, the athletic department had no obligations under the law.

In 1988, however, Congress explicitly gave Title IX institution-wide application by passing the Civil Rights Restoration Act of 1987⁶⁵ to "overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, and restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs."⁶⁶ Consequently, if *any* program or activity at an educational institution receives federal funds, then the *entire* institution must comply with Title IX. Today, then, a research grant to the mechanical engineering department or even federal financial aid granted to students for personal use at a college, for example, makes an entire college or university responsible for complying with Title IX and other federal civil rights laws in all of its programs and activities, including athletics.

In its 1992 decision in *Franklin v. Gwinnett County Public Schools*,⁶⁷ the Court expanded the remedies available to private plaintiffs beyond merely enforcing the contract between the federal government and the institution.⁶⁸ Relying on a principle derived from the Court's 1946 decision in *Bell v. Hood*,⁶⁹ the *Franklin*

substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

Id.

62. *Id.* at 729–30.

63. 465 U.S. 555 (1984).

64. *Id.* at 574. The Court had also affirmed the program-specific nature of Title IX in at least one earlier case, *North Haven Board of Education v. Bell*, 456 U.S. 512, 535–38 (1982).

65. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (2000)).

66. S. REP. NO. 100-64, at 2 (1988) (internal citations omitted).

67. 503 U.S. 60 (1992) (involving a female high school student who charged that her coach/teacher had sexually harassed her).

68. *Id.* at 76.

69. 327 U.S. 678 (1946). As the *Bell* Court explained, "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 684. The *Franklin* Court described "this longstanding rule as jurisdictional and upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or

Court concluded that a plaintiff could receive monetary damages when an educational institution violated Title IX.⁷⁰ Again in contract terms, the *Franklin* Court gave individual plaintiffs the right to receive monetary damages for the educational institution's breach of the funding contract.⁷¹

The *Franklin* Court did not provide guidance on whether monetary damages could include punitive damages. But at least one federal appellate court has ruled in the athletics context that Title IX does not allow punitive damages in a private action, although the law does permit recovery of attorneys' fees and costs.⁷² Also, in *Barnes v. Gorman*,⁷³ the Supreme Court ruled that punitive damages are not available in a private action under the Americans with Disabilities Act (ADA).⁷⁴ Likening the ADA—along with Title VI and Title IX—to a contract, the *Barnes* Court indicated that “funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages.”⁷⁵ Rather, the *Barnes* Court concluded that liability under Spending Clause legislation is limited to those remedies traditionally associated with breach of contract, namely, compensatory damages and injunctive relief.⁷⁶

B. Title IX in Academics vs. Title IX in Athletics

In his October 2002 testimony at the U.S. Senate subcommittee hearing on “Title IX and Science,” former U.S. Senator Birch Bayh (D-IN), key among Title IX congressional advocates in 1972, said that the progress of women in the athletics arena over the last 30 years “warms my heart.”⁷⁷ He then added:

[B]ut it also reminds me that at the time we were considering the Equal Rights Amendment and Title IX, I thought that the greatest benefit would come from opening the doors of our education system so that girls, young women, faculty members and administrators could fully utilize their God-given talents in the

laws of the United States.” *Franklin*, 503 U.S. at 66 (construing *Bell*, 327 U.S. at 684).

70. *Franklin*, 503 U.S. at 71.

71. *Id.* It should be noted that the Supreme Court has not yet directly addressed whether an institution might be liable to a private plaintiff for requested equitable relief for the breach of contract. That is, the Court has not yet determined whether a court might require an educational institution to change its policies or procedures to remedy gender discrimination. The Court has cautioned, however, that Title IX plaintiffs do not have a “right to make particular remedial demands.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999). Courts decide such cases consistent with the general principle that educational institutions must retain the flexibility necessary to administer their programs appropriately. *Id.* at 648–49.

72. *Mercer v. Duke Univ.*, 50 Fed. Appx. 643 (4th Cir. 2002).

73. 536 U.S. 181 (2002).

74. *Id.* at 189. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

75. *Barnes*, 536 U.S. at 188.

76. *Id.* at 187. *But see also* Charles L. Rombeau, *Barnes v. Gorman and Mercer v. Duke University: The Availability of Punitive Damages in Title IX Litigation*, 6 U. PA. J. CONST. L. 1192 (2004) (arguing for the imposition of punitive damages in Title IX cases that involve intentional discrimination).

77. *Title IX and Science: Hearing on SR-253 Before Senate Subcomm. on Sci., Tech., and Space of Senate Comm. On Commerce, Sci., and Transp.*, 107th Cong. (statement of Birch Bayh), available at <http://commerce.senate.gov/hearings/100302bayh.pdf> (Oct. 3, 2002).

academic area.”⁷⁸

Senator Ron Wyden (D-OR), former chair of the U.S. Senate Subcommittee on Science, Technology and Space, echoed Senator Bayh’s thoughts in a recent article:

Many Americans know [that] the enforcement of [Title IX] has brought women much closer to parity in high school and college sports opportunities. But in my view, what Title IX has achieved on the playing field remains undone in the classroom, where the promise of this law was originally directed. Particularly, I believe that Title IX has yet to be applied stringently enough in traditionally male-dominated fields such as the hard sciences, math and engineering—disciplines where our nation needs competent workers now more than ever before.⁷⁹

Nevertheless, the term “Title IX” has become shorthand for “gender equity in athletics,” and much of what the public knows about Title IX—a statute that has broad applications for all areas of federally financed education—has resulted from a number of high-profile equity-in-athletics cases that have reached the federal appellate courts.⁸⁰

While these decisions have shaped public perception about Title IX, they have also encouraged those interested in gender equity in STEM education to pursue a goal of true gender equity in a manner similar to the athletics cases.⁸¹ However,

78. *Id.*

79. Ron Wyden, *Title IX and Women in Academics*, COMPUTING RESEARCH NEWS, September 2003, at 1, available at <http://www.cra.org/CRN/issues/0304.pdf>.

80. Cases in the First Circuit include *Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (preliminary injunction), and 879 F. Supp. 185 (D.R.I. 1995), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (trial on the merits); in the Third Circuit, *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993); in the Fifth Circuit, *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); in the Sixth Circuit, *Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002); in the Seventh Circuit, *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265 (7th Cir. 1994), and *Boulahanis v. Board of Regents, Illinois State University*, 198 F.3d 633 (7th Cir. 1999); in the Eighth Circuit, *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); in the Ninth Circuit, *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999); and in the Tenth Circuit, *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

The Second Circuit considered a number of Title IX issues in *Boucher v. Syracuse University*, 164 F.3d 113 (2d Cir. 1999), but because of standing and class-certification issues, as well as the university’s decision to add particular women’s teams during the pendency of the litigation, the court did not reach the effective accommodation issues dealt with by the *Cohen* court and the other federal circuits.

The Sixth Circuit has also addressed significant Title IX issues in the context of secondary school athletic programs in a series of cases dating back to 1992, culminating in *Horner v. Kentucky High School Athletic Ass’n*, 206 F.3d 685 (6th Cir. 2000); and *Communities for Equity v. Michigan High School Athletic Ass’n, Inc.*, 377 F.3d 504 (6th Cir. 2004).

The Fourth Circuit addressed a unique Title IX case, which involved the treatment of a female student-athlete who had the opportunity to try out for Duke University’s football team, in *Mercer v. Duke University*, 190 F.3d 643 (4th Cir. 1999).

The Eleventh Circuit has yet to hear a Title IX equity-in-athletics case of any kind.

81. See, e.g., Debra R. Rolison, *Can Title IX Do for Women in Science and Engineering*

the Title IX framework credited for tremendous growth in women's athletics over the past three decades cannot translate directly into the academic sphere for a number of important reasons.

First, the implementing regulations relevant to athletics contemplated the segregation of male and female student-athletes on separate teams.⁸² Consequently, the Title IX enforcement scheme designed for athletics adopts what could be called a "separate but equal" approach to Title IX enforcement. That is, an educational institution must prove that the benefits and opportunities afforded to men compare favorably with those afforded separately to women. Title IX enforcement actions in athletics thus focus on the *actual results* of attempts to achieve equity: whether women actually receive an equitable share of athletics-related financial assistance;⁸³ whether the institution actually provides male and female student-athletes with equivalent benefits and other opportunities associated with athletics;⁸⁴ and whether the institution actually provides an equitable number of participation opportunities for male and female student-athletes.⁸⁵

In the academic context, on the other hand, such gender segregation does not (or should not) exist. Consequently, the Title IX enforcement scheme must deal, not with the number of women who study in or graduate from a particular program, but with whether the program provides an environment that affords women and men equivalent opportunities to participate in the educational process. Thus, while a statistical imbalance in the number of men and women graduating from an engineering program may provide evidence that the educational institution's practices do not comply with Title IX, that imbalance alone cannot constitute the Title IX violation. A Title IX violation would exist only if the educational institution failed to adhere to the requirements spelled out in the relevant implementing regulations, regardless of how few women actually graduate from a particular program.

What It Has Done for Women in Sports? APS NEWS ONLINE, May 2003, at 8, at <http://www.aps.org/apsnews/0503/may03.pdf> (arguing for gender-equity reforms in STEM disciplines patterned after gender-equity reforms in athletics).

82. 34 C.F.R. § 106.41(b) (2004) states in part: "[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." See also 65 Fed. Reg. 52,858, 52,862 (Aug. 30, 2000) (to be codified in multiple parts of C.F.R.) (noting that "many athletic programs are sex-segregated by design, whereas Title IX requires that most academic programs be offered to all students regardless of sex. Thus, since most academic classes are not segregated by sex, different standards are used for assessing compliance with Title IX in academic programs.").

83. See 34 C.F.R. § 106.37 (2004) (discussing the equivalence in athletic financial assistance to student-athletes). See 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

84. See 34 C.F.R. § 106.41(c)(2)-(10) (discussing the equivalence in other athletic benefits and opportunities—the so-called "laundry list" of nine items such as coaches' compensation, facilities, equipment, etc.). See 44 Fed. Reg. at 71,415.

85. See 34 C.F.R. § 106.41(c)(1) (discussing the ways in which an educational institution can demonstrate that it has provided equitable participation opportunities). These discussions encompass the three-part test for compliance with the effective accommodation requirements of Title IX, under which an educational institution must show that it satisfies one of three criteria: proportionality between the percentage of female student and female student-athletes, a history of continuing program expansion, or that its athletic program meets the interests and abilities of its students. *Id.* See 44 Fed. Reg. at 71,417–18.

Second, in athletics, women typically compete for spots on women's teams and men compete for spots on men's teams. And, of course, women cannot compete for participation opportunities on women's teams that do not exist due to an educational institution's failure to provide adequate funding and other support for those teams. Thus, the competition between men and women does not involve a head-to-head battle for the same position. Rather, it involves a broader battle for properly allocated resources.

In the academic context, on the other hand, men and women do compete head-to-head with each other for admission to particular schools, to work with top faculty advisors, to secure research funding, and to earn particular teaching assignments. Thus, any gender discrimination that occurs in the academic context more closely resembles gender discrimination in the employment context, in which men and women compete head-to-head for particular jobs.

Third, because of the team nature of athletics participation, Title IX compliance inquiries and enforcement efforts focus on whether the educational institution has distributed benefits equivalently to men's and women's *teams*.⁸⁶ This changes the equity inquiry somewhat, because it requires courts to assess things like whether the scheduling of men's and women's sports seasons provides equitable opportunities to the affected teams,⁸⁷ whether the men's and women's teams have equivalent facilities,⁸⁸ or whether the men's basketball coach should command a higher salary than the women's basketball coach.⁸⁹ Only in rare instances, such as when a woman tries out for a men's team,⁹⁰ does the Title IX discrimination inquiry focus on the circumstances surrounding the treatment of an individual student.

In the academic context, on the other hand, charges of discrimination under Title IX often involve individual students. Courts must determine whether an educational institution violates Title IX when a male student does not receive the

86. An exception to this general rule exists for athletics-related financial assistance, which the educational institution must distribute equivalently to male and female *student-athletes*, rather than to men's and women's *teams*. See, e.g., 34 C.F.R. § 106.37 (2004); 44 Fed. Reg. at 71,415–17.

87. See, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 855 (W.D. Mich. 2001), *aff'd*, 377 F.3d 504 (6th Cir. 2004) (holding that defendant state athletic association's practice of scheduling girls' sports in off-seasons discriminated against the girls on the basis of gender in violation with Title IX); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004) (similar facts, but at the district school level).

88. See, e.g., *Daniels v. Sch. Bd. of Brevard County of Fl.*, 985 F. Supp. 1458, 1463 (M.D. Fla. 1997) (holding that school district violated Title IX by providing unequal facilities for boys' baseball and girls' softball teams, even where boys' superior facilities were funded by booster club donations and not by the school district).

89. See, e.g., *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1077 (9th Cir. 1999) (finding no discrimination under Title IX when defendant university paid female women's basketball coach less than male coach of men's basketball team, when defendant university offered legitimate, nondiscriminatory reasons for the salary difference, including his extensive and superior experience).

90. See, e.g., *Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999) (finding violation of Title IX when football coach refused to allow female student-athlete, who tried out for and secured position as kicker on defendant-university's football team, to practice with the team and dress for games).

same sorts of success-oriented assistance as female students typically receive,⁹¹ or when admissions policies favor men in a majority-female public university.⁹² Rarely do widespread instances of systemic discrimination become the focus of a Title IX claim in the academics context.

Fourth, the discrimination that occurs in athletics cases results primarily because the educational institution must allocate a limited resource: money. The college or university decides whether to drop a men's team in order to fund a women's team, whether to take advantage of an opportunity to pursue a highly successful (and consequently expensive) coach for the men's basketball team but not pursue the same opportunity for the women's team, when to renovate particular facilities, or how to schedule practice times to make the best use of available facilities. Typically, the discrimination that does occur in athletics results more from a lack of money to do everything perfectly well, rather than from a desire to support one group to the exclusion of the other—although the rare exception to this general rule does exist.⁹³ The institution causes the discrimination by the improper allocation of resources, and the institution can, therefore, remedy the discrimination by a proper reallocation of resources.

In the academic context, on the other hand, the discrimination that occurs typically results from policies, procedures, or even informal practices that disproportionately disadvantage students or faculty of one gender. Remedying such discrimination requires more than a comparatively simple reallocation of resources. It requires changing the discriminatory policies, procedures, or practices, and, in many instances, changing the mind-set of (or otherwise removing from the process) those who have operated under the offending policies, procedures, or practices for, perhaps, many years. In other words, such remediation requires more than a comparatively simple shift of assets from one side of a ledger to another; it requires education and persistent oversight.

Fifth, in the athletics context, the institutional discrimination necessary for a Title IX violation is readily apparent, because the educational institution decides where and how to spend its money and allocate other resources. Thus, the educational institution can be held accountable for its decisions and has an

91. See, e.g., *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172 (10th Cir. 2001) (addressing evidentiary matters in case involving male nursing student who sued university under Title IX, claiming gender discrimination when female faculty members refused to give him the same help they routinely gave to female nursing students); *Bucklen v. Rensselaer Polytechnic Inst.*, 166 F. Supp. 2d 721 (N.D.N.Y. 2001) (addressing evidentiary matters in case involving male graduate student who sued university under Title IX, claiming gender discrimination when faculty refused to accommodate his request to take qualifying exam for the fourth time, although faculty had made accommodations for a similarly situated female student who also had difficulty with the qualifying exam).

92. See, e.g., *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) (discussing claims of female applicants who challenged a university admissions policy that lowered threshold admissions standards for men in an attempt to remedy an imbalance in the student body in favor of women).

93. See, e.g., *Pederson v. La. State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000) (holding that university discriminated against female student-athletes in words as well as deeds, by failing to create appropriate participation opportunities for female student-athletes and by discussing the matter in a dismissive and chauvinistic manner).

incentive to remedy the discrimination.

In the academic context, on the other hand, the discrimination that occurs typically involves individual students or individual faculty members, perhaps at the lowest levels of academic administration and in isolated pockets. But even when an “isolated pocket” is as large as an entire academic department, a successful Title IX plaintiff must prove that the educational institution—rather than an individual professor or an isolated group of professors—engaged in the discriminatory conduct.⁹⁴ In this regard, at least, Title IX claims for discrimination in the academic context more closely resemble Title IX claims in the sexual harassment context, in which courts tend not to impose liability on an academic institution for individual conduct unless the institution had proper notice of the misconduct and failed to act to stop it.⁹⁵

Finally, for all of the complicating factors that make Title IX cases in the athletics context difficult—most significantly, the seeming need to discriminate against men while working toward equity for women, but also the realistic limitations on financial resources—Title IX athletics cases are comparatively easy to resolve. In many instances, the Title IX violation results from an inequitable allocation of resources, so courts order a reallocation of resources.⁹⁶

Gender discrimination in the academic context, on the other hand, does not typically lend itself to such facile solutions. Changing the entrenched attitudes of faculty members in particular disciplines, or of individual faculty members throughout a college or university, may prove extremely difficult or even nearly impossible. Male faculty members might react with hostility and impede efforts at reform.⁹⁷ The fear of sexual harassment claims may cause some male faculty members to shy away from working too closely with female graduate students. Tight research schedules may not permit a research assistant to take time off to care for a new baby or an ailing parent. And most importantly, pursuing a claim of gender discrimination against an academic advisor could limit a student’s post-graduation opportunities.

94. See, e.g., *Chontos v. Rhea*, 29 F. Supp. 2d 931, 934 (N.D. Ind. 1999) (noting that, to hold the defendant university liable for the sexual harassment allegedly committed by a professor, the plaintiff would have to prove that the university acted with deliberate indifference after the student reported the misconduct to an appropriate university official). This case points out that discrimination under Title IX results not from a professor’s misconduct, but from a university’s failure to take appropriate steps to end the reported misconduct.

95. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998) (stating that sexual harassment liability under Title IX requires actual notice to an appropriate person who acts with deliberate indifference toward the harassment).

96. See, e.g., *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (ordering defendant university to fund certain teams at appropriate levels and to maintain a particular funding scheme for men’s and women’s teams, allowing a deviation only with court approval).

97. Duke University, for example, has received attention recently for its efforts to improve conditions for women in its physics department. But when the department chair sent a memo to faculty indicating his dissatisfaction with the department’s climate for women, some male faculty members responded that the chair was “fostering a ‘hypersensitive’ environment, one that is good for neither gender.” Robin Wilson, *Louts in the Lab*, CHRON. HIGHER EDUC., Jan. 23, 2004, at A7.

Although academics and athletics co-exist within an educational institution, these real differences between them mean that the Title IX enforcement scheme that has developed in the athletics context has little utility for the academic context, except perhaps in the limited area of employment discrimination as explored in coaches' compensation cases. Thus, it becomes necessary to develop a different framework for understanding how Title IX applies in the academic context. Rather than creating an environment that encourages actions aimed at achieving proportionality in participation opportunities and funding, Title IX in the academic context aims merely to level the playing field, so that women (and men) interested in a particular field of study can compete fairly for opportunities to engage in those programs of study or areas of employment. In this, Title IX in academics more closely parallels Title VII in the employment context, although the implementing regulations discussed in the next section have specific relevance to the operations of educational institutions.

C. Title IX Implementing Regulations

The Title IX implementing regulations spell out the details of the funding contract between the educational institution and the federal funding agency. Volume 34, part 106 of the Code of Federal Regulations contains forty-three separately numbered regulations adopted by DED in 1975.⁹⁸ In 2000, twenty-one other federal agencies adopted a final common rule that "provides for the enforcement of Title IX."⁹⁹ The rules for each of these agencies almost exactly replicate the rules promulgated by DED in 1975.¹⁰⁰ As the notice of adoption of the common rule explains:

These Title IX regulations are presented as a common rule because the standards established for the enforcement of Title IX are the same for all of the participating agencies. The procedures for how an agency will enforce Title IX, including the conduct of investigations and compliance reviews, also follow the same structure.¹⁰¹

Although DED initially had assumed primary responsibility for Title IX enforcement, these other agencies adopted the final rule to fulfill their statutory obligations.¹⁰² As explained in the notice of adoption:

As originally enacted in 1972, Title IX directed all Federal agencies providing financial assistance to recipients that operate education programs or activities to adopt regulations to achieve the statute's objectives. These Title IX regulations are thus nothing more than a long overdue effort to provide a regulatory enforcement mechanism for those Federal agencies that failed to adopt their own Title IX

98. See 34 C.F.R. § 106.41 (2004). See also *supra* note 42 (discussing the Department of Education Organization Act of 1979, which transferred Title IX responsibilities from the DED to HEW).

99. See 65 Fed. Reg. 52, 858 (Aug. 30, 2000) (to be codified in multiple parts of C.F.R.).

100. *Id.*

101. *Id.*

102. 20 U.S.C. § 1682 (2000).

regulations when the statute was originally enacted.¹⁰³

Each agency has published its version of the regulations in its part of the Code of Federal Regulations.¹⁰⁴ Because of the consistency among these sets of regulations and with the original 1975 DED regulations, this article cites to the DED regulations.

The regulations impose requirements on educational institutions in three areas: general administrative functions; student services and activities, including athletics; and employment practices. This section discusses the regulations in each of these areas. This section also includes cases, where available, to illustrate the principles embodied in the particular regulation. Unfortunately, however, many of the cases do not fully explore the Title IX ramifications of the conduct at issue. Rather, most of these cases involve motions for summary judgment or motions to dismiss, and therefore discuss the type of conduct that would, if proven, constitute a Title IX violation. This part of the article does, however, include a broader discussion of those very few cases that have reached trials on the merits.

1. Title IX and General Administrative Functions

Sixteen regulations address general administrative requirements under Title IX. Twelve of the sixteen explain the scope of the law and the operation of the regulations themselves, as discussed in Part I.C.1.a below, while four impose particular obligations on educational institutions, as discussed in Part I.C.1.b.

103. 65 Fed. Reg. at 52, 863.

104. *See id.* at 52,858. The relevant sections of the C.F.R. for each agency are as follows:
Nuclear Regulatory Commission, 10 C.F.R. pt. 5 (2005);
Small Business Administration, 13 C.F.R. pt. 113 (2005);
National Aeronautics and Space Administration, 14 C.F.R. pt. 1253 (2005);
Department of Commerce, 15 C.F.R. pt. 8a (2005);
Tennessee Valley Authority, 18 C.F.R. pt. 1317 (2004);
Department of State, 22 C.F.R. pt. 146 (2004);
Agency for International Development, 22 C.F.R. pt. 229 (2004);
Department of Housing and Urban Development, 24 C.F.R. pt. 3 (2004);
Department of Justice, 28 C.F.R. pt. 54 (2004);
Department of Labor, 29 C.F.R. pt. 36 (2004);
Department of the Treasury, 31 C.F.R. pt. 28 (2004);
Department of Defense, 32 C.F.R. pt. 196 (2004);
National Archives and Records Administration, 36 C.F.R. pt. 1211 (2004);
Department of Veterans Affairs, 38 C.F.R. pt. 23 (2004);
Environmental Protection Agency, 40 C.F.R. pt. 5 (2004);
General Services Administration, 41 C.F.R. pt. 101-4 (2004);
Department of the Interior, 43 C.F.R. pt. 41 (2004);
Federal Emergency Management Agency, 44 C.F.R. pt. 19 (2004);
National Science Foundation, 45 C.F.R. pt. 618 (2004);
Corporation for National and Community Service, 45 C.F.R. pt. 2555 (2004); and
Department of Transportation, 49 C.F.R. pt. 25 (2004).

a. Scope and Operation of the Title IX Statute and Regulations

The regulations “effectuate Title IX . . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”¹⁰⁵ The regulations import into Title IX the enforcement procedures established to eliminate racial discrimination under Title VI of the Civil Rights Act of 1964;¹⁰⁶ this means that developments in enforcing the laws that prohibit discrimination on the basis of race may also affect the enforcement of Title IX.¹⁰⁷ The regulations also caution that Title IX obligations exist independently of and do not alter other nondiscrimination obligations imposed by federal legislation or regulation, such as the prohibition of gender discrimination in employment in Title VII of the Civil Rights Act of 1964.¹⁰⁸

The regulations also define pertinent terms. “Federal financial assistance,” in particular, has a wide scope that includes: building funds; scholarships, loans, grants, wages or other funds paid on behalf of students or provided to students for payment to the educational institution; grants of real or personal federal property; provision of the services of federal personnel; all other contracts that provide assistance to the educational institution, except insurance or guaranty contracts; and the sale or other transfer of property financed in whole or in part with federal funds, unless the educational institution returns an appropriate share of the proceeds to the federal government.¹⁰⁹ Thus, *any* direct or indirect acceptance of federal funding obligates an educational institution to comply with Title IX.

Consistent with the Civil Rights Restoration Act of 1987,¹¹⁰ the regulations reaffirm that Title IX applies to all programs and activities at educational institutions that receive federal funds.¹¹¹ The regulations further define “program or activity” as “all of the operations” of an educational institution, even if a specific program or activity does not receive federal financial assistance,¹¹² but the regulations also exempt from Title IX those educational institutions with contrary religious tenets, military and merchant-marine educational institutions, and certain single-sex programs such as social fraternities and sororities, Girl Scouts, Boy Scouts, Camp Fire Girls, and some voluntary youth service organizations.¹¹³ The regulations also exempt traditionally single-sex institutions, but do set forth Title IX compliance guidelines for single-sex institutions that choose to transition to co-

105. 34 C.F.R. § 106.1 (2000).

106. *Id.* § 106.71 (referring to 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

107. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 694–96 (1979) (stating that Congress intended for Title IX to be interpreted in the same way as Title VI). *See also Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 619 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992) (“[I]t is settled that analysis of the two statutes is substantially the same.”).

108. 34 C.F.R. § 106.6 (referring to 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

109. *Id.* §§ 106.2, 106.5.

110. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (2000)).

111. 34 C.F.R. § 106.11 (2004).

112. *Id.* § 106.2.

113. *Id.* §§ 106.12–106.14.

education.¹¹⁴

b. Obligations Imposed on Educational Institutions

Four regulations impose specific obligations on educational institutions, describing activities that the educational institution must undertake to comply with the statute. When applying for federal funding, an educational institution must: assure granting agencies that programs and activities comply with Title IX;¹¹⁵ designate at least one employee to coordinate Title IX compliance efforts;¹¹⁶ establish a Title IX grievance procedure;¹¹⁷ and disseminate information regarding its Title IX nondiscrimination policy.¹¹⁸

An educational institution also must undertake any remedial actions, including any affirmative action, ordered by the granting agency in response to a finding of gender discrimination.¹¹⁹ In the absence of such a finding, though, this regulation does allow an educational institution to “take affirmative action to overcome the effects of conditions which resulted in limited participation [in the program or activity] by persons of a particular sex.”¹²⁰ This DED regulation does not directly address whether such under-representation must be institution-wide, or whether it may be within an individual program or activity, but the notice of adoption of the common rule for all of the federal granting agencies does contemplate that educational institutions might engage in activities targeted toward only one gender to remedy a particular under-representation at something other than an institution-wide level. In response to comments received prior to the adoption of the common rule, the notice provided the following clarification:

Several comments inquired about the viability of single-sex programs such as an educational science program targeted at young women and designed to encourage their interest in a profession in which they are underrepresented. Such courses may, under appropriate circumstances, be permissible as part of a remedial or affirmative action program as provided for by [§ 106.3 of the DED version of] these Title IX regulations.¹²¹

This comment makes clear that such programs may exist “under appropriate circumstances,”¹²² but does not define those “appropriate circumstances.” Clearly, colleges and universities could benefit from some direction to help them to make the right decisions regarding programs designed to help members of under-

114. *Id.* §§ 106.15–106.17.

115. *Id.* § 106.4.

116. *Id.* § 106.8.

117. *Id.*

118. *Id.* § 106.9.

119. Any such order is, however, subject to certain procedural requirements, including a right to a hearing, per 34 C.F.R. § 106.71, which imports into Title IX the Title VI compliance scheme listed at 34 C.F.R. §§ 100.6–100.11 (2004) and 34 C.F.R. § 101 (2004).

120. 34 C.F.R. § 106.3 (2004).

121. 65 Fed. Reg. 52,858, 52,861 (Aug. 30, 2000) (to be codified in multiple parts of C.F.R.).

122. *Id.*

represented groups to become more involved in certain fields of study. Otherwise, they might make decisions not required by the law simply to avoid controversy. In 2003, for example, fearing litigation based on charges of racial discrimination prior to the decisions of the Supreme Court in the University of Michigan race-based admissions cases,¹²³ the Massachusetts Institute of Technology, Princeton University and others decided to eliminate minority-only admissions for certain college preparation programs.¹²⁴ Because of the interconnectedness of Title VI and Title IX enforcement, these actions then precipitated questions about the viability of similar programs targeted toward attracting women to, and preparing them for, further study in STEM disciplines.¹²⁵ The Title IX regulatory scheme does permit such programs, but cases interpreting the law make clear that any affirmative action must be narrowly tailored to achieve an identifiable goal.

2. Student Services and Activities

The fifteen regulations that address gender discrimination against students apply to undergraduate and graduate students alike. Four of the fifteen regulations govern discrimination against potential students in the recruitment and admissions process, while eleven address discrimination against existing students in the programs and activities offered by the educational institution.

a. Potential Students—Admissions and Recruitment

The Title IX regulations prohibit gender discrimination in student-recruitment activities.¹²⁶ Nevertheless, recruitment efforts may focus on students of one sex if ordered as a remedial action by DED's Office of Civil Rights (DED-OCR) or if part of an affirmative-action plan designed to address the under-representation of students of one sex.¹²⁷ Thus, a college or university trying to admit more women to its STEM programs (or more men to its nursing program) may engage in activities targeted toward this goal.

The regulations do prohibit certain admissions practices, including: preferring one applicant over another solely on the basis of the applicant's sex; preferring applicants from particular single-sex schools, if such preferences limit opportunity for members of the other sex; ranking applicants separately by gender; applying limits on or otherwise controlling the proportion of male and female students admitted; and using an admissions test or other criterion that adversely and disproportionately affects applicants of one sex, unless the educational institution

123. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (undergraduate admissions); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions).

124. Peter Schmidt and Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, CHRON. HIGHER EDUC., Feb. 21, 2003, at A31. See also Roger Clegg, *Time Has Not Favored Racial Preferences*, CHRON. HIGHER EDUC., Jan. 14, 2005, at B10 (asserting that the demise of racially exclusive programs at elite educational institutions "makes it much more difficult for other institutions to claim any necessity for" similar programs on their campuses).

125. 34 C.F.R. § 106.71 (2004).

126. *Id.* § 106.23.

127. *Id.* §§ 106.3, 106.23.

can show both that the test or other criterion validly predicts student success and that no suitable gender-neutral alternative test or criterion is available.¹²⁸ An educational institution may not inquire into or treat applicants differently on the basis of the student's marital or parental status, but may inquire into an applicant's gender if it uses the information for something like roommate assignments and not as a means of discriminating in the admissions process.

Public elementary and secondary schools may not exclude girls (or boys) from particular educational institutions or programs, unless girls (or boys) have equivalent access to comparable programs.¹²⁹ This regulation does not, however, extend to public colleges and universities. Rather, in those cases that have challenged the male-only admissions policies of public institutions, such as those brought against The Citadel¹³⁰ and Virginia Military Institute,¹³¹ courts have relied on the Equal Protection Clause of the Fourteenth Amendment in deciding to require the admission of women to both all-male colleges. Additionally, it should be noted that nothing in this particular regulation applies to private educational institutions of any kind.

If the under-representation of women in a particular college or university results from an under-representation of women in the applicant pool, an educational institution could, consistent with Title IX, engage in targeted efforts to encourage more women to apply. But an educational institution could not remedy the under-representation of women by lowering admissions standards for female applicants only. Such an action would violate Title IX not only because it treats males and females differently by establishing separate admissions standards, but also because it does not address the cause of the under-representation—that is, the lower number of female applicants.¹³²

*Johnson v. Board of Regents of the University System of Georgia*¹³³ addressed

128. 34 C.F.R. §§ 106.21–106.22 (2004). These regulations comport with the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which addressed the use of race in the law school admissions process. The *Grutter* Court held that student body diversity constituted a compelling state interest, and discussed the means by which a state-funded law school could use race in the admissions process. *Id.* at 328, 334. An educational institution may not: fill its class with diverse candidates through the use of quotas; prefer one applicant over the other solely on the basis of a protected characteristic such as race; assess applicants separately and differently on the basis of race; or use race in an inflexible, mechanical manner. *Id.* at 334–38. An educational institution need not, however, exhaust every conceivable race-neutral alternative method of achieving its goals. *Id.* at 339. Rather, it must engage in a serious and good-faith consideration of workable race-neutral alternatives. *Id.*

129. 34 C.F.R. § 106.35.

130. *See United States v. Jones*, 136 F.3d 342 (4th Cir. 1998) (challenging men-only admissions policy of state funded military university in absence of comparable program for women).

131. *See United States v. Virginia*, 518 U.S. 515 (1996) (challenging men-only admissions policy of state funded military university in absence of comparable program for women).

132. *See Grutter v. Bollinger*, 539 U.S. 306, 334–35 (2003) (discussing the use of quotas and considering different groups of applicants separately in the admissions process).

133. 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001). For a more thorough discussion of this case, see Catherine Pieronek, *Discrimination Against Students in Higher Education*, 28 J.C. & U.L. 387, 407–09, 422–27 (2002), and Catherine Pieronek, *Discrimination Against Students in Higher Education*, 29 J.C. & U.L. 359, 382–87 (2003).

the issue of whether a university could use gender and race as factors in admissions decisions.¹³⁴ In *Johnson*, three white female applicants who were denied admission to the University of Georgia (UGA) challenged UGA's admissions system as a violation of both Title IX and Title VI because it gave preferences to male students and to minority students who were under-represented in UGA's student body.¹³⁵ The plaintiffs contended that UGA's admissions system effectively lowered the admissions threshold for male and minority applicants.¹³⁶

Prior to 1999, UGA used a three-step admissions-decision system that awarded points based on particular criteria and established cut-off levels for admission at each step of the process.¹³⁷ The first step awarded points only for academic credentials.¹³⁸ Those not admitted at the first moved on to the second step, which gave points to those who satisfied a secondary set of criteria, such as being male or a member of an ethnic minority group.¹³⁹ Those not admitted at the second step moved on to the third step, which involved individual review of applications to identify other factors that could work in an applicant's favor.¹⁴⁰

UGA abandoned its preferences scheme for male applicants in 1999, shortly after the plaintiffs filed their case. Thus, the case proceeded only on the issue of preferences granted toward minority students. Nevertheless, because of the similarities between Title IX and Title VI enforcement, the United States District Court for the Southern District of Georgia did discuss the use of gender preferences along with its discussion of racial preferences in admissions.¹⁴¹ Following the rationale expressed by the Fifth Circuit in *Hopwood v. Texas*,¹⁴² the district court stated that strict scrutiny applied to racial classifications and, consequently, to racial discrimination claims brought under Title VI.¹⁴³ The court then concluded that strict scrutiny must apply to a gender discrimination claim brought under Title IX as well, because "analysis of the two statutes is substantially the same."¹⁴⁴ Moreover, the district court then added, "Because Title

134. 106 F. Supp. 2d at 1363.

135. *Id.* at 1365.

136. *Id.* at 1365-66.

137. *Id.* at 1366.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1366-67.

142. 236 F.3d 256 (5th Cir. 2000).

143. *Johnson*, 106 F. Supp. 2d at 1367.

144. *Id.* (quoting *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 619 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992)). See also *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994) (discussing whether courts should examine claims of gender discrimination brought under Title IX under the strict-scrutiny standard used to evaluate claims of racial discrimination brought under Title VI, or whether courts should apply the intermediate-scrutiny standard used to evaluate gender discrimination claims brought under the Equal Protection Clause). In *Jeldness*, the Ninth Circuit explained that "decisions finding Title VI to be coextensive with the Equal Protection Clause were based largely on the legislative history of Title VI (passed in 1964), which is not necessarily analogous to the legislative history of Title IX (passed in 1972)." *Id.* at 1227. The appellate court concluded that Title IX's legislative history did not derive from the Equal Protection Clause, but rather, from Title VI. *Id.* Thus, "[b]ecause Title IX and Title VI use the same language, they should, as a matter of statutory interpretation,

IX and Title VI use the same language, they should . . . be read to require the same levels of protection and equality.”¹⁴⁵

Thus, in following through with its analogy between racial discrimination under Title VI and gender discrimination under Title IX,¹⁴⁶ the district court determined that UGA had to offer a compelling governmental interest to justify its use of gender classifications in order for its admissions program to survive strict scrutiny.¹⁴⁷ The court also agreed with the Fifth Circuit’s finding in *Hopwood* that “student body diversity” did not constitute a compelling governmental interest—a decision that does, however, contradict the later decision of the United States Supreme Court in the University of Michigan cases.¹⁴⁸ In the absence of any other compelling rationale offered by UGA, the district court declared impermissible UGA’s use of gender as an admissions criterion.¹⁴⁹

On appeal, the United States Court of Appeals for the Eleventh Circuit addressed only the charges of racial discrimination under Title VI. The appellate court declined to address whether “student body diversity” constituted a compelling state interest, concluding instead that, even if UGA could prove a compelling state interest in student body diversity, it had not narrowly tailored its admissions program to achieve that interest.¹⁵⁰ The court explained that the narrow-tailoring requirement served to ensure that “the chosen means ‘fit’ . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”¹⁵¹ Noting that UGA bore the burden of proof on the matter of narrow-tailoring, the court indicated that, “[t]o withstand summary judgment . . . [UGA] must show that a reasonable factfinder could conclude that there is sufficient record evidence supporting its claim that its freshman admissions process is narrowly tailored to

be read to require the same levels of protection and equality.” *Id.* See generally *United States v. Virginia*, 518 U.S. 515 (1996) (applying strict scrutiny to a case of gender discrimination in admission to a public, all-male military institute, thus casting doubt on whether actions that discriminate on the basis of gender should ever receive intermediate scrutiny).

145. *Johnson*, 106 F. Supp. 2d at 1367 (quoting *Jeldness*, 30 F.3d at 1227; *Klinger v. Department of Corrections*, 107 F.3d 609, 614 (8th Cir. 1997)).

146. *Id.* at 1375–76.

147. *Id.* at 1367.

148. *Id.* at 1372. In *Grutter v. Bollinger*, the United States Supreme Court expressly held that “student body diversity” can be a compelling governmental interest. 539 U.S. 306, 328–33 (2003). Because of the mechanical way in which UGA used race and gender in its admissions process, the university might have satisfied the compelling governmental interest requirement, but likely would have failed the concomitant narrow-tailoring requirement as the appellate court ultimately concluded. *Id.* at 333–39. Interestingly, even after the *Grutter* decision established less restrictive requirements for the use of race than the Eleventh Circuit established in *Johnson*, UGA still has not decided whether to return to using racial preferences in admissions. Jeffrey Selingo, *Michigan: Who Really Won?*, CHRON. HIGHER EDUC., Feb. 14, 2005, at A21. The Texas public universities sued in *Hopwood*, on the other hand, quickly returned to including race, along with a number of other personal characteristics, in their evaluation of students during the admission process. *Id.* at A23.

149. See *Johnson*, 106 F. Supp. 2d at 1376.

150. *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001).

151. *Id.* at 1251 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

achieve its goal of student body diversity.”¹⁵²

The Eleventh Circuit cited *United States v. Paradise*¹⁵³ for five factors to consider when evaluating narrow-tailoring:

- (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.¹⁵⁴

The *Johnson* court altered these factors somewhat to “take better account of the unique issues raised by the use of race to achieve diversity in university admissions,”¹⁵⁵ and then identified four significant points to consider in such a narrow-tailoring analysis:

- (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.¹⁵⁶

The *Johnson* court thus omitted the second of the *Paradise* factors, which dealt with duration, stating that, if “student body diversity [is] a compelling interest . . . then the duration of the race-conscious policy may not be an important consideration.”¹⁵⁷ The court distinguished “duration” with regard to a motive centered on achieving “diversity” from “duration” with regard to a motive centered on “remedying the present effects of past discrimination,” because the latter should have a definable stopping point while the former may not.¹⁵⁸ Later in its opinion, however, the appellate court indicated that UGA likely would fail on a “duration” factor as well, because “[t]here is no evidence that UGA envisions an end to its practice of mechanically awarding preferential treatment to non-white applicants”¹⁵⁹ After evaluating UGA’s admissions policies under all four of these factors, the Eleventh Circuit concluded that the university had not narrowly

152. *Id.*

153. 480 U.S. 149 (1987).

154. *Johnson*, 263 F.3d at 1252 (quoting *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) (citing *United States v. Paradise*, 480 U.S. 149, 171(1987))).

155. 263 F.2d at 1252.

156. *Id.* at 1253. Although these criteria use language different than that used by the *Grutter* Court, these criteria provide substantially the same guidance. See *Grutter v. Bollinger*, 539 U.S. 306, 333–39 (2003).

157. *Johnson*, 263 F.3d at 1252.

158. *Id.*

159. *Id.* at 1261.

tailored its admissions process.¹⁶⁰

Johnson provides one example of how to understand the “appropriate circumstances”¹⁶¹ that allow the use of gender-based preferences in actions undertaken to remedy the under-representation of students of one gender in an educational program or activity. Courts cannot approve the use of one set of admissions criteria for men and another for women, as originally employed by UGA, nor can courts sanction a rigid or mechanical quota system for admissions.¹⁶² Courts may, however, approve of an admissions system that takes into account either demonstrated or perceived aptitude for, or interest in, science or engineering when deciding between a male applicant and a female applicant. Courts might also approve of outreach programs that encourage young women to apply to STEM programs.¹⁶³ The four factors spelled out by the Eleventh Circuit in *Johnson* provide a good starting point for crafting any program aimed at attracting more women to STEM disciplines.¹⁶⁴

b. Existing Students—Educational Programs and Activities

Title IX requires that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by [an educational institution that] received Federal financial assistance.”¹⁶⁵ The law also prohibits educational institutions from “provid[ing] any course or otherwise carry[ing] out any of its education program[s] or activit[ies] separately on the basis of sex, or require or refuse participation therein by any of its student on such basis”¹⁶⁶

Many campuses now have programs targeted toward retaining women in

160. *Id.* at 1260.

161. 34 C.F.R. § 106.3 (2004).

162. *See generally* *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (holding that, in order to be narrowly tailored, “a race-conscious admissions program cannot use a quota system”).

163. In an effort to remedy a 41% male versus 59% female imbalance on its campus, for example, Santa Clara University targets special mailings to high school boys and has current students make phone calls encouraging boys who have been admitted to the university to attend. Peter Y. Hong, *A Growing Gender Gap Tests College Admissions*, LOS ANGELES TIMES, Nov. 21, 2004, at A1. The university does not engage in similar activities targeted toward high school girls. *Id.* The university further insists that it has kept admissions standards the same for both male and female applicants. *Id.* Such a program might pass scrutiny under Title IX, because it does not apply different admissions standards to male and female applicants, but only aims to encourage more applications from male students and to convince admitted male students to matriculate.

164. Even with this guidance, however, educational institutions should proceed cautiously. Although the *Grutter* Court allowed the use of preferences, it “did not endorse a single admissions method” in its opinion. Selingo, *supra* note 148, at A23. One commentator opined that, in *Grutter* and *Gratz*, the Court “imposed conditions that are neither pellucid nor self-executing, and colleges and universities must now figure out how to apply them to a great many practices that reflect the pluralism of American higher education.” Martin Michaelson, *Affirmative Action Has a Future*, CHRON. HIGHER EDUC., Feb. 11, 2005, at B17.

165. 34 C.F.R. § 106.31 (2004).

166. *Id.* § 106.34.

engineering and the sciences.¹⁶⁷ In an educational environment increasingly hostile to preferences of any kind, such programs may face scrutiny. As with admissions efforts targeted toward particular populations, however, the survival of such programs depends on whether an educational institution can articulate pedagogically sound reasons for offering such services separately or differently to female students. To survive judicial or administrative scrutiny, an educational institution must also provide comparable services to male students with similar needs. Some researchers have suggested, for example, that women and men learn computer programming differently.¹⁶⁸ It may seem logical, then, to offer a separate programming class for women to accommodate this different learning style. But before offering such an option, the educational institution should consider whether all students might benefit from access to alternative teaching methods.¹⁶⁹ While certain changes might, in fact, benefit female students more, offering these alternative experiences to all students may help to improve the overall educational experience while also ensuring that such actions survive Title IX scrutiny.

*Gossett v. Oklahoma ex rel. Board of Regents for Langston University*¹⁷⁰ illustrates the sort of academic activities that might violate Title IX. Marty Gossett had successfully completed his first semester in Langston University's nursing program and had enrolled in his second semester in the fall of 1994.¹⁷¹ He did well in all of his classes, except for one taught by two female instructors.¹⁷² Despite seeking help from these instructors, Mr. Gossett received a "D" in the class, which precipitated his dismissal from the nursing program.¹⁷³ After he had unsuccessfully appealed the grade and the dismissal, he filed a complaint under Title IX alleging gender discrimination, contending that the instructors did not give him "the same help, counseling, and opportunities to improve his performance as provided to women nursing students."¹⁷⁴ He specifically alleged that the instructors routinely allowed female students, but not male students, to take a grade of "Incomplete" and to have extra time to improve their grades.¹⁷⁵

The United States District Court for the Northern District of Oklahoma granted Langston University's motion for summary judgment.¹⁷⁶ The court rejected as insufficient all of the evidence Mr. Gossett presented to establish that the university's decision to terminate him because of his "D" merely formed a pretext

167. See generally IRENE F. GOODMAN ET AL., FINAL REPORT OF THE WOMEN'S EXPERIENCE IN COLLEGE ENGINEERING PROJECT (2002) (studying the effectiveness of a number of women's engineering programs across the country). Researchers have been studying the issue of women in science and engineering since the 1960s. *Id.* at 5.

168. MARGOLIS & FISHER, *supra* note 5, at 109–43.

169. *Id.*

170. 245 F.3d 1172 (10th Cir. 2001).

171. *Id.* at 1175–76.

172. *Id.* at 1176.

173. *Id.* at 1175–76.

174. *Id.* at 1176.

175. *Id.* at 1177.

176. *Id.* at 1175.

for gender-based discrimination.¹⁷⁷ Mr. Gossett presented undisputed evidence that, of the twenty-four students in the class for which he received a “D,” all nineteen women passed but three of the five men failed.¹⁷⁸ He offered an affidavit of a female nursing student who indicated that a different instructor in another course had given her the opportunity to change her “D” by completing seven additional weeks of course work.¹⁷⁹ He also offered the statement of a former nursing instructor who “described a pattern of discrimination at the school directed at male students in general and Mr. Gossett in particular.”¹⁸⁰

On appeal, the United States Court of Appeals for the Tenth Circuit reversed and remanded the case for further proceedings, finding that the proffered evidence raised questions of fact regarding the alleged institution-wide discrimination against male nursing students.¹⁸¹ The statement of the woman in the other course, as well as the statement of the former instructor, did not necessarily relate to the discrimination that Mr. Gossett allegedly experienced in the course for which he received a “D.”¹⁸² Nevertheless, the appellate court concluded that these statements could support Mr. Gossett’s allegations of institutional discrimination against male nursing students.¹⁸³

*Bucklen v. Rensselaer Polytechnic Institute*¹⁸⁴ presents a similar challenge to an educational institution’s practices under Title IX. Vincent Bucklen, a graduate student in and teaching assistant at Rensselaer Polytechnic Institute (RPI), failed his preliminary Ph.D. program examination three times and was told to withdraw from the program.¹⁸⁵ The dean of students informed Mr. Bucklen that he could not take the exam a fourth time, and refused Mr. Bucklen’s request to reconsider that decision.¹⁸⁶ Mr. Bucklen filed suit under Title IX, alleging that RPI had discriminated against him on the basis of his gender because the school had accommodated a similarly struggling female Ph.D. candidate by allowing her to take the oral portion of the exam in a written format because she was too nervous to perform well on the oral portion.¹⁸⁷ Mr. Bucklen contended that, “had he been a female, [RPI] would have given him the opportunity to take the examination in writing, would have given him a different committee on the third examination, or would have permitted him to take a course to make up for any deficiencies in his understanding of the materials.”¹⁸⁸ The United States District Court for the Northern District of New York found Mr. Bucklen’s allegations of gender-based discrimination under Title IX sufficient to survive RPI’s motion to dismiss.¹⁸⁹

177. *Id.* at 1178–79.

178. *Id.* at 1177.

179. *Id.*

180. *Id.* at 1178–79.

181. *Id.* at 1181.

182. *Id.* at 1179–81.

183. *Id.* at 1177–80.

184. 166 F. Supp. 2d 721 (N.D.N.Y. 2001).

185. *Id.* at 722.

186. *Id.* at 722–23.

187. *Id.* at 723.

188. *Id.* at 726.

189. *Id.*

Similarly, in *Curto v. Smith*,¹⁹⁰ Patricia Curto, a female veterinary student who twice failed a foundational course in animal anatomy and subsequently was dismissed from the College of Veterinary Medicine at Cornell University,¹⁹¹ filed a Title IX complaint against Cornell based on the fact that all four of the students expelled from the class of 2002 were women, while two male students in that class with similar academic deficiencies were not expelled.¹⁹² On Cornell's motion to dismiss, the United States District Court for the Northern District of New York found that these simple allegations might be sufficient to state a claim under Title IX, but ordered Ms. Curto to "file an amended complaint setting forth her Title IX claim *with particularity*."¹⁹³ Thus, such disparate treatment may form the basis of a Title IX claim, but assertions of such disparate treatment without particular supporting evidence may not sustain such a claim.¹⁹⁴

Although Title IX does impose some restrictions on what occurs in the academic environment, it has no effect on academic freedom in the classroom. Instead, the regulations preserve academic freedom by making clear that nothing requires, prohibits or abridges the use of particular textbooks or curricular materials, even if those materials might include content that otherwise could be considered discriminatory.¹⁹⁵

Educational institutions must also ensure that materials used for student skills-assessment and counseling do not direct a substantially disproportionate number of women (or men) to a particular program, course of study or classification. A disproportionately high enrollment of male students in an honors math class does not, in itself, violate Title IX. But such disparity may violate Title IX if it results, for example, from counselors routinely steering female students away from such courses or from educators restricting enrollment solely on the basis of SAT math scores, which may unfairly and unnecessarily disadvantage women.¹⁹⁶

190. 248 F. Supp. 2d 132 (N.D.N.Y. 2003).

191. *Id.* at 136.

192. *Id.* at 144.

193. *Id.* (emphasis added).

194. *But see Swierkiewicz v. Sorema*, 534 U.S. 506, 512–13 (2002) (holding that the requirements for establishing a prima facie case of discrimination do not apply to the pleadings stage of the case). In *Swierkiewicz*, the United States Court of Appeals for the Second Circuit had affirmed the district court's decision to dismiss a Title VII employment discrimination case because the plaintiff's pleadings did not provide direct evidence of discrimination, and because the pleadings did not set out a prima facie case under the standards set in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz v. Sorema*, No. 00-9010, 2001 WL 246077, at *2 (2d Cir. March 12, 2001). In reversing the appellate court's decision, the Supreme Court explained that discovery could uncover the direct facts and evidence necessary to support a discrimination claim. *Swierkiewicz*, 534 U.S. at 511–12. The Court found it inappropriate to dismiss such a case at the pleadings stage, unless the court clearly could not grant relief under any facts consistent with the allegations. *Id.* at 512.

195. 34 C.F.R. § 106.42 (2004).

196. While women, on average, have lower SAT math scores (501) than men (537), women are more likely to have taken four years of math in high school (55% of women versus 45% of men) and may have a better mathematics background for college that standardized test scores alone cannot reveal. Hong, *supra* note 163, at A33 (citing statistics provided by The College Board). Moreover, at least one researcher has found that "among women and men taking the same advanced math courses in college, women with somewhat lower SAT scores often do better

The regulations also address gender discrimination outside the classroom. Ensuring Title IX compliance in each of these areas helps to improve the campus climate for all students, and may help to attract and retain female students. An educational institution may not discriminate in: extracurricular programs and other benefits, including financial aid awards;¹⁹⁷ health and insurance benefits and services;¹⁹⁸ and athletic participation opportunities.¹⁹⁹ And although the regulations allow single-sex housing, educational institutions must ensure that men and women have access to campus housing, including single-sex residences, of similar quantity and quality, with similar rules and regulations, for comparable fees.²⁰⁰

An educational institution may not treat students differently based on whether a student is married or is a parent, and must treat pregnancy the same as any other temporary disability when providing medical benefits and services, approving leaves of absence, and seeking physician's certification of a student's physical and emotional ability to continue in or return to academic and extracurricular activities.²⁰¹

Title IX's nondiscrimination requirements extend beyond the campus when students must participate in a program or activity sponsored by another entity.²⁰² Thus, an engineering program that requires students to take a co-op assignment,²⁰³ or a medical school or teaching program that requires students to engage in an outside practicum, must undertake reasonable efforts to advise the co-op employer or practicum site of its Title IX obligations and must secure the employer's compliance with those obligations. On an initial level, the educational institution may secure compliance simply by requiring the co-op employer to sign a statement agreeing to abide by Title IX's nondiscrimination requirements. If the employer does not adhere to this agreement, however, the educational institution may have to take steps to remedy the situation, even if it becomes necessary to terminate the co-op relationship to protect students from any form of gender discrimination, including sexual harassment.

In order for a student to prevail on a Title IX claim against an educational institution for discriminatory conduct by an outside entity such as a co-op employer, however, the educational institution must have notice of the conduct and must have failed to act to stop the discrimination. *Crandell v. New York College of Osteopathic Medicine*²⁰⁴ illustrates this rule in the sexual harassment context.

than men with higher scores. The SATs turn out to underpredict female and overpredict male performance . . . [for] reasons [that] remain mysterious." Angier & Chang, *supra* note 5, at A1 (internal quotations omitted).

197. 34 C.F.R. § 106.37 (2004).

198. *Id.* § 106.39.

199. *Id.* § 106.41.

200. *Id.* § 106.32.

201. *Id.* § 106.40.

202. *Id.* § 106.31(d).

203. In engineering programs, a co-op assignment typically involves a semester away from campus working in the engineering environment. Some engineering programs require a semester or more in a co-op as a graduation requirement.

204. 87 F. Supp. 2d 304 (S.D.N.Y. 2000).

Colleen Crandell brought a Title IX claim against her medical school, the New York College of Osteopathic Medicine (NYCOM), citing seven incidents in which various professors or other supervisors throughout her medical school career had made inappropriate comments or unwelcome advances, or had engaged in inappropriate or unwelcome physical contact with her.²⁰⁵ Unfortunately, she had reported only one of the seven incidents to NYCOM, claiming that she feared recrimination if she had reported the other incidents.²⁰⁶ The United States District Court for the Southern District of New York granted NYCOM's motion for summary judgment on all but the one reported incident, citing *Gebser* for the requirement that an educational institution can be held liable for sexual harassment under Title IX only if the educational institution had notice of the offending conduct.²⁰⁷

Similarly, an educational institution must make sure that outside employers who use campus facilities to recruit students for employment also abide by relevant nondiscrimination laws in their recruitment and employment practices.²⁰⁸ The educational institution may, for example, require employers to sign a statement agreeing not to engage in gender discrimination. But when faced with evidence of gender discrimination, the educational institution may have to take steps to remedy the situation, even if it becomes necessary to bar the employer from the use of campus facilities or services for the employer's recruitment activities.

3. Employment Practices

Twelve regulations identify obligations imposed by Title IX on educational institutions regarding employment practices. As with the regulations relevant to students, these regulations contain the general admonition that educational institutions may not engage in gender discrimination in either the hiring process or in providing employment benefits.²⁰⁹

Title IX does nothing to alter an educational institution's obligations to comply with other federal laws, such as Title VII.²¹⁰ But Title IX may impact certain institutional obligations under state or local law, because Title IX supersedes state and local laws that prohibit or limit employment for members of one sex but not the other.²¹¹ In particular, Title IX requires that educational institutions that provide any compensation, service, or benefit to members of one sex pursuant to requirements imposed by state or local law also provide that same compensation, service, or benefit to members of the other sex. While a state initiative like California's Proposition 209 or Washington's Initiative 200 may prohibit certain practices that favor under-represented groups,²¹² Title IX requires equitable hiring

205. *Id.* at 321. The court did believe that all of the conduct of which Dr. Crandell complained, if proven to have occurred, would have constituted sexual harassment.

206. *Id.* at 307–11.

207. *Id.* at 306–07 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)).

208. 34 C.F.R. § 106.38 (2004).

209. *Id.* § 106.51.

210. *Id.* § 106.6.

211. *Id.* § 106.58.

212. California's Proposition 209, approved by voters in 1996, amended the state

practices and may permit affirmative action to remedy inequities such as a persistent under-representation of women on the faculty.

As with student recruitment and retention, an under-representation of female employees and faculty, by itself, does not violate Title IX, because such an imbalance might result from factors beyond the control of the educational institution, such as an under-representation of women among Ph.D. recipients in certain disciplines or from the personal choices that individual women make. No federal law can remediate the effects of the personal choices made by individuals during the hiring process. But certain hiring and employment practices, including perhaps those that lead faculty candidates to consider less prestigious employment, may violate Title IX if they affect men and women differently. Colleges and universities must not discriminate in their recruiting practices, and must provide equitable salaries, benefits, and other conditions of employment including workload and opportunities for advancement. Moreover, colleges and universities must eliminate any other informal practices or cultural conditions that may impair the full integration of women into the community.

a. Pre-Employment Practices

Educational institutions may not discriminate on the basis of gender in hiring, even if members of one sex have limited employment opportunities in any occupation or profession.²¹³ The regulations also encourage educational institutions to review recruiting practices to ensure that an over-representation of male faculty, for example, does not result from recruiting activities that violate Title IX by excluding viable female candidates.²¹⁴ Thus, the historical and persistent under-representation of women among engineering Ph.D. recipients does not relieve an educational institution of its Title IX obligations to try to recruit female faculty. Furthermore, if certain recruiting activities result in an over-representation of men among faculty candidates, the educational institution should review and, where possible, change its recruiting practices. If, for example, a physics department routinely looks to only a few graduate physics programs when hiring new faculty, such a practice could violate Title IX if those graduate physics programs limit the availability of female candidates by failing to provide an appropriate environment for female students to engage in and complete their doctoral course work and research.²¹⁵

constitution and prohibits state and local agencies, including public universities, from using racial or gender preferences. See CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996) (codifying Proposition 209). Washington's Initiative 200, approved by voters in 1998, imposes similar constraints. See WASH. REV. CODE §§ 49.60.010–020 (West 2002). See Robert O'Neil, *At Last, Guidance Seems Likely on Affirmative Action*, CHRON. HIGHER EDUC., Dec. 13, 2002, at B20.

213. 34 C.F.R. § 106.7 (2004).

214. *Id.* §§ 106.51, 106.53.

215. See Wilson, *supra* note 27, at A9, which offers one possible explanation for the under-representation of women in the upper ranks of some Ph.D. programs and discusses how this could impact faculty recruiting:

One possible reason is that graduate students' success depends heavily on their relationships with their advisers. And male professors—particularly in male-dominated disciplines like economics—may be less comfortable with female students.

Educational institutions may restrict hiring to members of one sex only in two circumstances: (1) when DED-OCR makes a finding that the educational institution has engaged in discriminatory hiring practices and then requires certain remedies including targeted recruiting of members of the disadvantaged sex;²¹⁶ or (2) when gender is a bona fide occupational qualification, such as when hiring the director of a single-sex campus residence or the attendant for a single-sex locker room.²¹⁷

How should an educational institution approach a hiring decision, for example, for a position established to recruit and retain women in an engineering program? Despite the fact that such programs focus on the unique needs of women students, the actual job description and responsibilities must control whether the educational institution may limit itself to recruiting and hiring women. If the responsibilities consist mainly of administrative functions such as managing a budget, scheduling tutoring sessions, and providing other institutional support, a man probably could perform such duties as well as a woman. On the other hand, if the director's responsibilities include serving as a role model in the absence of sufficient female faculty members to fill that role, gender may be a bona fide occupational qualification for that position.

An educational institution may not use employment tests or other criteria that have a disproportionately adverse affect on members of one sex, unless such tests or other criteria validly predict successful job performance and unless no gender-neutral alternatives exist.²¹⁸ The regulations also prohibit pre-employment inquiries into an applicant's marital status or pregnancy status, but allow an employer to ask about an applicant's gender, as long as the information does not facilitate discrimination in the hiring process.²¹⁹

b. Employment Benefits

An educational institution must treat male and female employees comparably in all of the benefits and conditions of employment, including: compensation, particularly for similarly situated employees who perform similar functions; seniority status, promotions, and tenure opportunities; and fringe benefits such as insurance or retirement plans. An educational institution may not discriminate on the basis of marital or parental status, and must treat pregnancy as a temporary disability in regard to leaves-of-absence and other medical benefits.²²⁰

As with other aspects of Title IX, determining institutional compliance requires

“If you are a working woman, your male adviser may have spent less time working with you on your dissertation and believed less in your potential,” says [a] female economist. “They promote their female students less, so by the end of the Ph.D. you see women disproportionately in the bottom half of the class.” In turn, when it comes time to recommend Ph.D. candidates for jobs at top-notch institutions, male professors automatically think of their male students.

Id.

216. 34 C.F.R. § 106.53.

217. *Id.* §§ 106.59, 106.61.

218. *Id.* § 106.52.

219. *Id.* §§ 106.57, 106.60.

220. *Id.* §§ 106.54–106.57.

looking beyond simple statistics to understand whether certain apparent inequities result from institutional discrimination or from other, allowable, factors. Cases involving the compensation of athletic coaches explain most clearly the factors that may or may not justify differing levels of compensation and employment conditions. In *Stanley v. University of Southern California*,²²¹ for example, the university's female coach of its women's basketball team, Marianne Stanley, filed a lawsuit that charged that the university had violated Title IX by paying her less than it paid the male basketball coach of the men's team, George Raveling, even though the two had ostensibly similar responsibilities in that both coached collegiate basketball teams.²²² In affirming the district court's grant of summary judgment in favor of the university, the appellate court took note of Mr. Raveling's "markedly superior experiences."²²³ He had fourteen more years experience as a coach, had twice been selected PAC-10 and national coach of the year, had written books on basketball, had coached the U.S. Men's Olympic Basketball Team, and had fund-raising responsibilities that Ms. Stanley did not have.²²⁴ He also faced greater public and media scrutiny than Ms. Stanley faced, and he generated more revenue than she did for the university.²²⁵ Thus, while faculty members who bear similar teaching and research responsibilities may feel entitled to identical pay, a faculty member who brings to the institution certain benefits—such as renown in a particular field or a well-funded array of research projects—may legitimately command a higher salary.

On the other hand, simply comparing pay rates for similarly situated employees may mask actually discriminatory practices. Female assistant professors may earn higher average salaries than male assistant professors either because of their value to the institution or, quite possibly, because they remain at that low rank longer than male assistant professors and thus earn higher salaries as a consequence of longer-than-average time-in-rank.²²⁶ A review of equitable employment practices, therefore, should address the reasons for salary discrepancies to determine whether apparently equitable salary distributions might mask other underlying discriminatory practices.

The 2004 GAO Report suggests, for example, that "salary and rank differences between men and women can largely be explained by work patterns and choices,"²²⁷ rather than by discriminatory conduct on the part of the educational institution. The report notes that perhaps as much as 90% or more of the discrepancy between the salaries paid to male and female faculty members can be explained "by differences in experience, work patterns, seniority, and education levels."²²⁸ The study listed a number of differences between male and female

221. 178 F.3d 1069 (9th Cir. 1999).

222. *Id.* at 1072–73.

223. *Id.* at 1077 (internal quotation marks omitted).

224. *Id.* at 1075.

225. *Id.* at 1074–77.

226. See generally VALIAN, *supra* note 5, ch. 11 (discussing the factors that can affect an analysis of salary equity). See also GAO Report, *supra* note 32, at 21 (exploring factors that contribute to salary differentials between male and female professors).

227. GAO Report, *supra* note 32, at 21.

228. *Id.* (citing NAT'L CTR. FOR EDUC. STATISTICS, GENDER AND RACIAL/ETHNIC

faculty, including:

- women more often taught as their primary responsibility, while men more often conducted research as their primary responsibility;
- women less often held a first professional degree or Ph.D.;
- women more often worked part-time, trading off career advancement or higher earnings for a job that offers flexibility to manage work and family responsibilities;
- women typically had less experience than men, and were more likely to be assistant or associate, rather than full, professors;
- women were more likely than men to seek teaching positions at two-year institutions or small four-year institutions rather than research institutions.²²⁹

While these differences may result from personal choices, they may also result from external pressures imposed by the educational institution. The GAO Report pointed out, for example, that some female faculty members faced tremendous challenges in “juggling family life with a tenure track faculty position.”²³⁰ Others “felt discouraged from pursuing a tenure track university position because the biological clock and the tenure clock tend to tick simultaneously.”²³¹ Still others “observed the long hours and difficult work of professors at research universities in the sciences and felt they could not perform well while also devoting time to family responsibilities.”²³²

NSF survey data, too, points to family pressures as a significant influence on the career choices of female Ph.D. recipients. Of those who received doctoral degrees in engineering in 1996–97 and 1997–98, women, to a greater extent than men, felt that they had to limit their job searches because of personal factors: 62.1% of women, compared to 29.2% of men, felt that their job search was limited “a great deal” or “somewhat” by their spouse’s career or employment;²³³ 41.5% of women, compared to 36.5% of men, cited limitations due to family responsibilities; and 41.3% of women, compared to 34.5% of men, cited a desire not to relocate.²³⁴

DIFFERENCES IN SALARY AND OTHER CHARACTERISTICS OF POSTSECONDARY FACULTY: FALL 1998 (2002)).

229. *Id.* at 21–23.

230. *See id.* at 22.

231. *Id.* at 22–23.

232. *Id.* at 23. A recent article in the *Chronicle of Higher Education* supports these findings: “Young women . . . may be opting out of research-university jobs for personal reasons. Many would-be female scholars, particularly in the sciences, seem to believe that children and a hard-charging research career don’t mix.” Wilson, *supra* note 27, at A12.

233. Interestingly, 42% of female engineering faculty in the United States have spouses who also work in higher education, while 31% have spouses who work in for-profit industry. COMM. ON WOMEN IN SCI. AND ENG’G, GLOBAL AND POL’Y AFFAIRS, NAT’L RESEARCH COUNCIL, FEMALE ENGINEERING FACULTY AT U.S. INSTITUTIONS: A DATA PROFILE, 12 (2001). Eighty percent have spouses who also completed a degree in science or engineering. *Id.*

234. NSF Diversity Report, *supra* note 9, at 286. The *Chronicle* also pointed out that some female graduate students, “[s]ensing the difficulties and frustrations faced by their female mentors . . . ‘self-select out’ of academic careers.” Wilson, *supra* note 27, at A12. Female scholars also tend to advance more slowly than their male counterparts. “For each year after securing a tenure-track job [at a research university] . . . male assistant professors are 23 percent more likely than

Personal choices may explain away some of the salary and rank differentials between male and female faculty members, as the GAO Report asserts.²³⁵ On the other hand, institutional pressures and an inhospitable climate ultimately may inform those personal choices.²³⁶ While the former does not violate Title IX, the latter might.

Apart from salary inequities, disparate employment *conditions* may also violate Title IX. In *Legoff v. Trustees of Boston University*,²³⁷ for example, a woman who served as head coach of Boston University's softball team and assistant coach of its field hockey team alleged that the university discriminated against her by paying her less than it paid to its male coaches and by requiring her, but not any of the male coaches, to coach two teams.²³⁸ Moreover, after she was terminated from her position, the university split her job into two separate positions.²³⁹ The United States District Court for the District of Massachusetts found these allegations sufficient to survive the university's motion for summary judgment.²⁴⁰

Certain practices in academia may similarly discriminate against women even if they persist for historical, rather than discriminatory, reasons. In the days of an all-male engineering faculty, relegating the newest faculty members to working in the worst offices or labs, or to teaching difficult courses such as large, required lectures full of first-year students, may have served as a sort of rite-of-passage into the academy. But assigning new female faculty members to undesirable offices or labs, or giving them unreasonable teaching loads, may constitute a Title IX violation if such practices limit the ability of new female faculty members to integrate fully with their colleagues,²⁴¹ to engage in meaningful research or to have an adequate chance for success in the classroom.

Sometimes, inequities in the conditions of employment may exist because of efforts to improve the position of women in the academic community. No matter how well intentioned, though, such inequities violate Title IX when they impair the ability of female faculty to achieve promotion and tenure at a rate comparable to their male peers. The few female faculty in the mathematics department, for example, may have more responsibilities than their male colleagues with respect to departmental or university committees. Although the participation of female

their female counterparts to earn tenure. And for each year after earning tenure, male professors are 35 percent more likely than their female colleagues to be named full professors." *Id.* And, as indicated by a 2003–04 survey conducted by the AAUP, male assistant professors at doctoral universities earn \$5,727 more per year than their female colleagues; male associate professors earn \$4,837 more; and male full professors earn \$9,471 more. AAUP, *Don't Blame Faculty for High Tuition: The Annual Report on the Economic Status of the Profession*, ACADEME, Mar.–Apr. 2004, at Table 5.

235. GAO Report, *supra* note 32, at 21.

236. Wilson, *supra* note 27, at A12.

237. 23 F. Supp. 2d 120 (D. Mass. 1998).

238. *Id.* at 123.

239. *Id.* at 124.

240. *Id.* at 123–24.

241. The inability to integrate fully into a faculty can have an adverse effect on a tenure decision, particularly if collegiality is among the qualities evaluated during the tenure process. See, e.g., Gregory M. Heiser, "Because the Stakes are So Small": Collegiality, Polemic and Professionalism in Academic Employment Decisions, 52 U. KAN. L. REV. 385 (2004).

faculty on various committees may help to improve the environment for all female faculty on the campus, those particular female faculty members tasked with additional committee responsibilities may find it difficult to complete the research necessary to achieve a positive promotion or tenure decision. Educational institutions must understand the impact such assignments can have on the research portfolios of a small segment of the faculty and adjust evaluation systems accordingly—perhaps by giving appropriate credit in the promotion and tenure process for service on such committees.

In an engineering program, female faculty may have the responsibility of advising female undergraduate students, who certainly could benefit from same-gender mentoring. But if 20% of the students are female and only 10% of the faculty members are female, as is typically the case in engineering, this creates a disproportionately heavy advising burden on female faculty members. While obviously well intentioned with regard to the benefits of such advising for female students, such policies likely violate Title IX in that they treat female and male faculty members differently because of their gender.

II. THE GAO REPORT TO CONGRESS

The cases discussed in Part I.C describe the sorts of Title IX violations that individuals can bring to the attention of funding agencies or to the courts. Such cases arise when educational institutions have not performed their obligations under the law, and typically represent the extreme circumstances in which the aggrieved individual and the educational institution cannot resolve their differences in any other way. While such cases provide interesting examples that help to define the contours of Title IX enforcement, they exist at the margins of Title IX compliance efforts.

The regulations discussed in Part I.C, on the other hand, provide the details of the funding contract between federal funding agencies and recipient institutions. These regulations spell out what both must do to comply with the law. Rather than tinkering at the margins of Title IX enforcement, as court cases do, these regulations define the substance of Title IX compliance and enforcement. The GAO Report examines whether and how federal funding agencies have met these basic Title IX obligations to ensure that women can achieve true equity in STEM education.

The GAO reviewed the Title IX compliance and enforcement procedures in place at the four federal agencies that provide grants for STEM-based education and research. As noted in the introduction to this article, the GAO undertook this study “[b]ecause of increased interest about women’s access to mathematics, engineering, and science, which receive billions of dollars in federal assistance.”²⁴² The report addressed three questions:

- (1) How do the DED, the Department of Energy (DOE), NASA, and the NSF ensure that federal grant recipient institutions comply with Title IX in STEM fields?
- (2) What do the data show about women’s participation in STEM

242. GAO Report, *supra* note 32, at 1.

fields?

- (3) What promising practices exist to promote the participation of women in STEM fields?²⁴³

This section discusses the GAO's findings, particularly with regard to questions (1) and (3); with regard to question (2), the Introduction covers the data about female student participation in STEM fields, and the discussion in Part I.C.3 provides additional information about the progress of female faculty in STEM fields.

- A. How do federal agencies ensure that federal grant recipient institutions comply with Title IX in STEM fields?

Combined, DED, DOE, NASA and NSF—called the “four federal science agencies”²⁴⁴ in the GAO Report—awarded almost \$5 billion in grants for the sciences in fiscal year 2003.²⁴⁵ These programs encompassed not only scientific and technological research, but also outreach programs targeted toward K-12 schools, higher education and private industry, and scholarships and fellowships awarded to students pursuing education in areas of “national need,” including biology, chemistry, computer and information science, engineering, geological science, mathematics, and physics.²⁴⁶

Title IX requires that each federal granting agency ensure that funding recipients comply with its nondiscrimination provisions:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, *is authorized and directed* to effectuate the provisions of [20 U.S.C. §] 1681 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.²⁴⁷

The GAO Report describes the four primary types of activities that federal funding agencies must undertake to ensure compliance with Title IX: (1) investigating and resolving complaints filed by individuals who allegedly suffered discrimination by grant recipients; (2) requiring statements of Title IX compliance assurance from grant recipients; (3) providing grant recipients with technical assistance in regard to Title IX compliance; and (4) conducting periodic compliance reviews of grant recipients.²⁴⁸ Additionally, as required, federal funding agencies must work with noncompliant recipient institutions to find a way to remedy any problems uncovered in the course of a compliance review or complaint investigation.²⁴⁹

243. *Id.*

244. *Id.*

245. *Id.* at 34–35.

246. *Id.* at 7.

247. 20 U.S.C. § 1682 (2000) (emphasis added).

248. GAO Report, *supra* note 32, at 9, Table 1.

249. *Id.* at 4–5, 9.

The GAO Report indicates that all four federal science agencies have satisfied responsibility (3) by providing grant recipients with technical assistance in regard to Title IX compliance.²⁵⁰ This, however, represents the limit of consistency among all four federal science agencies with respect to Title IX compliance efforts.

The GAO Report notes that all four federal science agencies do satisfy responsibility (2) by requiring statements of assurance from recipients indicating that their programs and activities comply with Title IX and other civil rights laws as part of the grant application process.²⁵¹ But such statements often take the form of a pro forma promise included in a grant proposal that the recipient institution has met or intends to meet its obligations under Title IX.²⁵² While as enforceable as a contract, this approach has some deficiencies, precisely because of its pro

250. *Id.* at 9, 11.

251. *Id.*

252. NASA's nondiscrimination clause, for example, merely states the following:

The Organization, corporation, firm, or other organization on whose behalf this assurance is signed, hereinafter called "Applicant"

HEREBY AGREES THAT it will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), Title IX of the Education Amendments of 1972 (20 U.S.C. 1690 *et seq.*), Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 16101 *et seq.*) and all requirements imposed by or pursuant to the Regulation of the National Aeronautics and Space Administration (14 CFR Part 1250) (hereinafter called "NASA") issued pursuant to these laws, to the end that in accordance with these laws and regulations, no person in the United States shall, on the basis of race, color, national origin, sex, handicapped condition, or age be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives federal financial assistance from NASA; and HEREBY GIVE ASSURANCE THAT it will immediately take any measure necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of federal financial assistance extended to the Applicant by NASA, this assurance shall obligate the Applicant, or in the case of any transfer of which federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the federal financial assistance is extended to it by NASA.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all federal grants, loans, contract, property, discounts or other federal financial assistance extended after the date hereof to the Applicant by NASA, including installation payments after such date on account of applications for federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign on behalf of the Applicant.

NASA, GUIDEBOOK FOR PROPOSERS RESPONDING TO A NASA RESEARCH ANNOUNCEMENT (NRA) E-2 (2004).

forma nature. For example, as noted in Part I.C.1.b, the regulations impose several affirmative duties on grant recipients. Educational institutions must, first, assure granting agencies that their programs and activities comply with Title IX;²⁵³ second, designate at least one employee to coordinate Title IX compliance efforts;²⁵⁴ third, establish a Title IX grievance procedure;²⁵⁵ and fourth, disseminate information regarding Title IX nondiscrimination policies.²⁵⁶ According to the GAO Report, despite receiving these pro forma assurances, the four federal science agencies could not determine whether recipient institutions had, in fact, met these specific obligations because nothing requires educational institutions to track or report this information.²⁵⁷ Moreover, upon reviewing the Title IX compliance status of selected recipient institutions, DED “found several instances in which [recipients] had not adopted or published complaint procedures,”²⁵⁸ for example. And the report points out that even those recipient institutions that have adopted or published complaint procedures might not have a system in place to track and identify resolutions to complaints. Of the seven research universities interviewed for the GAO Report, all indicated that they had an internal process to handle Title IX complaints, but “a few were unable to provide . . . actual numbers because they do not keep these data.”²⁵⁹ Thus, the system of requiring assurances in the form of a pro forma statement in a grant proposal might not suffice to satisfy a federal funding agency’s statutory obligations.

With regard to responsibility (1), investigating and resolving complaints filed against grant recipients, the report notes that federal funding agencies may refer Title IX complaints to DED-OCR, which “plays a key role in ensuring compliance with Title IX because it has primary responsibility to investigate most types of complaints at educational institutions, including complaints referred from other federal agencies.”²⁶⁰ In fact, DOE, NASA, and NSF, as a matter of policy, refer gender-discrimination complaints involving educational institutions to DED-OCR for investigation,²⁶¹ while DED conducts its own investigations and resolves complaints.²⁶² Since 1993, DED has received over 3,300 Title IX complaints

253. 34 C.F.R. § 106.4 (2004).

254. *Id.* § 106.8.

255. *Id.*

256. *Id.* § 106.9.

257. GAO Report, *supra* note 32, at 10.

258. *Id.* In response, DED issued a “[D]ear Colleague” letter in April 2004 reminding recipient institutions “of their Title IX requirements to establish and publicize complaint procedures.” *Id.*

259. *Id.*

260. *Id.* at 6.

261. *Id.* at 2, 9. *See also id.* at 40–48 (text of letters by DOE, NASA and NSG to GAO explaining their procedures for handling complaints). It is also useful to recall here that most federal agencies adopted Title IX compliance regulations in 2000, twenty-five years after DED issued its original Title IX regulations. *See supra* notes 98–104 and accompanying text. DOE issued its own set of regulations in 1980, but then adopted the common rule in 2001. GAO Report, *supra* note 32, at 5, n.5. NASA and NSF had not issued any regulations prior to adopting the common rule in 2000. *Id.*

262. GAO Report, *supra* note 32, at 9.

against higher education institutions.²⁶³ Although DED cannot determine how many complaints were referred by DOE, NASA, and NSF,²⁶⁴ these agencies indicated to GAO interviewers that they actually received “very few” Title IX complaints each year.²⁶⁵

The apparently small number of complaints filed with DOE, NASA, and NSF may occur, in part, because of “a lack of awareness that Title IX covers academics,”²⁶⁶ as a result of failures on the part of educational institutions to establish or disseminate the required policies and procedures and, unfortunately, as a result of the attention paid to Title IX in the athletics context. As the GAO Report notes, “scientists and students at most schools [indicated] that they thought Title IX covered only sports and did not know [that] the law also encompassed academic issues.”²⁶⁷ The government and educational institutions can remedy this misunderstanding through education.

Unfortunately, however, education alone may not solve the problem of underreporting of violations. The report also suggests that the small number of Title IX complaints may also result from personal decisions not to file legitimate complaints because of a fear of retribution coupled with concerns that resolving a Title IX complaint would detract from time spent on research.²⁶⁸ This problem does not have an easy solution, especially given that the federal courts have split on the issue of whether Title IX allows complaints based on retribution or retaliation. Whether or not Title IX protects complainants from such retaliation depends on the forthcoming decision of the United States Supreme Court hearing an appeal in *Jackson v. Birmingham Board of Education*.²⁶⁹

With regard to item (4), periodic compliance reviews, the GAO Report points out that, of the four federal science agencies, only DED has conducted any periodic compliance reviews, which the report describes as “an agency-initiated assessment of grantees to determine if they are complying with the law.”²⁷⁰ Since 1993, however, DED has conducted only seventeen Title IX compliance reviews at colleges and universities, and only three of those seventeen have focused on gender equity in the sciences.²⁷¹

DED had agreed to perform compliance reviews on behalf of the other three federal science agencies, but has not yet conducted any—a situation unlikely to change anytime soon.²⁷² Recognizing DED’s limitations in this regard, NASA

263. *Id.*

264. This number excludes complaints regarding equity in athletics. *Id.*

265. *Id.* at 10.

266. *Id.* at 11.

267. *Id.*

268. *Id.*

269. 309 F.3d 1333 (11th Cir. 2002), *rev'd*, 544 U.S. ____, No. 02-1672 (Mar. 29, 2005). See Epilogue, *infra* notes 373–376 and accompanying text.

270. GAO Report, *supra* note 32, at 8.

271. *Id.* at 11.

272. *Id.* at 9. Moreover, DED has such agreements with seventeen other federal agencies, not only for Title IX, but also for other civil rights laws including Title VI and Section 504 of the Rehabilitation Act of 1973. *Id.* at 12. DED has, however, indicated that “performing compliance reviews for other agencies was never feasible” and “has informed those agencies that it could not

“has begun to take steps toward ensuring that compliance reviews are conducted on their [recipients].”²⁷³ The agency is in the process of developing a compliance review program, has requested compliance information from recipients and has initiated a review of the information provided to determine Title IX compliance, to identify problem areas, and to identify recipient institutions that should receive on-site compliance reviews.²⁷⁴

Neither DOE nor NSF has conducted any compliance reviews to-date, and the report indicates that neither agency has a plan to engage in that process.²⁷⁵ While DOE has instructed field-office staff on how to conduct compliance reviews, no field office has yet conducted a review, “primarily due to resource constraints.”²⁷⁶ And, due to a lack of funding and staff, NSF has no plans to develop a compliance review program.²⁷⁷

As the above information indicates, this lack of monitoring by the agencies has occurred, “in part, because agencies have not effectively coordinated the implementation of compliance reviews and, according to agency officials [because of] a shortage of resources to conduct the reviews.”²⁷⁸ In other words, the funding agencies have not fulfilled their obligations under the statute because they could not coordinate compliance reviews of individual institutions among themselves, and because they lacked sufficient funding to engage in such reviews.

On the issue of funding, the GAO Report states that DED officials have set a goal of “us[ing twenty] percent of their budget for both outreach and reviews of compliance with federal laws.”²⁷⁹ However, DED typically uses only about 15% of its budget for such activities.²⁸⁰ Moreover, the agency indicated that the three reviews of science grantees that it conducted in 1994 and 1995 actually occurred only because of congressional interest.²⁸¹ And while DED had planned to conduct over fifty compliance reviews in 2004 related to special education and accommodations for the disabled, the agency had no similar plan to conduct any compliance reviews involving Title IX.²⁸²

On the issue of agency coordination, the United States Department of Justice (DOJ) engages in three activities to coordinate agency compliance with Title IX: providing technical assistance to agencies with questions about compliance activities or requirements; brokering agreements between DED and various agencies to carry out complaint investigations and compliance reviews; and requiring agencies to submit annual reports on compliance activities.²⁸³ But the GAO Report points out that, while DOJ knew that DOE, NASA, and NSF were not

conduct these reviews for them.” *Id.* at 12, n.6.

273. *Id.* at 12.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 8.

279. *Id.* at 11.

280. *Id.*

281. *Id.* at 11–12.

282. *Id.*

283. *Id.* at 13.

conducting compliance reviews due to limited resources, DOJ did not know that DED had not adhered to its agreement with those three agencies to conduct reviews for them.²⁸⁴ DOJ has no legal authority to force federal funding agencies to conduct Title IX compliance reviews, however, and can only issue periodic reminders to the agencies of the need to comply with the law.²⁸⁵

The question at the beginning of this section asked, “How do federal agencies ensure that federal grant recipient institutions comply with Title IX in STEM fields?” Unfortunately, the GAO Report provides an unsatisfying, but unavoidable, answer: they do not. But the report also indicates that NASA, alone among the four federal science agencies, has undertaken some concrete steps to begin a compliance review process that ensures that recipient institutions comply with Title IX, and goes on to recommend that DOE and NSF also engage in that process.²⁸⁶

B. What promising practices exist to foster greater participation by women in STEM fields?

Outside of the realm of Title IX enforcement and compliance reviews, the GAO Report highlights “several examples of grant-making agencies that have instituted policies and practices designed to foster greater participation by women in the sciences.”²⁸⁷ The report divided these practices into three general categories, each discussed separately in the sections that follow.

1. NSF Considers How Proposals Aim to Encourage Greater Participation of Women in STEM-Based Research Grants

In its grant proposal evaluation process, NSF judges individual proposals on more than just the intellectual merits of the proposed activity. NSF proposal reviewers also evaluate the broader societal impacts of a proposed activity, which may include efforts directed at promoting teaching, incorporating K-12 outreach, broadening the participation of under-represented groups, and enhancing the research infrastructure through key partnerships and mentoring relationships, particularly for under-represented students.²⁸⁸ As a result, many NSF projects now include elements that attempt to inspire younger students to pursue education in the STEM disciplines. The GAO Report noted these positive impacts, but also cautioned that “the effects of implementing the [societal impact] criterion have yet to be fully evaluated.”²⁸⁹ Citing a 2001 National Academy of Public Administration finding that “NSF does not have adequate data to track changes or improvements to encourage greater participation by underrepresented minority researchers,”²⁹⁰ the GAO Report takes a “wait-and-see” approach to evaluating the

284. *Id.*

285. *Id.*

286. *Id.* at 28.

287. *Id.* at 24.

288. *Id.* at 24–25.

289. *Id.* at 24.

290. *Id.* at 25.

long-term merits of NSF's approach to funding decisions. This inability to track changes or improvements does present a serious problem, though, because it limits NSF's ability to prove that such proposal requirements achieve the desired goal of encouraging more members of under-represented groups to study in STEM disciplines.

2. Colleges and Universities Seek to Relieve Some of the Pressures for Women Beginning Tenure-Track Careers

As discussed in Part I.C.3.b, the GAO Report indicates that female faculty members may choose less demanding employment to allow them to balance the competing demands of work and family.²⁹¹ To counter this trend, the GAO Report found that some colleges and universities have instituted policies to extend the tenure clock by a semester or a year when an untenured faculty member has a child.²⁹² As the report noted, "Allowing junior faculty to 'stop the clock' relieves some of the pressure on junior faculty seeking tenure."²⁹³

Yet, even this female-friendly (or, more precisely, mother-friendly) policy comes with several pitfalls. Some colleges and universities may apply this policy to male and female faculty members alike. The GAO Report pointed out, however, that, "often male professors do not play as large a role as women in caring for newborns and can use the extra year to add to their research and publication portfolios,"²⁹⁴ thus putting similarly situated female faculty members at a further disadvantage. Or, even though the institution may have an established parental leave policy, some departments might not implement that policy. Furthermore, some female faculty members may choose not to ask for the leave because of fears that such a request may ultimately work against them in the tenure process.²⁹⁵

Although the GAO Report noted the benefits of family-leave policies, it also pointed out that, "when one is involved in scientific research, pressure remains to produce results."²⁹⁶ A faculty member might not have to appear in a classroom several times a week, but still must run a research laboratory. That individual must still "organize the work, supervise graduate students working on the projects, and

291. *Id.* at 21–23.

292. *Id.* at 25. Many colleges and universities, however, still give only six to eight weeks of paid maternity leave.

293. *Id.*

294. *Id.* This phenomenon occurs not just in academia, but also in industry. STEM-oriented Georgia Tech recently conducted a survey of graduates from the Classes of 1994 through 1997 and found that, among those with children under eleven years old, 90% of men depended on their wives for child care, while only 57% of women depended on their husbands for child care. See Donna Llewellyn, et al., *Alternate Pathways to Success*, 2004 ASEE Annual Conf. and Exposition, Washington D.C. (2004) (on file with author).

295. GAO Report, *supra* note 32, at 25. Not only might colleagues in the faculty member's own department view such leaves as evidence of a lack of commitment on the part of the faculty member, but outside tenure reviewers, who might not be aware of the institution's leave policy, may criticize the resulting gaps in a tenure applicant's resume. *Id.* at 25–26.

296. *Id.* at 26.

also advise students on their academic course work and projects.”²⁹⁷ And, as with the policies that stop the tenure clock, such relief from teaching duties “may benefit male faculty more than female faculty,”²⁹⁸ because male faculty typically have less involvement in caring for newborns or ailing family members.

With the help of NSF ADVANCE grants,²⁹⁹ some colleges and universities have found creative ways to help ease the burdens on those with child-care or other serious family responsibilities. The University of Washington, for example, has used NSF ADVANCE funds to establish a Transitional Support Program (TSP) that, among other things, provides financial support to faculty members who need to care for newborns or ailing family members, or to cope with personal illness.³⁰⁰ TSP provides funds to allow faculty members to develop distance-learning courses that they can teach while on leave, or to fund ongoing research activities in the faculty member’s absence.³⁰¹ The confidential TSP grant application process identifies faculty members—both male and female—who need such support to balance the needs of family and career.³⁰² This program provides a good example of a flexible way to support the faculty members who need time off for serious personal reasons. The application process, too, helps to identify those faculty members who truly need the time off, thus mitigating the inequities inherent in the blanket family-leave policies discussed above.

3. Colleges and Universities Seek to Expand the Recruiting Pool for STEM Careers and to Make Those Positions More Attractive to Women

The GAO Report lists several practices that colleges and universities have instituted to increase the recruiting pool and to improve hiring success for female faculty in the STEM disciplines: providing on-site child care; establishing an inclusive hiring process; evaluating the status of women faculty on a periodic basis; addressing social-climate issues; funding additional education for existing employees; and establishing flexible work schedules.³⁰³ Each practice does have the potential for positive impacts on the status of female faculty, but each also presents some problems: on-site child care might not accommodate sick children; a hiring process might encompass a wide search area, but if female candidates are not available because they have not graduated from an appropriate Ph.D. program,

297. *Id.*

298. *Id.*

299. NSF awards ADVANCE grants to colleges and universities for the purpose of effecting institutional transformations that work toward fuller participation of women faculty in science and engineering. See generally NSF, *NSF Announces Institutional Transformation Awards Under “ADVANCE,”* available at <http://www.nsf.gov/od/lpa/news/press/01/pr0179.htm> (Oct. 9, 2001) (describing NSF ADVANCE grants and the first set of programs supported by those grants).

300. See generally UNIV. OF WASH. CTR. FOR INST. CHANGE, *UWADVANCE*, at <http://www.engr.washington.edu/advance/> (last visited Feb. 24, 2005) (detailing the University of Washington’s initiatives in this regard).

301. *Id.*

302. *Id.*

303. GAO Report, *supra* note 32, at 26–27.

such efforts will not succeed; a periodic survey may reveal salary inequities, but might also explain away any differences by pointing to the personal choices women make without simultaneously addressing the conditions of employment or climate issues that make such decisions necessary or even inevitable.

C. Key Conclusions from the GAO Report

The GAO Report itself best summarizes the state of Title IX compliance and enforcement in STEM disciplines:

Our review of federal science agencies' oversight for Title IX suggests that much of the leverage afforded by this law lies underutilized in the science arena, even as several billion dollars are spent each year on federal science grants. Although [DOE], NASA, and NSF have carried out most of the activities required of them under Title IX, the impact of their work may be limited without compliance reviews of [grant recipients] and their practices. Given the general lack of knowledge and familiarity with the reach of Title IX and the disincentives for filing complaints against superiors, investigations of complaints alone by federal agencies are not enough to judge if discrimination exists. Without making full use of all compliance activities available, agencies lack a complete picture of federal [grant recipient] efforts to address occurrences of sex discrimination. On the other hand, a more aggressive exercise of oversight on the part of agencies that wield enormous influence in the world of science funding—[DOE], NASA, and NSF—would provide an opportunity to strengthen the goal of Title IX and enable this legislation to better achieve intended results.³⁰⁴

Clearly, the GAO Report contemplates a more active role for the four federal science agencies in ensuring that the original goals of Title IX are achieved in the STEM disciplines. The report goes on to recommend that NASA continue to implement its new compliance review process, and that DOE and NSF also periodically conduct compliance reviews of grant recipients.³⁰⁵

One concern about the report, however, is that it tends to attribute the differences between the progress of male and female faculty and students to the personal choices of individuals. The report states, for example, that “[s]everal recent studies show that salary and rank differences between men and women can largely be explained by work patterns and choices.”³⁰⁶ The report then explains that “some women trade off career advancement or higher earnings for a job that offers flexibility to manage work and family responsibilities,”³⁰⁷ noting that women faculty had indicated that “juggling family life with a tenure track faculty position was extremely challenging.”³⁰⁸ The report does acknowledge that “the variability in men’s and women’s participation in the sciences may result from

304. *Id.* at 28.

305. *Id.*

306. *Id.* at 21.

307. *Id.* at 22.

308. *Id.*

discrimination in the workplace or subtler discrimination about what types of career or job choices women can make.”³⁰⁹ Nevertheless, when the report states that “91 percent of the discrepancy between men’s and women’s faculty salaries could be explained by differences in experience, work patterns, seniority, and education levels,”³¹⁰ it leaves the impression that workplace discrimination contributes very little to any actual differences between men and women. It fails to explore how some of the personal choices result from working conditions that negatively affect women to a greater extent than men.³¹¹

III. CONCLUSIONS REGARDING TITLE IX COMPLIANCE AND ENFORCEMENT IN THE STEM DISCIPLINES

When Congress enacted Title IX in 1972, it intended that the law would help women to achieve equal access to all aspects of education at all levels. Over the last three decades, women have made tremendous progress in higher education, now comprising nearly 60% of all bachelor’s and master’s degree recipients,³¹² nearly half of all Ph.D. and first professional degree recipients,³¹³ and more than 40% of all student-athletes at National Collegiate Athletic Association (NCAA) member institutions.³¹⁴ Nevertheless, while the proportion of women studying in STEM fields has grown tremendously since 1972, women still comprise a distinct minority of those studying in STEM fields at all levels, particularly in engineering and in some natural-sciences fields such as physics.³¹⁵ Undoubtedly, some of this under-representation occurs because of the personal choices women make to satisfy their own educational interests. But some of these choices may also result from pressures within the academy itself, including: an existing predominance of male faculty in a particular discipline, which can affect both the success of female graduate students and the hiring of female faculty within that discipline; “toxic atmospheres” within particular academic disciplines; incredible pressure to engage in research competing with the demands of family life; and biases in the hiring process.³¹⁶ One researcher described the subtle nature of this type of discrimination: “[M]ost women don’t perceive themselves as having experienced discrimination. What’s happening now is below everybody’s radar screen.”³¹⁷

Certainly, Title IX cannot remedy the under-representation that results from personal choices. But, by focusing Title IX compliance efforts on those institutional policies or practices that negatively, and perhaps imperceptibly,

309. *Id.* at 23.

310. *Id.* at 21.

311. *But see* Wilson, *supra* note 27, at A8, for a more thorough, albeit qualitative, assessment of this aspect of the gender-equity-in-STEM problem.

312. NSF Report, *supra* note 6, at 10, Table 2; 17, Table 9.

313. *Id.* at 33, Table 25.

314. NCAA, 1982–2003 SPORTS SPONSORSHIP AND PARTICIPATION REPORT 34 (2004). *See generally* U.S. DEP’T OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY 13 (2003) (report of the presidential commission convened to discuss the current state of Title IX enforcement with regard to athletics).

315. *See supra* notes 5–25 and accompanying text.

316. *See* Wilson, *supra* note 27, at A8.

317. *Id.* at A9.

impact those personal choices, Title IX can assure that, at a minimum, the academic environment is hospitable to the inclusion of women who choose to pursue a particular discipline.

By what practical means can Title IX effect the desired change? The history of Title IX enforcement points out four approaches to compliance, each of which has had some effectiveness in achieving gender equity for women: compliance reviews by funding agencies; lawsuits by private plaintiffs; reporting requirements ordered by Congress through legislation; and institutional self-assessment. The first three approaches all have negative implications for educational institutions, as each occurs as a result of some alleged misconduct by the educational institution. The results of these contentious proceedings may force an educational institution to adopt an unsatisfying approach to Title IX compliance. Only by active self-assessment can educational institutions control the manner in which they work to achieve true gender equity. This section of the article summarizes the implications of these various methods of Title IX compliance.

A. Compliance Reviews by Federal Funding Agencies

As discussed in Part II, striving for Title IX compliance by relying on compliance reviews by funding agencies has the pitfalls noted throughout the GAO Report. Most significantly, the four federal science agencies claim that they lack the necessary funding to conduct compliance reviews at educational institutions that receive federal funds.³¹⁸ While DED responds to complaints, and the other federal science agencies forward their complaints to DED for review, agency-initiated compliance reviews almost never occur.

Prior to the issuance of the GAO Report, NASA—alone among the four agencies—had stepped up its efforts to verify whether grant recipients comply with the law. As described in its response letter to the GAO Report, NASA “has taken steps to reactivate its previously dormant Title IX compliance program.”³¹⁹ In fiscal year 2003, NASA began a “desk audit review of grantee compliance with Title IX regulatory provisions,”³²⁰ and in June 2003 published a “Notice of Request for Information” inviting public comment on NASA’s plans to request from 917 grant recipients information on Title IX compliance.³²¹ Finally, in December 2003, NASA issued a letter:

to all . . . grant recipients requesting information on whether the recipient had, pursuant to Title IX requirements: (1) designated an employee to act as the “Title IX coordinator;” (2) adopted and published internal grievance procedures to promptly and equitably resolve complaints alleging discrimination on the basis of sex in its education programs or activities; (3) taken specific steps to regularly and consistently notify the public, *i.e.*, participants, employees, applicants, etc., that it does not discriminate on the basis of sex in the

318. GAO Report, *supra* note 32, at 11–12.

319. *Id.* at 46.

320. *Id.*

321. *Id.* (citing Notice of Request for Information, 68 Fed. Reg. 37,866 (June 25, 2003)).

operation of its education programs and activities; and (4) conducted a self-evaluation to evaluate current policies and practices and the effects of such policies and practices on the admission and treatment of students, and the employment of academic and non-academic personnel working in connection with the recipient education program or activity.³²²

NASA also indicated that it was in the process of “reviewing the grant recipient responses to systematically identify grant recipient compliance, identify problem areas, and assist in the targeting of recipients for possible onsite compliance reviews.”³²³ Clearly, at least with regard to the \$58.3 million in taxpayer money that NASA spends on STEM-related research,³²⁴ NASA has now started to become proactive in the area of Title IX compliance.

DOE, which in 2003 provided just over \$1 billion in STEM-related grants,³²⁵ has also taken some steps in the right direction by training its field officers and by monitoring their Title IX compliance efforts. Nevertheless, in its response letter to the GAO Report, DOE acknowledged that, as of July 2004, no field office had yet conducted a compliance review at a grant recipient due to staffing and funding shortages.³²⁶

NSF, which in 2003 granted \$3.6 billion to educational institutions,³²⁷ indicated in its response letter to the GAO Report that it plans to continue on its current course, with no new initiatives directed toward ensuring Title IX compliance at grant recipients.³²⁸ NSF indicated that it will continue to rely on DED to conduct compliance reviews on its behalf, despite the fact that DED has not conducted any such reviews to date, a policy not likely to change anytime soon.³²⁹ NSF also intends to continue to rely on DED to investigate Title IX complaints involving educational institutions, and on the Equal Employment Opportunity Commission to investigate Title IX complaints involving employment discrimination.³³⁰ NSF also noted that it discharges its other responsibilities under Title IX by notifying grant recipients that they must comply with the law and by requiring appropriate, although likely pro forma, assurances from those recipients.³³¹

DED, which provided \$129 million in STEM-related grants in 2003,³³² recounted its Title IX compliance efforts to-date in its response letter to the GAO Report.³³³ In thirty-two years, DED has conducted only three reviews of gender

322. *Id.*

323. *Id.*

324. *Id.* at 34 (detailing obligations for fiscal year 2003). This is the smallest amount expended by any of the four federal science agencies.

325. *Id.*

326. *Id.* at 43.

327. *Id.* This is by far the largest amount expended by any of the four federal science agencies.

328. *Id.* at 47–48.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 35.

333. *Id.* at 40–41.

equity in STEM education at the college or university level, although it has also conducted twelve such reviews at the secondary-school level to address the issue of getting more female students into the STEM “pipeline.”³³⁴ DED also indicated that the seventeen other non-athletics Title IX compliance reviews it conducted on issues including sexual harassment, grievance procedures, due process and support services, while not directly applicable to STEM education, nonetheless benefited all female students, faculty and employees at those institutions.³³⁵ Furthermore, to the extent that DED does have funding to conduct compliance reviews, and even has some agreements in place with the other federal science agencies to conduct reviews on their behalf, the agency appears to have decided to concentrate its civil-rights compliance reviews on different areas of the law in response to congressional concerns, rather than on a comprehensive review of how grant recipients comply with all civil-rights statutes.³³⁶

Quite simply, the responsible federal agencies have not adhered to their requirements under Title IX. Taxpayers, therefore, cannot depend on these agencies to initiate the compliance reviews that could lead to improved gender equity in STEM education. If these agencies suddenly decided to alter course, however, and aggressively pursue the required compliance reviews, the ramifications for educational institutions could be significant. If the agency identifies a Title IX violation, it has the authority, subject to a right of appeal, to impose specific remedial actions on an educational institution.³³⁷ Such remedies might not comport with the institutional mission and might have a negative impact on the educational institution that far outweighs the positive changes such a remedial scheme might bring about.

B. Lawsuits by Private Plaintiffs

The dearth of Title IX equity-in-academics cases likely results from the fact that students and employees (including faculty) lack awareness of the reach of Title IX or fear the consequences of initiating such actions. As the GAO Report states:

[S]cientists and students at most schools we visited told us that they thought Title IX covered only sports and did not know the law also encompassed academic issues. Also, others suggested they would be unlikely to file a complaint for fear of retribution from supervisors or colleagues [because] filing a complaint could hinder their ability to attain tenure [and] would take time away from their research.³³⁸

Despite the fact that Title IX functions differently in the athletic and academic realms, lawsuits filed in the athletics context provide some examples of how courts might order an educational institution to engage in particular activities to come into compliance with Title IX. It is important to note that these types of Title IX

334. *Id.*

335. *Id.*

336. *Id.* (discussing DED’s plans to conduct compliance reviews related to disability issues in 2004).

337. *Id.*

338. *Id.* at 11.

lawsuits usually arise when female student-athletes perceive that the educational institution has treated them inequitably and has not tried to remedy the inequities in an acceptable manner. Cases that make it to court arise from a conflict, rather than from a genuine desire to achieve common goals. In fact, in stating their cases, each side establishes positions diametrically opposed to one another, making compromise difficult, at best. In the athletics realm, courts have typically resolved these conflicts in favor of the student-athlete. Furthermore, court-imposed remedies can be intrusive. The decade-long case involving Brown University illustrates these pitfalls to litigation.³³⁹ Instead of keeping two women's teams at university-funded varsity status, which cost \$62,000 annually in 1992,³⁴⁰ Brown chose to enter into expensive and protracted litigation to preserve the right to manage its own athletic program, which, by all accounts, was among the best in the nation in terms of the opportunities it provided for female student-athletes.³⁴¹ In the end, however, Brown had to enter into a settlement that required precise management of the male-female ratio of participation opportunities.³⁴² Moreover, the litigation had its costs. Under Title IX's fee-shifting provision, the plaintiffs made a claim for \$1.4 million in fees, costs and interest³⁴³—not to mention the money that Brown spent on defending itself. Additionally, Brown has experienced a decade's worth of negative publicity because of this lengthy and contentious case.

Nevertheless, litigation occurs because it achieves success for plaintiffs. In the 1971–72 academic year, immediately prior to the enactment of Title IX, women comprised approximately 15% of all college athletes.³⁴⁴ By the 1991–92 academic year, immediately before *Cohen v. Brown University* and other litigation driven by groups such as the American Association of University Women, the Women's Sports Foundation and the National Women's Law Center (NWLC),³⁴⁵ women

339. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (preliminary injunction), and 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (trial on the merits).

340. *Cohen*, 809 F. Supp. at 981.

341. Since becoming a coeducational institution in 1971:

Brown . . . had created an exemplary array of sports opportunities for its female students. Brown women had 15 sports teams to choose from, almost twice the average of 8.3 for other NCAA Division I schools. Only one school, Harvard, had a broader and more generous women's athletic program.

JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* 70 (2002).

342. Jim Naughton, *Judge Approves Settlement of Brown U.'s Title IX Case*, *CHRON. HIGHER EDUC.*, July 3, 1998, at A31. In particular, Brown must:

insure that the proportion of female athletes at the institution remains within 3.5 percentage points of female undergraduates. [If] Brown decides to eliminate a women's sport, or institute a men's sport, it must insure that the proportion of female athletes at the institution is within 2.25 percentage points of the proportion of female undergraduates.

Id.

343. *Id.*

344. 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979). Fifteen percent corresponds to 31,852 female student-athletes.

345. See, e.g., GAVORA, *supra* note 341, at 49 (describing how these organizations set out to

comprised 34% of all student-athletes at NCAA member institutions.³⁴⁶ In the 2002–03 academic year, women comprised 43% of all student-athletes at NCAA member institutions.³⁴⁷ Thus, in the two decades before active Title IX enforcement began, the number of female student-athletes more than tripled, from 31,852 to 96,469, for an average growth of 3,231 new athletic participation opportunities each year.³⁴⁸ In the following decade, the number of female student-athletes nearly doubled again, to 160,650, for an average growth of 6,418 new athletic participation opportunities each year, nearly double the previous annual growth rate.³⁴⁹

Litigation not only achieves direct results for the plaintiffs, but it can cause other educational institutions to engage in litigation-averse behavior that may have other undesirable consequences. The slew of cases challenging cuts to men's athletic programs resulted from actions on the part of educational institutions to trim budgets while insulating themselves from Title IX liability.³⁵⁰ Rather than making difficult budgetary decisions that affect both men's and women's teams, these educational institutions instead chose to limit the opportunities available to men to avoid lawsuits by women. While the courts do not necessarily endorse these decisions, the courts also recognize that the educational institutions have the right to make these decisions, regardless of whether men ultimately suffer in the pursuit of equitable treatment for women.

C. Legislative Oversight

In the absence of appropriate (not to mention, statutorily required) oversight on the part of federal funding agencies, Congress could step in and dictate the form of reporting required by educational institutions to back up the pro forma assurances contained in funding contracts.³⁵¹ Congress has already acted in this manner in the athletics realm by passing the 1994 Equity in Athletics Disclosure Act (EADA).³⁵² The EADA requires educational institutions to make available to “students, potential students, and the public . . . financial, [participation,] and other information [concerning the institutions’] women’s and men’s intercollegiate

cultivate clients to test Title IX in the athletics realm in the early 1990s).

346. NCAA, *supra* note 314, at 33–34. Thirty-four percent represents 96,469 female student-athletes out of a total of 282,516. *Id.* at 34.

347. *Id.* at 63–66. Forty-two percent represents 160,650 female student-athletes out of a total of 377,641. *Id.* at 64.

348. *Id.* at 33–34. *See* 44 Fed. Reg. at 71,419.

349. NCAA, *supra* note 314, at 64. The actual rate of growth may be even higher than this, as these numbers count participation opportunities only at NCAA member institutions. On the other hand, the actual rate of growth may be slower, because these numbers do not take into account the growth in the number of NCAA member institutions over the last three decades.

350. *See, e.g.,* Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002); Kelley v. Bd. of Trustees, Univ. of Ill., 35 F.3d 265 (7th Cir. 1994); Boulahanis v. Bd. of Regents, Ill. State Univ., 198 F.3d 633 (7th Cir. 1999); Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002); Neal v. Bd. of Trustees of the Cal. State Univs., 198 F.3d 763 (9th Cir. 1999).

351. *See, e.g.,* NASA, *supra* note 252, at E-2.

352. Pub. L. 103-382, § 360B, 108 Stat. 3518, 3969 (codified in scattered sections of 20 U.S.C.).

athletic programs.”³⁵³ Such reports must include the following:

- (1) the number of full-time male and female undergraduate students at the college or university;
- (2) the number of participants on varsity teams;
- (3) operating expenses by team;
- (4) the number of coaches and assistant coaches by team;
- (5) the total amount of athletically related student aid;
- (6) the ratio of aid given to male versus female student-athletes;
- (7) recruiting expenditures on male versus female student-athletes;
- (8) total annual revenues; and
- (9) salaries of coaches and assistant coaches.³⁵⁴

In developing the regulations needed to effectuate the legislation, the Secretary of Education stated:

The EADA is a “sunshine” law designed to make prospective students and prospective student athletes . . . aware of the commitments of an institution to providing equitable athletic opportunities for its men and women students In enacting the EADA, Congress expected that knowledge of an institution’s expenditures for women’s and men’s athletic programs would help prospective students and prospective student athletes make informed judgments about the commitments of a given institution of higher education to providing equitable athletic benefits to its men and women students.³⁵⁵

Thus, Congress enacted the EADA based on a belief that greater visibility of how an educational institution treats male and female student-athletes in all aspects of an athletic program can help to foster awareness of the state of gender equity in the program at a particular educational institution. Presumably, educational institutions that report unflattering data might also take steps to improve their athletic programs.

Could EADA-like legislation have a similar impact on gender equity in STEM education? Perhaps it could. Such a requirement might make educational institutions more accountable for their choices in hiring faculty, supporting graduate students, and providing other resources that help women to integrate into the STEM curriculum. It might also foster self-examination and lead to better practices that support female students in STEM disciplines. On the other hand, a legislative mandate for reporting according to rigid, mechanical standards might simply encourage efforts to make the reported numbers look better rather than to create meaningful change. It also might discourage innovative efforts to attract more under-represented students to STEM education, particularly if such efforts

353. 60 Fed. Reg. 6940-01 (Feb. 3, 1995) (to be codified at 34 C.F.R. pt. 668).

354. *Id.*

355. *Id.* (internal quotation marks, omissions, and citations omitted).

would not directly impact the reported numbers.

Furthermore, relying on requirements of EADA-like legislation to track the state of gender equity for women does nothing to address the quality of a particular educational experience. A look at the 2003–04 EADA disclosure form for the University of Notre Dame points out some of the problems with using this reporting scheme as a method of verifying Title IX compliance.³⁵⁶ Looking only at the percentages of participation opportunities and financial aid expenditures shows how such statistical measures leave some questions unanswered. Notre Dame sponsors thirteen varsity teams each for men and women.³⁵⁷ Women comprise 46.6% of the undergraduate student body and 43.3% of student-athletes, and receive 41.1% of athletically related student financial aid.³⁵⁸ These numbers look reasonably equitable, particularly given the university's stated plans for continually improving athletic programs for all varsity student-athletes in a variety of ways including improving facilities and fully funding all allowable athletic scholarships.³⁵⁹ Yet, these numbers say nothing about the quality of the athletics experience for men and women.

The statistics for men's football and women's rowing—the two largest teams—point out areas of potential inequity. In 2003–04 men's football had 109 student-athletes, one full-time head coach and eleven full-time assistant coaches, and spent \$15,671 per student-athlete.³⁶⁰ On the other hand, women's rowing had eighty-two student-athletes, one full-time head coach and two full-time assistant coaches, and spent \$1,659 per student-athlete.³⁶¹ With regard to the inequities in coaching staffs, it might make sense for football to have a large number of full-time coaches, given the various positions on offense and defense, each of which requires the development of specific and different skills. Rowing, on the other hand, requires less diversity of skill. Yet, it is impossible to believe that a team with one full-time coach per twenty-seven student-athletes (women's rowing) can provide the same quality of athletics experience as that of a team with one full-time coach per nine student-athletes (football). With regard to expenditures, it might make sense to spend nine times as much on football as on rowing, because football uses more expensive equipment, has more coaches, travels farther for competitions and requires extensive support for home-game operations. Moreover, the sport brings in 70.1% of all athletics revenues while consuming only 26.4% of all athletics expenditures.³⁶² Yet again, it is impossible to believe that a team that spends one-tenth of what another team spends per-player can provide an equivalently strong experience. Finally, these numbers hide the fact that, based on NCAA bylaws, football can offer up to eighty-five full scholarships, while rowing can offer only

356. See UNIV. OF NOTRE DAME, EADA REPORT, at <http://www.nd.edu/athletics/disclosure.shtml> (2004).

357. UNIV. OF NOTRE DAME, 2004 EADA TABLES, Table 1, at http://www.nd.edu/athletics/EADA04_A.pdf (2004).

358. *Id.* at Table 6.

359. *Id.*

360. *Id.* at Tables 1, 3a, 3b, 4.

361. *Id.*

362. *Id.* at Table 10.

twenty, even though both teams have a large number of players.³⁶³

On the other hand, simply because two teams (for example, men's and women's basketball) might operate under similar constraints such as coaching-staff size, funding, per-player expenditures, and NCAA scholarship limits does not mean that both teams provide equivalent experiences. These statistics do not address whether both teams have equivalent access to similar practice facilities and times, whether the educational institution has looked for (and hired) equivalently strong coaches for both sports, or whether the coaches have appropriately used the available scholarship money.

The point of these examples is not that an educational institution might be able to justify apparent inequities in an athletics program, such as that between men's football and women's rowing, or that numbers that look comparable might hide other inequities. Rather, the point of these examples is to show that relying only on such numbers to confirm Title IX compliance can mask the questions that need to be asked to determine whether a particular program provides truly equitable opportunities for men and women.

Creating an athletics-like reporting system for academics, requiring annual reports of the numbers of students involved in a particular degree program, would similarly mask a number of qualitative factors. Do female students receive an appropriate amount of attention from faculty advisors?³⁶⁴ Do faculty members write equivalently strong letters of recommendation for their male and female students?³⁶⁵ Do faculty members equivalently promote their male and female students for further study or employment?³⁶⁶

Moreover, reporting and publicizing such numbers tends to encourage thinking in terms of proportionality, even when none is required.³⁶⁷ Would a physics

363. NCAA, 2004–05 NCAA DIV. I MANUAL, Bylaws 15.5.3.1.2, 15.5.5.1 at 205, 206 (2004).

364. The *Chronicle* reports that “male professors—particularly in male-dominated disciplines like economics—may be less comfortable with female students.” Wilson, *supra* note 27, at A9. The article goes on to say that male professors may spend less time working with female students on their dissertations and may promote their female students less. *Id.* By the end of the Ph.D. process, a disproportionately high number of women end up in the bottom half of their class. *Id.*

365. The *Chronicle* reports that “[l]etters of recommendation written for women are likely to be weaker than those written for men . . . and they are apt to describe women as ‘reliable, responsible, and meticulous,’ while men are called ‘brilliant and original.’” *Id.*

366. Again, the *Chronicle* points out that, “when it comes time to recommend Ph.D. candidates for jobs at top-notch institutions male professors automatically think of their male students,” given the greater amount of time male faculty members tend to spend with their male graduate students. *Id.*

367. For example, on the thirtieth anniversary of Title IX, in 2002, the NWLC published a list of thirty athletics programs that did not comply with Title IX in the area of athletic financial assistance, because they deviate from strict proportionality by anywhere from four to seventeen percentage points. NWLC, *30 Colleges and Universities Challenged by NWLC for Athletic Scholarship Violations under Title IX of the Education Amendments of 1972*, available at <http://www.nwlc.org/pdf/30Schools.pdf> (June 18, 2002). The list included the University of Notre Dame, which, in 2000–01, had allocated 38% of financial aid to female student-athletes, who comprised 44% of student-athletes. *Id.* When questioned about Notre Dame's inclusion on the list, an NWLC representative said simply, “The numbers speak for themselves.” Eric Hansen,

program deny an opportunity to a well-qualified male applicant in order not to worsen an existing gender imbalance in the program? Might a nursing program think twice about dismissing an objectively incompetent male student for similar reasons? Neither students nor taxpayers are served when educational institutions make decisions for reasons other than the academic integrity of their programs. Colleges and universities have long thought for themselves about their academic requirements and should, therefore, also think for themselves about the ways in which they can demonstrate equity in STEM education before the government, on behalf of federal taxpayers, demands that educational institutions engage in such reporting.

D. Self-Evaluation

With the recent attention given to this under-representation by Congress, the GAO and, more recently, the NWLC,³⁶⁸ colleges and universities now may face new pressures to prove that their programs and activities in the STEM disciplines comply with the requirements of Title IX. Given the pitfalls of the other three approaches to Title IX compliance, educational institutions should consider carefully whether to engage in a process of self-evaluation to determine how female students and faculty fare in STEM disciplines.

This approach to Title IX compliance has several significant advantages. When an educational institution does its own investigation, it can set out the parameters for the discussion of gender-equity in STEM disciplines, consistent with the educational institution's own mission and goals. It eliminates the contentiousness that can accompany a federal agency-initiated investigation or a private lawsuit. And, it sets the stage for meaningful compliance with both the spirit and letter of the law. A self-evaluation can help to identify those institutional policies or habits that have led to an under-representation of women in the STEM disciplines, enabling the educational institution to make changes consistent with its own objectives while also bringing the institution into compliance with Title IX.

Governmental compliance reviews, litigation, and statutory reporting requirements put an educational institution on the defensive, having to explain itself to those who challenge its policies and practices. Self-evaluation, on the other hand, puts the educational institution in charge, allowing it to decide for itself

Title IX Study Findings Surprise ND Officials, SOUTH BEND TRIBUNE, June 21, 2002, at B1.

The regulations, however, allow for deviations from a strict proportionality requirement under certain conditions, such as when a coach decides for competitive purposes not to use all of the scholarships allocated to a team, or when a new team allocates scholarships in a manner that reserves some funds for future years. *See* 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979). Both of these circumstances applied to Notre Dame that year: the women's basketball coach had used fewer than all fifteen of her available scholarships, and Notre Dame had established a new women's team in 1998, which had not yet allocated its full complement of scholarships. The numbers, clearly, do not "speak for themselves."

368. *See, e.g.*, NWLC., *Women's Groups Launch National Letter-Writing Campaign Demanding that Universities Break Down Barriers to Women in the Sciences*, available at <http://www.nwlc.org/details.cfm?id=2056§ion=newsroom> (Nov. 18, 2004); NWLC, *Women in the Sciences: Left Out, Left Behind*, available at <http://www.womensprerogative.org/womeninsciences/> (last visited Feb. 24, 2005).

the best way to achieve gender equity in academics.

CONCLUSION

The GAO's recommendation that the four federal science agencies step up their efforts in Title IX enforcement and compliance at colleges and universities may be just the beginning of renewed interest in gender equity in the academic realm, or it may become just one more governmental report gathering dust on a shelf. The outcome depends on how the four federal science agencies view their responsibilities with regard to Title IX, as well as on the availability of funding to discharge those responsibilities. The letters each of the agencies submitted in response to the GAO Report, included in Appendices VII through X of the report,³⁶⁹ point out the significant differences—in fact, the inconsistencies—in the approach each agency plans to take to discharge its responsibilities as a federal funding agency subject to Title IX. One consistent theme that has emerged, however, is that lack of funding and lack of agency coordination have impeded progress in this regard.

Educational institutions, too, have responsibilities under Title IX and must provide assurances to funding agencies that their programs and activities do not discriminate on the basis of gender. But according to the GAO Report, other than assenting to the pro forma language contained in funding proposals, colleges and universities have not undertaken any efforts to provide evidence that supports the assertions in the language of these nondiscrimination compliance assurances.

Individuals who have suffered discrimination in their STEM educational experiences may take Title IX compliance and enforcement into their own hands either through a complaint to the relevant funding agency or through a lawsuit. But a lack of knowledge of individual rights under Title IX, coupled with a fear of retaliation among those aware of their rights,³⁷⁰ may mean that inequity in STEM education will continue, unchallenged, for the near future. The lack of available cases to illustrate the key points brought out in this article underscores this fact. Nevertheless, the new interest in this subject by organizations such as the NWLC may provide the impetus for filing such cases, in the same way that the NWLC and other organizations jump-started Title IX enforcement efforts in the athletics context in the early 1990s.³⁷¹

The next phase of this effort to bring more women into STEM disciplines could also rest in the hands of Congress. The GAO Report may bring about a new congressional awareness of the lack of Title IX compliance and enforcement efforts on the part of agencies that depend on federal funds for their operating budgets. This may inspire some legislators to craft a law similar to the EADA to facilitate public reporting of efforts toward educating and hiring more women in STEM disciplines. And although such reporting requirements have limited utility in that they convey only the results of the gender-equity process, they serve an important public function in identifying those institutions that have demonstrated a

369. GAO Report, *supra* note 32, at 40–48.

370. *Id.* at 10–11.

371. See GAVORA, *supra* note 341, at 49.

commitment to gender equity in STEM disciplines.

If colleges and universities do not try to solve the issue of under-representation of women in STEM disciplines through their own initiatives, they run the risk that the government, either through enforcement actions or through judicial decisions, will do it for them. On the other hand, by engaging in a self-evaluation process and disseminating those results, educational institutions can help to re-frame the debate in a manner that will achieve much-needed progress in this critical area of educational development.

Senator Wyden expressed his continuing concern over the under-representation of women in STEM disciplines during the January 2005 hearings to confirm Margaret Spellings as the new Secretary of Education:

The potential of Title IX is enormous. Enforcing it in academic fields could revolutionize the study and application of math and science in our country.

Educators of good conscience should not wait for a Federal reprimand to comply with a Federal law that benefits all of us. Title IX ought to be a guiding principle in hiring, tenure, scholarships, and lab space for all scholars on all the academic campuses around our country. Title IX can finally give women studying science a fair shake where they have not gotten one before. . . .

. . . I formally call on . . . Margaret Spellings[] to work to ensure that girls and women in our federally funded schools do not suffer discrimination in math and the sciences. [It] is an issue of economics, and it is also an issue of national security. A report from the Hart-Rudman Commission on National Security to 2025 warned that America's failure to invest in science and to reform math and science education [is] the second biggest threat to our national security. . . .

. . . America [cannot] meet its national security needs if it is not giving women a fair shake as it relates to opportunity in math and science. . . . I call on the new Education Secretary . . . to take this message of economic fairness and national security to heart.

The remarks that [Harvard University President] Dr. Summers has made [positing that the lack of women in STEM careers results from innate differences between men and women] . . . have generated a new and important discussion about this issue. As the Senate confirms a new Education Secretary, I believe there is no better time to return our attention to the issue of how this body can advance opportunities for women in math and science, not by writing any new laws but by enforcing the laws on the books.³⁷²

The time may be right for Congress and DED to tackle the issue of the under-representation of women in STEM disciplines. Colleges and universities should

372. 151 CONG. REC. S91-92 (daily ed. Jan. 20, 2005) (statement of Sen. Wyden) (referring to remarks made by Harvard University President Lawrence H. Summers in January 2005). *See also* Bombardieri, *supra* note 5, at A1 (reporting on President Summers' remarks).

work to shape the debate, rather than react to its outcome.

EPILOGUE

As this article went to press, the United States Supreme Court announced its decision in *Jackson v. Birmingham Board of Education*³⁷³ that "the private right of action implied by Title IX encompasses claims of retaliation,"³⁷⁴ overturning the decision of the United States Court of Appeals for the Eleventh Circuit,³⁷⁵ which had affirmed the decision of the United States District Court for the Northern District of Alabama to dismiss a Title IX claim based on retaliation against an employee who complained about inequities in a high school athletic program.³⁷⁶ It remains to be seen whether this decision will provide the necessary safety net for faculty and students to file Title IX complaints about gender discrimination in STEM programs.

373. 544 U.S. ____, No. 02-1672 (Mar. 29, 2005).

374. *Id.*, slip op. at 1.

375. 309 F.3d 1333 (11th Cir. 2002). *See supra* note 269 and accompanying text.

376. *Jackson*, No. 02-1672, slip op. at 1.

SARBANES-OXLEY IN HIGHER EDUCATION: BRINGING CORPORATE AMERICA'S "BEST PRACTICES" TO ACADEMIA

CARL OXHOLM III*

INTRODUCTION

In the summer of 2002, Congress and the President responded to the spectacular failures of several multinational corporations¹ by imposing a new set of reporting obligations on all publicly-traded corporations. Named for its two principal sponsors,² the Sarbanes-Oxley Act of 2002³ established new standards for accountability for corporate officers and board directors, new requirements for acceptable corporate conduct, and new penalties, both civil and criminal, for transgressions.

Over the past three years, the not-for-profit sector—which has experienced its own visible and dramatic failures⁴—has found itself under increasing pressure to “adopt Sarbanes-Oxley.” New York Attorney General Eliot Spitzer was the first state law enforcement official to accept its principles and propose them as mandatory standards in his state;⁵ governors, attorneys general, and legislators in

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1. Enron, WorldCom, Tyco, and HealthSouth are familiar examples. The list is long, impressive, and continuing to grow.

2. United States Senator Paul S. Sarbanes, chair of the Senate Banking, Housing and Urban Affairs Committee, and Representative Michael G. Oxley, chair of the House Committee on Financial Services.

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.A.) [hereinafter Sarbanes-Oxley Act].

4. The origins of Drexel University College of Medicine actually lie in the bankruptcy of the Allegheny Health, Education and Research Foundation (“AHERF”) in 1997—at that time, the largest bankruptcy of a not-for-profit corporation in the country's history.

5. See FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, *New York Attorney General Proposes Corporate Reforms Affecting Not-For-Profit Corporation*, available at

other states have followed suit;⁶ the Internal Revenue Service (“IRS”) has become more active in examining non-profits;⁷ lawyers and judges have questioned what duties are owed to non-profits by their trustees; and calls for greater accountability are coming from inside academia as well.⁸ Meanwhile, in Washington, the Senate Finance Committee has issued a draft report and held hearings on the issue of whether, and how, Sarbanes-Oxley ought to be imposed on not-for-profit corporations.⁹

http://www.ffhsj.com/cmemos/040209_corp_gov_reforms.pdf (Feb. 9, 2004) (citing Draft Memorandum, Attorney General’s Legislative Program, Program Bill #02-03; Legislative Bill Drafting Commission 06251-01-3; Program Bill # 01-03; Legislative Bill Drafting Committee 01369-03-3.); Daniel J. Tschopp, Steve C. Wells & Douglas K. Barney, *Financial Debacles and State Regulation*, CPA JOURNAL ONLINE, (July 2004) at <http://nysscpa.org/cpajournal/2004/704/essentials/p64.htm>.

6. California became the first state to enact “Sarbanes-Oxley for Non-Profits” when Governor Schwarzenegger signed Senate Bill 1262 on September 29, 2004. 2004 Cal. Legis. Serv. ch. 919 (S.B. 1262) (West). The law requires all charities that receive or accrue gross revenues of \$2 million or more in any fiscal year to prepare annual financial statements that are audited by an independent certified public accountant pursuant to standards for auditor independence, to appoint an audit committee, and to make its annual financial statements available to the public. *Id.*

7. On August 10, 2004, the IRS announced a new enforcement effort, called the Tax Exempt Compensation Enforcement Project, aimed at identifying (and eliminating) the provision of excessive compensation and other forms of financial benefits by tax-exempt organizations to their officers, directors, and other insiders. IRS, *IRS Initiative Will Scrutinize EO Compensation Practices*, available at <http://www.irs.gov/newsroom/article/0,,id=128328,00.html> (Aug. 10, 2004). The IRS expects to contact nearly 2,000 charities and foundations to seek more information about their compensation practices and procedures. *Id.* This initiative comes at a time when the salaries of top administrators are rising in a visible way. See Julianne Basinger & Sarah H. Henderson, *It’s Lucrative at the Top*, CHRON. HIGHER EDUC., Nov. 19, 2004, at B3 (special supplement on executive compensation). The IRS’ interest is not solely with executive compensation, however. See Joe Stephens & David B. Ottaway, *IRS to Audit Nature Conservancy From Inside*, WASH. POST, Jan. 17, 2004, at A1.

8. See, e.g., NAT’L ASSOC. OF COLL. & UNIV. BUS. OFFICERS (“NACUBO”), *The Sarbanes-Oxley Act of 2002: Recommendations for Higher Education*, available at <http://www.nacubo.org/documents/news/2003-03.pdf>. (Nov. 20, 2003); Erin Strout, *Money & Management Notes: Smith’s President Wants Accountability*, CHRON. HIGHER EDUC., July 23, 2004, at A25; Julianne Basinger, *Colleges are Urged to Shift Their Accounting Practices in the Post-Enron Era*, CHRON. HIGHER EDUC., Jan. 9, 2004, at A32; CORP. BD. MEMBER, *Next on the Griddle: Nonprofit Boards* available at http://www.boardmember.com/issues/archive.pl?article_id=1179&V=1 (Nov.–Dec. 2003); BOARDSOURCE & INDEP. SECTOR, *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations*, available at <http://www.boardsource.org/clientfiles/Sarbanes-Oxley.pdf> (2003); Martin Michaelson, *A New Era of Corporate Governance Bears Down on Higher Education: The Sarbanes-Oxley Act Adopted in Wake of Corporate Scandals May Have Some Major Implications for College and University Boards*, TRUSTEESHIP, Jan.–Feb. 2003, at 37; John Mattie & Jack McCarthy, *The Substance of Transparency: The Sarbanes-Oxley Act*, BUS. OFFICER MAG., Feb. 2003, at 39.

9. Hearings were held in Washington, D.C., on June 22, 2004, on the topic of “Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities.” The list of invited speakers can be found at <http://www.finance.senate.gov/sitepages/hearing062204.htm> (last visited Mar. 14, 2005). The day before the hearing, the committee released a “discussion draft” which is a catalogue of reforms and best practices for tax-exempt organizations that the committee had been developing for many months. See SENATE FINANCE COMM., *Staff Discussion Draft*, available at www.finance.senate.gov/hearings/testimony/2004test/062204stfdis

In large measure, non-profits enjoy the special benefits they receive—exemption from tax being chief among them—because they do the public’s business.¹⁰ The substantial financial assistance they receive indirectly from all

.pdf (June 22, 2004). The draft is described as a "work-in-progress" and is meant to encourage additional comments and suggestions as the Finance Committee considers possible legislation; but despite the many serious concerns expressed by those who attended the hearings, the chair of the Finance Committee said that he intended to introduce changes “quickly, perhaps even this year.” Brad Wolverton, *Nonprofit Leaders Express Concern About Some Ideas Advanced by Senate Aides*, CHRON. PHILANTHROPY, Aug. 5, 2004, at 39.

In October 2004, the Senate Finance Committee encouraged the Panel on the Nonprofit Sector to review the issues and undertake its own analysis of how the nonprofit sector could best achieve the highest ethical standards in governance, fundraising, and overall operations. On March 1, 2005, the Panel published its report and recommendations, inviting comment and noting that it intended to continue its efforts in a second phase of deliberations. See PANEL ON THE NONPROFIT SECTOR, INTERIM REPORT PRESENTED TO THE SENATE FINANCE COMMITTEE, available at <http://www.nonprofitpanel.org/interim/PanelReport.pdf> (Mar. 1, 2005).

The Congressional Joint Committee on Taxation has also responded to the Senate Finance Committee staff discussion draft. On January 27, 2005, it issued its own report and recommendations, entitled “Options to Improve Compliance and Reform Tax Expenditures.” A substantial part of the 435-page report applies to non-profits, and many of the recommendations track those found in the Senate Finance Committee’s report. The Joint Committee’s Report is available at www.house.gov/jct/pubs05.html. The Joint Committee’s report is now engendering response from the non-profit community. See, e.g., NAT’L COMM. ON PLANNED GIVING, *Panel Makes Recommendations for Charitable Giving and Oversight*, at http://www.ncpg.org/gov_relations/?section=8 (last updated Mar. 9, 2005).

10. The tests under federal and state law are different, but their point is the same. Under Section 501(c)(3) of the Internal Revenue Code, a corporation must be:

operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . .

I.R.C. § 501(c)(3) (2000).

In Pennsylvania, a corporation must satisfy a demanding five-part test to be considered a “purely public charity” to be exempt from taxation: it must (a) advance a charitable purpose, (b) donate or render gratuitously a substantial portion of its services, (c) benefit a substantial and indefinite class of persons who are legitimate subjects of charity, (d) relieve the government of some of its burden, and (e) operate entirely free of the profit motive. *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985).

With state and municipal finances challenged by increasing demands for service in a declining economy (generating less tax revenue), the beneficiaries of state taxes (especially school districts that depend upon property taxes) have begun demanding that these criteria are satisfied, and to sue when the potential tax revenue is sufficiently significant. In February 2004, for example, the Illinois Department of Revenue revoked the tax-exempt status of Provena Covenant Medical Center of Urbana, stating that it did not believe the hospital was operating with a charitable purpose, a ruling that could force the hospital to pay \$1 million per year in local property taxes. See, Julie Appleby, *Scales Tipping Against Tax-exempt Hospitals: Critics Challenge Bill Collection, Charity Care, Salaries at Non-profits*, USA TODAY, Aug. 24, 2004, at B1. Even private high schools and public universities have been subject to this kind of attack. See e.g., *Pottstown Sch. Dist. v. Hill Sch.*, 786 A.2d 312, 319 (Pa. Commw. Ct. 2001) (holding that private high school was tax exempt); *Pa. State Univ. v. Derry Township Sch. Dist.*, 45 Pa. D. & C.4th 51, 58 (Pa. Commw. Ct. 2000) (holding that public university and medical center did not operate entirely free-from-profit motive, and therefore did not qualify as purely public charities for tax purposes); Michael Arnone, *Sinking Their Teeth Into Sacred Cows*, CHRON. HIGHER EDUC., Feb. 27, 2004, at A21.

levels of governments, even without regard to grants, arguably makes them more deserving of governmental oversight and control than publicly-traded companies, because it is the public's tax money, not that of private investors, that is being spent.¹¹ But as Senator Sarbanes has noted, Sarbanes-Oxley was not designed for non-profits, and the two worlds are clearly different.¹²

Whether Sarbanes-Oxley should be applied to non-profits in general, or to institutions of higher education in particular, will be decided by others. This article will explore the ways in which its "spirit" is consistent with the aspirations of academia, and suggest ways that colleges and universities—public as well as private—can implement the Act's "best practices" while minimizing the new (and substantial) burdens those practices can impose.¹³

I. SARBANES-OXLEY: AN OVERVIEW OF THE ACT

The purpose of the Sarbanes-Oxley Act of 2002 is simply stated: "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."¹⁴ The Act itself is not simply written: it is sixty-six pages long, has eleven Titles,¹⁵ and includes a "sense of the Senate" for good measure.¹⁶ It even includes three separately-named Acts, including the "Corporate and Criminal Fraud Accountability Act of 2002"¹⁷ and the "Corporate Fraud Accountability Act of 2002,"¹⁸ both of which add altering, hiding and destroying documents and otherwise interfering with investigations to the list of crimes for which corporate officers, agents, and employees can go to jail.¹⁹

It is not the purpose of this article to teach Sarbanes-Oxley, and it will therefore

11. See Constantine Papadakis, *Both Sides [Now]*, TRUSTEESHIP, Nov.–Dec. 2004, at 34 ("Colleges and universities must be held to a standard higher than corporations because in many ways they are more important to society. They last longer than corporations that come and go, and they receive substantial financial assistance directly through grants and tax exemption.").

12. Senator Paul S. Sarbanes, Sarbanes-Oxley and Ethical Principles of Corporate Behavior, Address at Drexel University's Bennett S. Lebow College of Business Lecture Series, available at <http://www.lebow.drexel.edu/events/sarbanes/sarbanesspeech.pdf> (May 14, 2004) [hereinafter Address of Senator Paul S. Sarbanes].

13. E.g., HIGHER EDUC. SPECIAL REPORT, *Sarbanes-Oxley: Voluntary Compliance Viewed as a Best Management Practice*, available at <http://www.fitchrating.com> (Jan. 27, 2004).

14. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. at 745 (Title clause).

15. The principal focus of the Act is the Securities Exchange Acts of 1933 and 1934, and Sarbanes-Oxley amends those Acts in more than twenty particulars. But the Act also amends Title 18 of the United States Code (crimes) to "law enforcement officers" in many respects. Among other things, the Act includes punishments for those who retaliate against those who provide information about violations of "federal law"—and this can arise within academia. See *infra* note 81 and accompanying text.

16. Sarbanes-Oxley Act § 1001 (not codified, but published as 15 U.S.C.A. § 78a note (1997 & West Supp. 2004)).

17. Sarbanes-Oxley Act § 801 (codified at 18 U.S.C.A. § 1501 (2000 & West Supp. 2004)).

18. *Id.* § 1101 (codified at 15 U.S.C.A. § 78a (1997 & West Supp. 2004)).

19. It should be noted that these two changes to the criminal law apply to all business entities, including not-for-profits. See *id.* § 1107 (codified at 18 U.S.C.A. § 1513(e) (2000 & West Supp. 2004)); *infra* notes 81–89 and accompanying text.

not analyze its structure or attempt to address all of its sections and implications; that can be left to the accountants and law firms that have already flooded our desks with invitations to attend educational (marketing) programs on the topic.²⁰ The bottom line for those in higher education is that Sarbanes-Oxley, by its terms, was not intended to apply to the non-profit world.²¹ The approach the Act takes to protecting investors, though, is of critical importance to non-profits, because it provides the keys to corporate accountability, which is the touchstone of the Act.²²

The Act can be divided into three parts: internal controls (exercised by management), external checks (performed by the board or external auditors), and investigations (triggered by whistleblowers or others). The relevant sections of the Act can be structured along these lines as follows:²³

1. INTERNAL CONTROLS

Sec. 302(a)(4,6). Corporate responsibility for financial reports [CEO Certification re: internal controls].

Sec. 307. Rules of professional responsibility for attorneys.

Sec. 402. Enhanced conflict of interest provisions.

Sec. 404(a). Management assessment of internal controls.

Sec. 406. Code of ethics for senior financial officers.

Sec. 1001. Sense of the Senate regarding the signing of corporate tax returns by

20. Because of its far-ranging implications for public companies, especially the very serious sanctions for non-compliance, Sarbanes-Oxley has been dubbed the "Lawyer and Accountant Relief Act of 2002." For those who wish to remain current with developments in the law, the American Bar Association is offering a three-volume, 1357-page, loose-leaf "Practitioner's Guide" that promises to "giv[e] you unique insight on today's governance *industry*." THE PRACTITIONER'S GUIDE TO THE SARBANES-OXLEY ACT (John J. Huber et al. eds., 2004) (emphasis added).

21. The Act is replete with indications of this intent. By way of example, the Public Company Accounting Oversight Board ("PCAOB") is given responsibility for implementing the Act. Sarbanes-Oxley Act § 101(a) (codified at 15 U.S.C.A. § 7211 (1998 & West Supp. 2004)). By its name, the Act applies only to "public companies," but its purpose makes its jurisdiction specific: "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." *Id.* The Sarbanes-Oxley Act additionally amends the Securities Acts to include recognition of accounting standards which are "necessary or appropriate in the public interest and for the protection of investors" and needed to "improv[e] the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws." *See id.* § 108 (codified at 15 U.S.C.A. § 7218 (1998 & West Supp. 2004)).

22. *See* Address of Senator Paul S. Sarbanes, *supra* note 12, at 1 (quoting Michael Granof, accounting professor at University of Texas):

The key to the law is accountability. Directors and senior executives must be answerable for what goes on in their organizations. The usual defense of being oblivious is no longer acceptable: senior executives must not only certify to the accuracy of their firm's financial statements, but they must also show that a system is in place to track and control costs.

23. With only very slight modification by the author, the following "Conceptual Map for Non-Profit Institutions" was developed by Paul N. Tanaka, university counsel for Iowa State University, for use at the 44th Annual Conference of the National Association of College and University Attorneys (June 2004). It is used with his permission.

chief executive officers.

2. EXTERNAL CHECKS

- Sec. 201. Services outside the scope of practice of auditors.
- Sec. 202. Preapproval requirements.
- Sec. 203. Audit partner rotation.
- Sec. 204. Auditor reports to audit committees.
- Sec. 206. Conflicts of interest.
- Sec. 301. Public company audit committees.
- Sec. 302(a)(3,5). Corporate responsibility for financial reports [CEO Certification of accuracy and full disclosure to auditors]
- Sec. 404(b). Management assessment of internal controls.
- Sec. 407. Disclosure of audit committee financial expert.
- Sec. 906. Corporate responsibility for financial reports.

3. INVESTIGATIONS

- Sec. 303. Improper influence on conduct of audits.
- Sec. 802. Criminal penalties for altering documents.
- Sec. 806. Protection for employees of publicly traded companies who provide evidence of fraud.
- Sec. 1102. Tampering with a record or otherwise impeding an official proceeding.
- Sec. 1107. Retaliation against informants.

This Article will address these three areas in turn, with specific reference to the interests and needs of higher education. It will conclude with some thoughts about why, and how, a college or university might adopt “the principles of Sarbanes-Oxley.”²⁴

24. According to Senator Sarbanes, Drexel University was “the first university to voluntarily adopt the best practices of the Sarbanes-Oxley legislation.” Address of Senator Paul S. Sarbanes, *supra* note 12, at 1. Their adoption came at the decision of the university’s president, Constantine Papadakis, Ph.D., in November 2002, who decided to “voluntarily adopt for the University those reforms that make sense for us.” Memorandum from President Constantine Papadakis, Ph.D., to Chair, Board of Trustees, Drexel University and Chair, Board of Trustees, Philadelphia Health & Education Corporation (“PHEC”) *available at* http://www.drexel.edu/papadakis/sarbanes/Pennoni_Chuck_111902_Sarbanes_Oxley.pdf (Nov. 15, 2002). In doing so, he explained, “While non-profit entities like PHEC and Drexel are not subject to Sarbanes-Oxley, I believe that both entities should pay heed to that Act, for two principal reasons: first, they make good sense and are likely to become viewed as ‘best practices’; and second, our auditors will likely be recommending them.” *Id.* Among other things, he instructed his legal staff to prepare appropriate amendments to the corporate bylaws and to draft a “whistleblower policy;” he asked his senior vice presidents for finance and institutional advancement to draft a code of conduct; and he announced that the university’s annual financial statements would be certified by himself and the university’s CFO. That same month, the chair of the university’s board of trustees, C.R. Pennoni, formed a special board committee on governance, compliance and audit, which spent ten months examining and addressing a wide variety of issues that were inspired by the Act’s principles of corporate integrity and

II. INTERNAL CONTROLS

Sarbanes-Oxley is not designed to rid businesses of corruption. It does not punish anyone for embezzling, wasting corporate assets, excessive compensation, or anything else.²⁵ Those rules, and punishments, lie elsewhere.²⁶ Instead, its goal is to encourage the earlier discovery and disclosure of corruption. Its method is to require businesses to have enough incentives and mechanisms in place to persuade persons who are generally lower in the organizational chart to disclose problems (and possible wrongdoing) to someone with greater authority.

accountability. Chaired by Drexel Trustee John J. Roberts, formerly a Global Managing Partner at PricewaterhouseCoopers, LLP, the committee's work resulted in amendments to the corporation's bylaws, a university-wide code of conduct applicable to all segments of the university "from new hire to the Chair of the Board of Trustees," the establishment of a "whistleblower hotline" and adoption of policies to encourage accountability and minimize conflicts of interest. DREXEL UNIV., CODE OF CONDUCT 18, *available at* <http://www.drexel.edu/hr/policies/OGC5.pdf> (last visited Mar. 20, 2005).

Before the passage of Sarbanes-Oxley, though, Drexel had already implemented many of the Act's "best practices." In particular, the board of trustees already had an independent Audit committee that had its own charter and, among other powers, the ability to retain lawyers, accountants, and other consultants at its sole discretion. The charter was written in large measure by the committee's chair, Randolph H. Waterfield, a certified public accountant and formerly a partner in Ernst & Young, LLP. Materials relating to Drexel's adoption of the best practices of Sarbanes-Oxley are available on the Drexel University website at <http://www.drexel.edu/papadakis/sarbanes>.

25. *But see* Sarbanes-Oxley Act § 806 (codified at 18 U.S.C.A. § 1514A(a) (2000 & West Supp. 2004)) (Protection for employees of publicly traded companies who provide evidence of fraud.) *Id.* § 1107 (codified at 18 U.S.C.A. § 1513(e) (2000 & West Supp. 2004)) (Retaliation against informants.); *Id.* § 802 (codified at 18 U.S.C.A. §§ 1519–20 (2000 & West Supp. 2004)) (Criminal penalties for altering documents.); *Id.* § 1102 (codified at 18 U.S.C.A. § 1512 (2000 & West Supp. 2004)) (Tampering with a record or otherwise impeding an official proceeding.).

26. The precursor to Sarbanes-Oxley in the non-profit world was the "intermediate sanctions" legislation enacted by Congress in July 1996. I.R.C. § 4958 (2000). Those rules impose taxes on "disqualified persons" who engage in "excess benefit transactions" with tax-exempt organizations. *Id.* § 4958(a)(1) (2000). The sanctions applied to transactions occurring on or after September 14, 1995; they were "intermediate" because they were less than revoking the institution's tax-exempt status. *Id.* They required scrutiny of compensation paid to "disqualified persons"—a class of persons that included not just senior administrative staff of the non-profit, but any voting member of its board of trustees. *Id.* An "excess benefit" existed "if the value of what the organization receives in return is less than the value of what it provides;" and a "disqualified person" was prohibited from receiving any "economic benefit" from a transaction in any way, "direct or indirect." *Id.* § 4958(c)(1)(A) (2002). Thus, any contractual relationship between a university and a member of its board of trustees was subject to scrutiny, to make sure the board member (or his company) was not being paid more than fair value for goods or services it sold to the university. This inspired many colleges and universities to develop policies requiring their trustees and officers to disclose actual or potential conflicts of interest, and, if not total prohibition, then procedures requiring independent verification of the objective fairness of the contract's compensation terms. The Treasury Department published its final regulations in early 2002, just months before Sarbanes-Oxley was signed into law. *See* 67 Fed. Reg. 3076 (Jan. 23, 2002) (to be codified at 26 C.F.R. pts. 53, 301, 602). This remains an issue of significant importance to non-profits, with the establishment of the IRS' Tax Exempt Compensation Enforcement Project in August 2004. *See supra* note 7.

A. Chief executive officers (“CEO”) and chief financial officers (“CFO”)

The process begins with accountability: someone must be responsible for vouching for the accuracy of the financial reports. Sarbanes-Oxley imposes this obligation on two individuals: “the principal executive officer or officers *and* the principal financial officer or officers, or persons performing similar functions.”²⁷ Both the president and the CFO are required to provide written certifications attesting to the completeness and accuracy of the reports that they are validating.²⁸ If the certifications are subsequently determined to be incomplete or wrong, the Act requires both officers to give back to the corporation any bonuses or equity they received, and all profits made on any of the company’s stock that they sold, within the twelve months prior to the date of the certification.²⁹ Of course, the corporation’s directors would be free to impose any other penalties they felt appropriate.

The new certification has six components, each of which is designed to ensure that the certification is meaningful:

1. The officer has “reviewed the report” (not just read it);
2. To the best of the signer’s knowledge, the report does not contain any untrue statement that is material, or neglect to include any fact that would help to make any statement in the report “not misleading;”
3. The information “fairly present[s] in all material respects” the financial condition and operations of the company;³⁰
4. The two officials have designed and implemented the “internal controls” that they believe are necessary to ensure that all material information (not just for the company, but for all of its “consolidated subsidiaries”) has been provided to them and included in the reports, and have tested those controls to see if they are working;
5. They have provided the results of their tests to the corporation’s independent auditors and the audit committee of the board of directors, and have identified any material weaknesses in the controls of which they have any knowledge; and,
6. They have disclosed in the report if there have been any significant changes since the date of the last such report, either in the internal controls or in any factors that could affect those controls.³¹

27. Sarbanes-Oxley Act § 302(a) (codified at 15 U.S.C.A. § 7241 (1998 & West Supp. 2004)) (emphasis added).

28. *Id.* § 302(a). The Senate also wanted the corporation’s chief executive officer to sign the corporation’s federal tax returns, but the House of Representatives declined such a dramatic expansion of personal liability. *See id.* § 1001 (codified at 15 U.S.C.A. § 78a (1997 & West Supp. 2004)).

29. *Id.* § 304(a) (codified at 15 U.S.C.A. § 7243 (1998 & West Supp. 2004)).

30. This requirement is not limited to all “consolidated” entities. The Act also requires disclosures relating to “off-balance sheet transactions”—i.e., relationships with “unconsolidated entities or other persons that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, *or* significant components of revenues or expenses.” *Id.* § 401(a), amend. (j) (codified at 15 U.S.C.A. § 78m (1997 & West Supp. 2004)).

31. *Id.* § 302(a)(1–6) (codified at 15 U.S.C.A. § 7241 (1998 & West Supp. 2004)).

Furthering the fourth requirement, the Act also requires that each annual report filed by the corporation include “an internal control report” which “state[s] the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and contain[s] an assessment of . . . effectiveness” of that structure and procedure.³² This report, in turn, must be evaluated by an independent public accounting firm, attesting to and reporting on “the assessment made by the management” as part of its annual audit.³³ The accounting firm is regulated by the Public Company Accounting Oversight Board (“PCAOB”), whose job it is to set standards for the public accounting firms, to “oversee the audit of public companies,” and audit the auditors.³⁴

As an academic statement, no one could fault the Act’s approach: the six components of the annual certification are the six basic questions that a chief financial officer or president would be asked under cross-examination by the lawyer representing the class in a securities fraud suit. They are the building blocks of competency. But like the speck of dust held by Horton, the simple words “internal controls” contain a universe. As listed by one consulting accounting firm that was proposing to help Drexel University comply with Sarbanes-Oxley, the financial functions requiring such “internal controls” included:³⁵

Accounts Payable	Endowment Accounting
Accounts Receivable	Financial Reporting
Auxiliary Accounting	Financial Systems and Operations
Capital Asset Management	Internal Audit
Cash Control	Investment Accounting
Contract and Grant Administration	Payroll
Construction Accounting	Plant Accounting
Debt Accounting	Purchasing
	Student Loans/Financial Aid

32. *Id.* § 404(a) (codified at 15 U.S.C.A. § 7262 (1997 & West Supp. 2004)).

33. *Id.* § 404(b) (codified at 15 U.S.C.A. § 7262 (1997 & West Supp. 2004)).

34. *Id.* § 101(a) (codified at 15 U.S.C.A. § 7211 (1997 & West Supp. 2004)). In this way, the Act answers the question, “Who watches the watchers?” Each public accounting firm is required to register with the PCAOB, including submission of “a statement of the quality control policies of the firm for its accounting and auditing practices.” *Id.* § 102(b)(2)(D) (codified at 15 U.S.C.A. § 7212 (1997 & West Supp. 2004)). The PCAOB establishes “such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports.” *Id.* § 103(a)(1) (codified at 15 U.S.C.A. § 7213 (1997 & West Supp. 2004)). The PCAOB has the jurisdiction to ensure that the accounting firm has diligently reviewed the adequacy of the public corporation’s internal controls (§ 103(a)(2)), to audit the accounting firms (§ 104), conduct investigations and disciplinary proceedings (§ 105), suspend or revoke the registration of the accounting firm and bar individuals from being associated with registered accounting firms (§ 105(3)), and impose fines of up to \$15 million for corporations (§ 105(c)(4)(D)), as well as to refer the matter to the appropriate federal authorities for prosecution under the criminal code.

35. Note that this list is not exhaustive; it is just what this particular consultant proposed to review.

For each process, the first step toward ensuring that adequate controls are in place is simply documentation of the current processes (“documentation”). Using these records, consultants will analyze each process to see what kinds of controls the system already has (“analysis”) and what is missing (“gap analysis”). Then they will determine what new controls are required (“diagnostics”), designing and installing what it lacks (“remediation”). Finally, consultants will test them (“validation”) and then audit them on an annual basis (or otherwise, as needed).³⁶ At our option, the consultants were also willing to compare our controls to those of our peers (“benchmarking”). Thus, the origins of the name “Auditors Relief Act of 2002.”³⁷

Such a huge undertaking will take thousands of hours of staff time and hundreds of thousands of dollars in consultant fees and expenses. With administrative staffs already at their minima and little flexibility in budgets, it will be the rare president who agrees to perform this level of review and remediation on systems that do not appear to be broken or, if they are, that are costing the college or university so little. But what Sarbanes-Oxley has done for academia is make explicit the assumptions behind the presentation of financial statements, and challenge institutional leadership at least to make a reasonable inquiry into the accuracy of those assumptions.

Given this roadmap, a prudent president will assess the institution’s financial systems to identify the areas in which it is most at risk for holes and “disloyal” conduct. Are there written policies specifying the amount of money that different levels of employees can spend and whose signatures are required on contracts of different dollar values or risks?³⁸ Are those who buy or those who handle the institution’s cash sufficiently trained and supervised? In academia, purchasing authority is often decentralized, with departments having the ability to spend their budgets as they see fit—is there review and oversight at that level? While consultants may be helpful to some degree, an institution’s senior administrative staff can undoubtedly do a good job of identifying the areas of risk on their own.

36. Sarbanes-Oxley does not allow the same auditors to both design/implement these systems and then audit them. Sarbanes-Oxley Act § 201(a) (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)). The job of auditing the new systems would have to be handed off to the institution’s independent auditors, whose annual fee would be adjusted accordingly.

37. The consultant’s proposal did not include the Drexel University College of Medicine, a subsidiary corporation. The College of Medicine has twenty-three different departments, each of which is involved with patient billings and/or grant revenues. Under Sarbanes-Oxley, the president and chief financial officer of the parent corporation are responsible for certifying the adequacy of the controls employed in all “consolidated subsidiaries.” Sarbanes-Oxley Act § 302(a)(4)(B) (codified at 15 U.S.C.A. § 7241 (1997 & West Supp. 2004)). Thus, even if Drexel University had engaged the consultant for the whole of the scope of work it proposed, the result would have been inadequate to meet the requirements of Sarbanes-Oxley.

38. Many institutions have established “approval authority” guidelines that relate to purchases, where the dollar value of the transaction is apparent and where the budget serves as an internal control through its line items. The more difficult cases involve contracts where an institution agrees to indemnify, defend, or waive claims for consequential damages. Furthermore, the delegation of signature authority comes typically from the president, who specifies the limits of that authority. But has the board imposed any limits on the president? Are operating expenses treated the same as capital expenses, e.g., construction projects, deferred maintenance, and the lease or purchase of land?

The president and CFO can then locate the areas that pose the greatest risk, in dollars and reputation, and focus resources on those risks, in an organized approach. If that is done, and made the subject to review by the board of trustees, then the spirit of Sarbanes-Oxley has been adopted.³⁹

B. Codes of Conduct

Beyond the processes are the personnel. Sarbanes-Oxley requires that each regulated corporation have an agreed-upon statement of what constitutes acceptable behavior. The Act encourages each regulated corporation to adopt and publish a “code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.”⁴⁰ The Act expects that such codes will require compliance with all applicable laws and regulations;⁴¹ that is the easy part. It also seeks to impose on corporations and their officers the “ethical” duty to ensure that all financial reports are “full, fair, accurate, timely, and understandable.”⁴² This is a call to reform the culture of business—a call that is more likely to be welcome in academia than Wall Street, where “shared governance” is not the dominant operating principle.

More than this, though, Congress expressed its hope that such codes would “promote . . . honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships.”⁴³ Many professional associations, including NACUBO, have offered sample codes that call on financial officers to act with the highest integrity.⁴⁴ But other than establishing a tone, they typically do not provide much instruction; and unless there is commitment at the highest levels of the administration to enforce their terms,⁴⁵ they can be perceived as meaningless, thereby eviscerating their only purpose.⁴⁶

39. This process does not require certification. Governing boards, however, would undoubtedly appreciate notice that the president had undertaken this review and attempted to ensure that the areas of greatest financial risk to the institution were being addressed. This is an appropriate conversation to include with each annual or quarterly report made by the president to the board. *See* Sarbanes-Oxley Act § 302(a) (codified at 15 U.S.C.A. § 7241 (1997 & West Supp. 2004)).

40. *Id.* § 406(a) (codified at 15 U.S.C.A. § 7264 (1998 & West Supp. 2004)). More precisely, the Act requires that the Securities and Exchange Commission issue rules that will require each corporation to “disclose” in its public filings whether it “has adopted” such a code and, if not, “the reason therefor.” *Id.* The law itself does not contain any penalties for not adopting such codes.

41. *Id.* § 406(c)(3) (codified at 15 U.S.C.A. § 7264 (1998 & West Supp. 2004)). Note, however, that this is listed as the last of the three components.

42. *Id.* § 406(c)(2) (codified at 15 U.S.C.A. § 7264 (1998 & West Supp. 2004)).

43. *Id.* § 406(c)(1) (codified at 15 U.S.C.A. § 7264 (1998 & West Supp. 2004)).

44. NACUBO, *supra* note 8, at 11.

45. Sarbanes-Oxley does not require enforcement mechanisms for codes of ethics.

46. Here is one such provision, taken from Drexel’s Code of Ethics for Senior Financial Executives:

The executive’s ethics shall reflect due regard for possible conflicts of interest. He or she shall be prepared to assist in the clarification, disclosure, and ethical handling of

Unlike private business, higher education has a second domain in which money might corrupt: fundraising. Those who obtain grants from government agencies are already subject to strict conflict of interest rules and reporting requirements;⁴⁷ but no such regulations exist for those who seek to raise money from “friends of the university.” Is it “ethical” or acceptable to condition the decision to invest university funds in a specific fund or with a certain investment advisor only on the condition (express or implied) that the advisor or fund makes a contribution to the university? “Quid pro quo” might work in business; but does it work in academia? Deciding to have a “code of ethics,” in the spirit of Sarbanes-Oxley, may well inspire debates that might otherwise never have occurred, and lead to new rules that will be statements of high calling, but deleterious either to the institution’s bottom line or to its sense of self.

C. Beyond the Money

The objective of ethical conduct will undoubtedly resonate well in higher education, where the absence of strife and bias (or at least the full disclosure of interest and bias) is a cornerstone of academic integrity. The “principles of Sarbanes-Oxley,” then, may inspire colleges and universities to formulate policies relating to conflicts of interest and commitment⁴⁸ and codes of conduct that apply

possible real or apparent conflicts of interest that may arise in the institution. To this end, each executive shall refrain from accepting duties, incurring obligations, accepting gifts or favors of monetary value, or engaging in private business or professional activities where there is, or would appear to be, a conflict between the executive’s private interests and the interests of the institution.

DREXEL UNIV., CODE OF ETHICS FOR SENIOR EXECUTIVE OFFICIALS, *available at* http://www.drexel.edu/papadakis/sarbanes/MEMO_TO_EMPLOYEES.pdf (last visited Mar. 20, 2005). But crafting such codes is a complex task. The quoted language suggests, for example, that a CFO does not need to disclose any conflicts; he just needs to be “prepared to assist” in their disclosure. Is it up to the financial officer to decide if there is, or might be, a conflict of interest?

Another example from the same code: “The executive shall be dedicated to exercising his or her special competence and knowledge to ensure the most effective use of institutional resources, and shall be prepared to work with others in the institution to this end.” *Id.* Why not “shall exercise” and “shall work?” And when the CFO does not work well with others (i.e., violates the Code) and is not sanctioned by the president for this “violation,” what message is then sent to everyone else in the department about the university’s “ethical” commitment?

With a (tenured) faculty predisposed to providing immediate and critical analysis—a situation totally foreign to most for-profit corporations—a university ought to be careful before adopting a code of ethics.

47. The rules issued by the National Institutes of Health (“NIH”) provide ready examples of these requirements. *See, e.g., NIH, Objectivity in Research*, ¶ 7, *available at* <http://grants2.nih.gov/grants/guide/notice-files/not95-179.html> (July 14, 1995); NIH, OFFICE OF EXTRAMURAL RESEARCH, *NIH Medical & Behavioral Research Grant Policies, Guidelines & Funding Opportunities*, *at* <http://grants2.nih.gov/grants/oer.htm> (last modified Feb. 2, 2005). For a general review, see NIH, *Conflict of Interest Information and Resources*, *at* http://www.nih.gov/about/ethics_COI.htm (last reviewed Feb. 14, 2005).

48. In the for-profit world, the issues are conflicts of interest. *See Sarbanes-Oxley Act* § 402 (codified at 15 U.S.C.A. § 78m (1997 & West Supp. 2004)). In the not-for-profit world, however, it is the organization’s mission that is critical. For that reason, many universities (including Drexel) have policies on “conflicts of interest *and commitment*” and require employees to act in the best interests of the university—a concept that can be very difficult to define in

to the entire university community, not just to those who handle the money. Indeed, unlike for-profits, it is not “all about the money” for non-profits; more often, it is all about the organization’s good name. Colleges and universities live and die on the basis of their reputations. Good faculty and good students will not go to bad places; alumni/ae and foundations will not give them gifts; government agencies and corporations will not give them grants; and scandal corrodes collegiality like almost nothing else.

Anyone who reads *The Chronicle of Higher Education* for any period of time will see what really matters in higher education: resume fraud by a president or a coach,⁴⁹ misconduct involving a student,⁵⁰ fundraising for political candidates,⁵¹ dishonesty (plagiarism or fabrication) by an administrator, teacher, or researcher,⁵²

particular instances. See DREXEL UNIV. CONFLICT OF INTEREST AND COMMITMENT POLICY, available at http://www.drexel.edu/provost/policies/conflict_of_interest.asp (last modified Nov. 16, 2004). In academia, where the hypothetical rules, debates about “conflicts of commitment” can be expected to delay adoption of any policy. The well-established “duty of loyalty” that an employee clearly owes to her employer at law will be understood by faculty as a “loyalty oath” that is both insulting to be requested, and never to be given. Thus, the process by which a conflict of interest policy is developed and imposed requires most careful attention. As is often the case in academia, the process may well determine the product.

49. See Julianne Basinger, *4 Years After a Scandal, a President Steps Down*, CHRON. HIGHER EDUC., Mar. 5, 2004, at A23:

Academe also has done some soul-searching in recent years reacting to questions that have arisen about the credentials of coaches and professors. In late 2001, a reporter discovered inaccuracies in the official biography of the University of Notre Dame’s new football coach, George J. O’Leary, and he was fired after only five days on the job. That incident touched off a wave of résumé-checking that ended up putting a few more coaches out of work. Professors, too, have come under fire, including Joseph J. Ellis, a Pulitzer Prize-winning historian at Mount Holyoke College who claimed a military record in the Vietnam War that he never had, and Quincy Troupe, a poet who retired as a professor at the University of California at San Diego last June after it was discovered that he had lied about having a college degree.

See also, Welch Suggs, *U. of Louisiana at Lafayette Fires Coach Over Diploma-Mill Degrees*, CHRON. HIGHER EDUC., July 30, 2004, at A27 (discussing the firing of University of Louisiana at Lafayette’s men’s basketball coach for claiming degrees which he had not received).

50. A sexual relationship is the easiest to imagine, but the opportunities for professional misconduct are plentiful. For example, during the summer of 2004, nearby LaSalle University (Pennsylvania) was rocked by the allegation that two coaches had discouraged one student (or more) from reporting a possible rape by an athlete. Welch Suggs, *La Salle U. Suspends 2 Basketball Coaches Amid Probe of Rape Charges Against Players*, CHRON. HIGHER EDUC., July 23, 2004, at A33. The university’s president acted promptly and properly; both coaches immediately took leaves of absence and later resigned from the university. *Id.* But is there any doubt at all that the university will feel the repercussions for years, from losing potential student applicants and alumni financial support, to receiving greater oversight by the trustees and accrediting bodies? How many times will LaSalle’s name now be included in articles about misconduct with students?

51. See Scott Smallwood & Alice Gomstyn, *Peer Review*, CHRON. HIGHER EDUC., Oct. 24, 2003, at A8 (focusing on the resignation of the president of University of South Florida’s College of Medicine following criticism for asking staff members to contribute to a U.S. senatorial campaign).

52. The president of Hamilton College resigned after it came to light that in a number of instances he had used plagiarized material in speeches he had delivered in the nine years since assuming office. Maurice Isserman, *Plagiarism: A Lie of the Mind*, CHRON. HIGHER EDUC., May

self-dealing by members of the board of trustees.⁵³ The opportunities for public embarrassment are seemingly endless, primarily because so many people associated with the institution can cause it harm. For that reason, if they are thinking about codes of conduct, colleges and universities would perhaps do a better job of risk management by attending to all conduct that could cause it material harm,⁵⁴ not just financial loss.⁵⁵

III. EXTERNAL CHECKS

Sarbanes-Oxley does not rest with imposing new requirements on a corporation's management and giving new powers to government prosecutors to enforce compliance. Instead, it totally rewrote the obligations of those who are in a good position (if not the best) to check up on management: the board of directors and the external (independent) auditors. The Act now puts them at personal risk if a corporation under their review misrepresents its financial condition or otherwise violates the disclosure laws.

A. Independent Auditors

Colleges and universities are not generally required to obtain independent review of their financial statements,⁵⁶ so many do not even engage outside auditors

2, 2003, at B12.

53. See Julianne Basinger, *Boards Crack Down on Members' Insider Deals*, CHRON. HIGHER EDUC., Feb. 6, 2004, at A1.

54. Before Sarbanes-Oxley, Drexel University had a published policy on conflicts of interest and commitment, under which each employee with the ability to obligate the university was required to submit a signed statement once each year, either confirming the absence of any such actual or potential conflicts, or disclosing them. DREXEL UNIV. CONFLICT OF INTEREST AND COMMITMENT POLICY, available at http://www.drexel.edu/provost/policies/conflict_of_interest.asp (last modified Nov. 16, 2004). The passage of Sarbanes-Oxley prompted Drexel's board of trustees to call for the creation of a more comprehensive code of conduct, which would provide a single reference point for the behaviors that the university expected of its "members" (which term included those who did business with the university, as well as its employees and trustees). That code was written by a university-wide advisory committee (consisting of faculty, staff, and administrators), reviewed by the faculty senate, and adopted by the board of trustees in December 2003. DREXEL UNIV. BD. OF TRUSTEES QUARTERLY MEETING, available at http://www.drexel.edu/papadakis/sarbanes/r_code_of_conduct.pdf (Dec. 17, 2003).

55. This is not to suggest that academia does not have its share of problems related to the misuse of funds. See, e.g., Karen Fisher, *The University of North Carolina System has Taken Charge of Financial Matters at the North Carolina School of the Arts*, CHRON. HIGHER EDUC., Nov. 26, 2004, at A19 (discussing an audit that revealed that "nearly \$1 million had been diverted to non-academic uses"); Joann S. Lublin, *Travel Expenses Prompt Yale To Force Out Institute Chief*, WALL STREET J., Jan. 10, 2005, at B1; Piper Fogg, *Grant-Theft Auto*, CHRON. HIGHER EDUC., Feb. 4, 2005, at A7 (involving faculty member at George Washington University who was charged with embezzling almost \$600,000 in federal grant money); Erin Strout, *Iowa State Restores Misspent Donation*, CHRON. HIGHER EDUC., March 11, 2005, at A29; John Gravois, *Yale Forces Out Tenured Professor for 'Financial Misconduct'*, CHRON. HIGHER EDUC., Jan. 21, 2005, at A10; Paul Fain, *Former Morris Brown President Indicted*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A35.

56. Institutions receiving over \$500,000 in federal funds are required to have an A-133 Audit. See Circular No. A-133, 68 Fed. Reg. 38,401 (June 27, 2003).

to validate their annual financial statements. If “the spirit of Sarbanes-Oxley” means anything, it probably requires at least this much.⁵⁷ No amount of oversight by even the best intentioned boards of trustees (or trustee audit committee) can match the expert analysis provided by accounting firms of the financial condition of a corporation. Surely it is a “best practice” of business to get an independent, expert review of the company’s financial books and records once each year.⁵⁸

Testimony given to the Senate Banking Committee confirmed that the accountants who had been auditing public companies had “fallen asleep at the switch” as a result of long, comfortable relationships with their clients.⁵⁹ For that reason, the Act imposed a series of new rules on the auditors who were certifying the financial reports, such as: the lead engagement partner must be rotated at least every five years,⁶⁰ the audit firm cannot provide most “non-audit service[s],”⁶¹ and the audit firm cannot work at all for a company whose senior financial staff includes anyone who worked on the company’s audit within the past year while then employed by the audit company.⁶² These rules are designed to ensure “auditor independence”⁶³ and to reduce the possibility that the auditor upon whom the public depended for accurate information would become “too close” or “too loyal” to the subject of its audit.⁶⁴

In reality, few colleges and universities are going to be all that important to public accounting firms, and it is unlikely that any lead auditor would compromise his or her judgment to “save the account;” so the rules that Sarbanes-Oxley imposes on outside auditors have little urgency for academia. The Act does

57. If a college or university is unable to provide this level of review, the board should at least retain a certified public accountant to serve as its consultant and receive advice on what it should be looking for when it reviews the financial statements prepared by management. See *infra* note 75 and accompanying text.

58. Accounting firms do provide different levels of reviews. Certifying the financial statements provides the highest level of review, and the greatest level of confidence in the accuracy of the reports, but it is also the most expensive. Less-extensive and expensive examinations include “compilations” and “reviews.” For further information, visit the website of the American Institute of Certified Public Accountants at www.aicpa.org.

59. Address of Senator Paul S. Sarbanes, *supra* note 12, at 3.

60. Sarbanes-Oxley Act § 203 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)). Beyond this, the Act instructs the Comptroller General to review whether audit *firms* ought to be rotated periodically. *Id.* § 207 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)) (emphasis added).

61. *Id.* § 201 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)).

62. *Id.* § 206 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)).

63. The responsibility owed by independent auditors to the public has been part of the law for more than twenty years. In 1984, the Supreme Court noted:

By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. . . . This ‘public watchdog’ function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

United States v. Arthur Young, 465 U.S. 805, 817–18 (1984).

64. The fact that Sarbanes-Oxley will not eliminate questionable or improper conduct, or ensure that directors act properly, is easily demonstrable. See, e.g., Jonathan Weil & Joann S. Lublin, *TIAA-CREF Faces Questions On Governance: Fund’s Brass Failed to Inform Key Panel About Improper Deal With Ernst, Its Outside Auditor*, WALL ST. J., Dec. 6, 2004, at C1.

suggest, however, that those receiving and reviewing the outside auditor's reports should consider, from time to time, whether some change in the external auditor ought to be made to ensure objectivity and independence.

B. Board Audit Committee

All an auditing firm does is report. It needs someone to report to. The Act requires that the independent auditor report to the board's audit committee or, if there is none, to the full board of directors.⁶⁵ While the Act does not require there to be a separate audit committee, it is very likely that most boards will create such committees, for one reason: the Act threatens the members of the audit committee with personal liability for misfeasance. This is not directly stated in the Act; rather, all the Act does is require that all of this information about the true financial condition of the company go to the audit committee, which the Act makes "*directly responsible* for the appointment, compensation, and oversight of the work of [the outside auditor]."⁶⁶ At that point, the law takes over: what would a prudent person do if he or she had this information and was charged with that responsibility? Because the amount of information will be large, and largely technical, and because it will take a substantial amount of time and knowledge to master those data,⁶⁷ it is predictable that most directors will want a special audit committee to be created;⁶⁸ and it is probably wise for college and university boards to do so.⁶⁹

The Act imposes on the board (and audit committee) the same, common-sense rules that it imposes on management: there cannot be any conflicts of interest, and there must be some expertise in (or available to) the board in reviewing financial matters.⁷⁰ Further, all members of the board are required to disclose any ownership interest they have directly or indirectly in the company.⁷¹ No member

65. Sarbanes-Oxley Act § 204 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)); *Id.* § 205 (codified at 15 U.S.C.A. § 78c(a) (1997 & West Supp. 2004)).

66. *Id.* § 301 (codified at 15 U.S.C.A. § 78F(m)(2) (1997 & West Supp. 2004)) (emphasis added).

67. Many boards will offer training to the members of their audit committees. No matter how much training is given, no trustee—especially a volunteer without financial expertise—is likely to feel that the training is enough to make him or her into an expert.

68. Boards might be tempted to add "audit" to the jurisdiction of its finance committee, because those with expertise in business matters most likely serve on that committee. But the audit function is intended to be a check on the spending (finance) function. For that reason, combining the two functions into one board committee would be a step in the right direction, but not full adoption of the spirit of Sarbanes-Oxley.

69. It is typical for board bylaws to include a provision indemnifying trustees (and others) for acts within the scope of their duties. Some even provide for the advancement of costs. This contractual right, however, does not prevent the claim from being asserted, which exposes the trustee to the risk of reputational injury. Whether the college or university can pay, and whether the institution's insurance covers the claim, are other considerations. Finally, college and university bylaws often do not provide indemnity in the case of "gross negligence" (and some state laws do not even permit such agreements). Many trustees will not be gifted, expert, or even experienced in reading financial statements. What does "gross negligence" mean for them? Is it enough for them simply to attend all meetings and rely upon the one "financial expert" to ask all the right questions?

70. Sarbanes-Oxley Act § 101 (codified at 15 U.S.C.A. § 7211 (1997 & West Supp. 2004)).

71. *Id.* § 403(a) (codified at 15 U.S.C.A. § 78p (1997 & West Supp. 2004)).

of the board that is “affiliated” with or working for the company can serve on the audit committee.⁷² And, although not required, the Act provides that an audit committee should have “at least 1 member who is a financial expert”⁷³—that is:

[A] person [who] has, through education and experience as a public accountant or auditor or a principal financial officer, comptroller, or principal accounting officer . . .

- (1) an understanding of generally accepted accounting principles and financial statements;
- (2) experience in –
 - (a) the preparation or auditing of financial statements of generally comparable issuers; and
 - (b) the application of such principles in connection with the accounting for estimates, accruals, and reserves;
- (3) experience with internal accounting controls; and,
- (4) an understanding of audit committee functions.⁷⁴

As with the other parts of Sarbanes-Oxley, these requirements make eminent sense. Perhaps in publicly-traded corporations, where the directors are well compensated and drawn from similar entities, there is some chance of getting this one person on the board and appointing her to the audit committee. But does this practice make sense in academia?

At public colleges and universities, the trustees are assigned to the board by persons or officials outside the institution’s control; at private colleges and universities, they are appointed or elected for a variety of purposes (including honor and recognition); but even where there is discretion over whom to appoint, and even if there were someone in the community with the requisite expertise who had the requisite commitment to higher education and the willingness to volunteer, few indeed would accept this honor when it came with the threat of personal liability for providing poor oversight over the institution’s finances.

The Act does provide some support for the members of the committee: it requires that the audit committee be given the power to hire “independent counsel and other advisors, as it determines necessary to carry out its duties.”⁷⁵ This is

72. *Id.* § 301 (codified at 15 U.S.C.A. § 78j-1 (1997 & West Supp. 2004)). Note that this includes the president, who is often a member of all board committees.

73. *Id.* § 407 (codified at 15 U.S.C.A. § 7265 (1997 & West Supp. 2004)). If the audit committee does not have such a member, it must provide a written statement of the reasons that it does not. *Id.*

74. *Id.* § 407(b) (codified at 15 U.S.C.A. § 7265 (1997 & West Supp. 2004)) (emphasis added).

75. *Id.* § 301. Note that this does include the authority to directly hire attorneys. That power may be critical in the event that the committee decides to investigate alleged misconduct by the president or any senior administration official who may be a peer of, or superior to, the university’s general counsel. Performing investigations through counsel, instead of through internal audit staff (for example), will often extend a cloak of confidentiality to the process and results—both desirable for the college or university.

similar to the authority the Act gives to hire an independent auditor.⁷⁶ In academia, then, if the college or university does not employ an independent auditor to review the financial books and records, the college or university's audit committee (or full board) should retain a certified public accountant to advise it on how it should go about confirming the accuracy of the statements. Such "contracted expertise" at least begins the process of independent review that the Act would demand if a college or university was a publicly traded corporation.

Ultimately, though, it is the full board (and not just one of its committees) that bears the responsibility for governing the institution and ensuring the transparency, accuracy, and accountability of its operations.⁷⁷ The members are intended to serve as a check on the president and senior management. But who picks the board? If the president plays a dominant role in that process and succeeds in having supporters elected to the board, the same risks of over-familiarity are spawned. The public depends upon the trustees to ask the "hard questions" and challenge the president. For this reason, the board should also strive to ensure appropriate separation from the president, in both the nomination of trustees and the review of the president's performance and compensation.⁷⁸

The obligation imposed on the board audit committee by Sarbanes-Oxley does not end with reviewing what management and the external auditor provide. In addition to this "formal" reporting system, the Act seeks to encourage (and enable) the lower-level employee to bring their problems, complaints and "concerns" to their superior's attention and, if need be, directly to the audit committee.⁷⁹

C. Hotlines

Board audit committees must establish "procedures for . . . the receipt, retention, and treatment of complaints . . . regarding accounting, internal accounting controls, or auditing matters [and for] the confidential, anonymous submission by employees . . . of concerns regarding questionable accounting or auditing matters."⁸⁰ The requirements of confidentiality and anonymity include within them the protection of whistleblowers from retaliation—something that the Act specifically requires with respect to allegations of fraud.⁸¹

76. *Id.* § 301.

77. If a member of the board does not get the information that he or she needs to satisfy this obligation, the appropriate response is for the member to resign. See Pamela Gaynor, *O'Neill's Exit Stirs Criticism of UPMC*, PITTSBURGH POST-GAZETTE, Dec. 10, 2004 (reporting on the resignation of former U.S. Treasury Secretary Paul O'Neill from the board of directors of the University of Pittsburgh Medical Center, who noted "he often felt he needed far more information that he was given to fulfill the responsibilities of a director"; as if to prove the point, the fact of his resignation was not released to the other members of the board, or the public, for three months).

78. See *supra* notes 7 and 26 and accompanying text. There is no doubt that the quality of the people sitting on the board affects the institution's credibility. See, e.g., Gaynor, *supra* note 77, at A1.

79. Sarbanes-Oxley Act § 301; *Id.* § 806 (codified at 18 U.S.C.A. § 1514A(a) (2000 & West Supp. 2004)).

80. *Id.* § 301.

81. *Id.* § 806. The Act also makes it a crime to retaliate against anyone who provides any "law enforcement officer" any "truthful information" about the "commission or possible

Whistleblowers and hotlines are subjects warranting their own articles.⁸² The existence of a hotline may give disaffected employees just another way to complain; policies protecting whistleblowers will undoubtedly prompt employees on the verge of termination to call to report improper conduct (and thereby invoke the protections against retaliation that the law requires);⁸³ and the promise of confidentiality might create a new contractual obligation that can result in a suit for damages if the caller is later identified (a likely result in departments that are small). Needless to say, the rights of whistleblowers are still being defined by the courts, and they can substantially complicate procedures that the university might already have in place.⁸⁴ Even so, they are probably an indispensable element of the integrity of the system, if the college or university is serious about making its managers accountable for their actions. Without a hotline and policies protecting those who call, it is expecting too much of subordinates to ask (or require) them to report on their supervisors or the senior officers of the college or university.⁸⁵

commission” of any violation of any federal law. *Id.* § 1107 (codified at 18 U.S.C.A. § 1513(e) (2000 & West Supp. 2004)). The law forbids taking “any action harmful to [the whistleblower], including interference with [his or her] lawful employment or livelihood.” *Id.* This amendment *does apply* to academia, as it applies to *all* persons and *all* federal laws. *Id.* Given the expansive definitions of “mail fraud” and “wire fraud,” and the federal rights afforded to employees against discrimination, it is very likely that complaints to the hotline will implicate “federal law.” The crime, though, comes only in providing information to “law enforcement officers”—and the definition of “law enforcement officer” does not include the person who answers the hotline. But query whether it applies to the Equal Opportunity Commission and complaints made to it of violations of federal anti-discrimination laws.

82. See, e.g., Christopher Westfall, *Whistleblower Rules Become a World Into Itself*, KPMG AUDIT COMM. INSIGHTS, available at http://www.kpmginsights.com/aci/display_aci_analysis.asp?intAnalysisTypeID=1&intInsightsTypeID=1&edition_id=4628&content_id=442569 (June 30, 2004).

83. Cf. Allison S. Wellner, *A Battle Over Ethics*, CHRON. PHILANTHROPY, Aug. 5, 2004, at 36 (involving an employee of Western University of Health Science who was fired and subsequently sued by the university for reporting potentially fraudulent practices to the IRS and state attorney general.) The university, believing itself the victim of a disgruntled former employee, argued that the employee made the allegations in order to obtain a better contract for a friend and in an effort to disrupt a planned merger. *Id.*

84. In the first reported decision involving a whistleblower, a corporate CFO asked to have an attorney present when he was questioned about allegations that he had made. See Molly McDonough, *Fired CFO Wins Early Sarbanes Claim*, A.B.A. J. EREPORT, Feb. 15, 2004, available at http://www.moreombudsman.com/cfo_win.asp. When that request was denied on the ground that it would destroy the confidentiality of the investigation, the CFO refused to attend the meeting. *Id.* Fired for insubordination, he successfully sued and was awarded back pay plus compensatory damages. *Id.* It does not take much effort to imagine the effect this series of events had on the working relationship in that office. *Id.*

85. See Alison Stein Wellner, *In the Trenches: How Whistle-Blower Policies Protect Charity Workers Who Report Ethics Lapses*, CHRON. OF PHILANTHROPY, Apr. 15, 2004, available at <http://philanthropy.com/jobs/2004/04/29/20040429-293229.htm>. The article discusses the use of such a hotline at Drexel University:

Since its inception, the hot line has received about two telephone calls per month, says Dr. Papadakis [President of Drexel University]. Callers are not restricted from discussing any subject, he says, and about half of the calls have been on personnel issues -- for example, one caller complained about not receiving a promotion. Other calls were about more substantive matters, such as unauthorized access to the university's computer system, and a suspected irregularity in the hiring of a contractor.

In addition to encouraging employees to make full and prompt disclosures of questionable conduct, the Act makes it a crime to “alter[], destroy[], mutilate[], or conceal[]”⁸⁶ or “cover[] up, falsif[y], or make a false entry in”⁸⁷ a “record, document, or other object,”⁸⁸ or attempt to do so, “or otherwise obstruct[], influence[], or impede[] any official proceeding.”⁸⁹ These crimes are limited to specific circumstances involving the securities laws or federal investigations, so they are not directly applicable; but they make the point that whatever a college or university does to adopt the spirit of Sarbanes-Oxley, it must think about how to preserve data once an investigation begins.⁹⁰ It is a “best practice” for many reasons to have a document retention (or document destruction) policy; but the college or university should remember to suspend that policy, specifically, once an investigation begins, and to impose sanctions if data is destroyed.⁹¹

D. New Rules for Attorneys

Finally, the Act imposes new duties upon lawyers. Any attorney working for a regulated corporation (by employment or engagement) is required “to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or

In each case, there has been an investigation. Thus far, no impropriety has been uncovered. ‘But this is a great way to communicate,’ Dr. Papadakis says. Without the hot line, he notes, ‘the information would not have come through, because the person was worried, or didn’t want to do be identified, and we would have missed their contribution.’

Id.

86. Sarbanes-Oxley Act § 1102 (codified at 18 U.S.C.A. § 1512 (2000 & West Supp. 2004)).

87. *Id.* § 802 (codified at 18 U.S.C.A. § 1519 (2000 & West Supp. 2004)).

88. *Id.* § 1102.

89. *Id.* § 1102. Note that this prohibition applies not only to *existing* “official proceedings,” but to proceedings that might later occur (the “official proceeding” need not even be “about to be instituted”).

90. Indeed, the university may need to establish procedures on how such investigations should be conducted. When should the president (not) be told?

91. Under well-established principles of common law, destruction of documents (and other types of proof) leads to the presumption that whatever was destroyed was adverse to the interest of the person who destroyed it:

The spoliation of papers and the destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him. This principle has been applied in a great variety of cases, and it is now so well established that it is unnecessary to do more than state it.

McHugh v. McHugh, 40 A. 410, 411 (Pa. 1898), *cited with approval by*, Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d 1038, 1050 (Pa. Commw. Ct. 1997). The destruction of evidence may also give rise to an independent cause of action for spoliation. *See e.g.*, M.L. v. Univ. of Pittsburgh, 26 Pa. D. & C.4th 106 (Pa. Commw. Ct. 1995) (allowing claim against fraternity for its destruction of the guest list for one of its parties, to impede the plaintiff from identifying her attackers) *questioned by* Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 67 n. 3 (Pa. Super. Ct. 1998) (noting that while a few Pennsylvania trial courts have embraced spoliation of evidence as a separate cause of action other Pennsylvania trial courts have refused to recognize it as a separate tort).

the chief executive officer of the company (or the equivalent thereof.)”⁹² What does “material” mean when applied to “breach of fiduciary duty”? When a trustee misses more than half of the meetings of the board committee on student life, that is probably a material breach of the obligation owed to the board, but it is probably not material to the health of the institution. But if that question is difficult to answer, what constitutes a “[material] breach” of a “similar obligation”? And how far does “agency” go in this context (as opposed to tort liability, for example)?

If the general counsel (or chief executive officer) “does not appropriately respond” with “appropriate . . . measures or sanctions” (presumably in the personal judgment of the reporter), the attorney is required “to report the evidence to the audit committee of the board . . . or to another committee of the board of directors comprised solely of directors not employed directly or indirectly” by the corporation.⁹³ How often do lawyers entirely agree with each other? Their ability to look at things from any angle and create arguments is what protects clients. In law firms, partners get the final word over associates, department chairs over all partners within their department. For colleges and universities that have legal staffs, the general counsel is the final word. But the Act allows no such deference to experience or authority: the junior attorney is charged with the obligation to go directly to the trustees if he or she does not think the general counsel (or president) has acted “appropriately.”⁹⁴

When it is “all about the money,” the questions are fewer and perhaps easier to answer. In academia, though, the spirit of Sarbanes-Oxley requires a sensitivity to “big issues” that can arise in many contexts, and a common understanding by all attorneys who work for it (perhaps addressed in the retainer letter and written office policy) of the duty promptly to disclose actions of questionable integrity.⁹⁵

IV. ADOPTING THE SPIRIT OF SARBANES-OXLEY

No college or university should blindly “adopt” Sarbanes-Oxley. Once that is done, or once that impression is given, the expectation will be created that the college or university will comply with the same requirements that are applicable to publicly-traded corporations; and as those corporations subject to the Act regularly attest, those obligations are exceedingly time-consuming and expensive. Unlike

92. Sarbanes-Oxley Act § 307(1) (codified at 15 U.S.C.A. § 7245 (1998 & West Supp. 2004)).

93. *Id.*

94. *Id.*

95. In the ashes of the bankruptcy of AHERF, criminal charges were brought against the non-profit corporation’s general counsel for having allowed its executive officers to “borrow” funds from restricted endowments for general operating purposes. *See supra*, note 4. Tens of millions of dollars were lost. After years of litigation (primarily against insurance companies), less than twenty percent of the trust funds were restored. In that situation, any associate general counsel aware of what was happening was likely obligated to report the matter to the board’s chair or audit committee, as a matter of professional ethics. *See* MODEL RULES OF PROF’L CONDUCT R. 1.13 (2002) (referring to the “Organization as Client”). Those rules require “whistleblowing” only when the inappropriate action “is likely to result in substantial injury to the organization” and helps the attorney to identify factors to be considered and the various ways to respond. *Id.* As such, the profession’s ethical rules are sufficient for academia, if the commitment is made to honor those rules.

corporations, the stocks of which are publicly traded, institutions of higher learning are in no position to pass those costs on to its customers, and therefore, they must be judicious in its application. Moreover, many of the inducements that lure employees of for-profit institutions to stray from propriety (e.g., bonuses, stock options) are typically not present in the not-for-profit world, and others (e.g., loans to help new officers move to their new jobs) are often necessary.⁹⁶ Financial misconduct is just one of a great many things that can hurt institutions of higher education. As one risk among many, its dimensions should be appreciated so that appropriate remediation can be accomplished in a planned and timely way.

At the same time, no college or university can afford not to adopt the “spirit” of Sarbanes-Oxley. What all institutions of higher education should take from the Act is an attitude: our investors—those who send us their children (and tuition), those who send us their gifts (alumni/ae and friends), and those who do business with us (in research and development efforts)—deserve to know that their money is being well and appropriately spent.⁹⁷ Those who give us their labor—those who teach along with the staff and administrators who support them—deserve to know that the business affairs of the corporation are being attended to with diligence and integrity. We should be willing to give them the evidence they need to satisfy themselves on those accounts, and that includes making a reasonable effort to ensure that the information we give them is “full, fair, accurate, timely and understandable.”⁹⁸

We should take more than this from Sarbanes-Oxley, however, because academia is not just “all about the money.” The broader issues are risk, integrity and accountability. Financial misconduct is only one of the major risks that a college or university faces.⁹⁹ How (and how well and how often) does the college or university assess its (other) risks? Once those risks are known and prioritized, what systems are in place to address (monitor and control) those risks, and how adequate are those systems? Has the college or university clearly articulated the standards of conduct it expects of those who serve it (trustees, officers, management, employees, vendors)? If so, are there well-understood, and trusted, procedures in place by which misconduct can be discovered or reported? Who is responsible for maintaining the integrity of the system? Are managers held responsible for their conduct and that of those reporting to them? Do the employee and management training programs include ethics? Does the college or university have a compliance program? How is the board of trustees structured to oversee integrity and compliance issues? Are the various relationships among the board and the administration sufficiently defined?

These are good questions to ask at any time, and especially now, when

96. See Sarbanes-Oxley Act § 402(a) (codified at 15 U.S.C.A. § 78m(k) (1998 & West Supp. 2004)).

97. See, e.g., Paul C. Light, *Fact Sheet on the Continued Crisis in Charitable Confidence*, available at <http://www.brook.edu/views/papers/light/20040913.pdf> (Sept. 13, 2004); Greg Winter & Jonathan Cheng, *Givers and Colleges Clash on Spending*, N.Y. TIMES, Nov. 27, 2004, at A1.

98. Sarbanes-Oxley Act § 406(c)(2) (codified at 15 U.S.C.A. § 7264(c)(2) (1998 & West Supp. 2004)). See *supra* note 42 and accompanying text.

99. See *supra* notes 49–54 and accompanying text.

legislators are threatening to impose their own answers. Asking these questions is perhaps the single most important job of the non-profit trustee. Indeed, *not* asking them might be exactly the type of inattention that violates the two core fiduciary duties owed by trustees to their institution: the duties of care and loyalty.¹⁰⁰

When Senator Sarbanes summarized the Act that bears his name, he identified this “set of fundamental guidelines:”

- Eliminate conflicts of interest. To do this, first identify them, and then identify and eliminate the conditions that give rise to them.
- Establish effective checks-and-balances mechanisms. Gatekeepers must carry out their responsibilities. They must not fall asleep at the switch or, indeed even worse, be lured from their post by quick easy money.
- Insist on disclosure, transparency, and openness.
- Assure effective oversight.
- Mandate accountability.
- Be forward thinking. It is not enough to deal with problems after the fact, when a lot of harm has been done to a lot of people. It is not enough to deal with problems as they arise. We must take the next step, and seek to prevent problems from arising in the first place.¹⁰¹

These principles are just as important to have guiding conduct in higher education as they are to have regulating the financial affairs of publicly-traded corporations. How they are imported and where they get applied will vary from institution to institution. But we who work in higher education and perform this public service should not await the next scandal, or the next legislative act, before making those decisions for ourselves.¹⁰²

100. One leading decision identified “the core element” of a director’s service to be the obligation to remain informed, and the core test of a director’s service as “whether there was [a] good faith effort to be informed and exercise judgment.” *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996).

101. Address of Senator Paul S. Sarbanes, *supra* note 12.

102. Appendix A includes fifteen questions that each institution ought to ask itself. Appendix B offers ten “best practices” for institutions of higher education.

APPENDIX A

FIFTEEN QUESTIONS TO ASK

1. Do your employees know why accurate financial information is so important?
2. Do they know that they are responsible and accountable for accuracy?
3. What is the level of training/expertise of the people who prepare the financial reports, and of the CFO and CEO who present them?
4. Does your institution know what the areas of real financial risk are (contracts, billings/grants, procurement, cash, bookkeeping, reconciling)?
5. How do you know that a sufficiently close watch is being kept in those areas?
6. Should you have an internal auditor?
7. Are the statements reported in accordance with accounting principles that are generally accepted?
8. Does the board know enough about numbers/financial reports to adequately assess them?
9. Is the board structured in a way to ensure independence (nominating committee), accuracy (board treasurer, finance committee, audit committee), and accountability (compensation committee)?
10. Is your relationship with your outside auditor too comfortable?
11. Do you know where there are conflicts of interest (staff, administration, board)?
12. Do your employees know what is expected of them (proper use of corporate resources, integrity in dealing with third parties, honesty in reporting, absence of conflicting commitments, etc.)?
13. Do your board members know what is expected of them (level of engagement, duties owed, conflicts of interest, etc.)?
14. Is there some means by which your employees can effectively and anonymously report their concerns without fear of retaliation?
15. Should you obtain outside assistance to evaluate the risks facing the institution?

APPENDIX B

TEN “BEST PRACTICES” TO CONSIDER

1. Background checks for new hires;
2. Annual disclosure of conflicts of interest, required of employees and trustees alike, pursuant to a written conflict of interest policy or bylaw provision;
3. Code of conduct for employees and trustees that includes sanctions for non-compliance and a credible system for investigating and responding to allegations of improper conduct;
4. Written whistleblower policy and procedures that provides confidentiality and protects the caller from retaliation;
5. Periodic “risk assessments” by outside consultants;
6. Annual audit of financial statements by an independent certified public accountant (and, if the institution is large enough, hire an internal auditor);
7. At least one “financial expert” on the board;
8. An audit committee of the board, with a written charter specifying its jurisdiction and detailing its authority;
9. A nominating committee of the board, to ensure board independence from the president and senior management; and,
10. Standing instruction to legal counsel to notify general counsel, president, chair of board audit committee, and/or chair of board of wrongful conduct that is material to the institution.

CHEERS, PROFANITY, AND FREE SPEECH

HOWARD M. WASSERMAN*

Free speech controversies on college campuses often are grounded in concerns for civility, politeness, and good taste. They also tend to follow the same path: The government regulates speech in an effort to alter the level of discourse, limit the profane, and protect public and personal sensitivities; courts strike down the regulations as violating the First Amendment freedom of speech;¹ and we end up right where we started.

Colleges and universities may be pursuing a similar course in trying to deal with objectionable and offensive cheering by students at sporting events. University of Maryland officials expressed anger and embarrassment following a men's basketball game against conference rival Duke University in January 2004, when fans chanted and sported t-shirts with the slogan "Fuck Duke" and directed epithets at certain Duke players.² This was one of many incidents of offensive or obnoxious cheering by students throughout the country during the 2004 college basketball season.³ John K. Anderson, chief of the Educational Affairs Division of the Maryland Attorney General's Office, advised the university that a written code of fan conduct applicable at a university-owned and operated athletic facility, if "carefully drafted," would be constitutionally permissible.⁴ University of

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1. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (striking down as vague and overbroad a university policy prohibiting discriminatory speech); *UMW Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (same); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (same). Compare Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 (1990) ("Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including racial equality—we fear that the movement to regulate campus expression will undermine equality, as well as free speech.") with Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436 (1990) ("I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with the elimination of racism—we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism.").

2. See Eric Hoover, *Crying Foul Over Fans' Boorish Behavior*, CHRON. HIGHER EDUC., Apr. 9, 2004, at A1, A35 [hereinafter Hoover, *Crying Foul*].

3. *Id.*

4. See Letter from John K. Anderson, chief of the Educational Affairs of the Maryland Attorney General's Office to C.D. Mote, Jr., president, University of Maryland (Mar. 17, 2004) 1, 4 (on file with author). See also Hoover, *Crying Foul*, *supra* note 2, at A35–36 (discussing Anderson's advice to the University of Maryland).

Maryland Associate Athletics Director Michael Lipitz began working with a committee of students to devise rules of conduct.⁵ The committee ultimately recommended that the university find ways to encourage students to cheer in non-offensive ways, although rules and formal punishment remain a “last resort” if a proposed standing monitoring committee determines voluntary compliance is ineffective.⁶ Other schools currently have, or are studying the need for, similar codes of conduct.⁷

One can envision resulting guidelines restricting profanity and targeted epithets in signs and chants, as well as imposing a general obligation that students keep their cheering stylish, clever, clean, and classy.⁸ The ostensible purpose behind such guidelines is to enable the majority of fans, particularly children, to enjoy the game unburdened by objectionable or offensive signs, messages, and chants.⁹ The sanction for offensive cheering presumably would be removal from the arena.¹⁰ But any such policy, if enacted and intended to be enforced, should not, and arguably will not, survive First Amendment scrutiny. And we end up right where we started.

The speech at issue is expression by fans related to a sporting event, to all aspects of the game, all the participants in the game, and all the circumstances surrounding the game—a broad new category we can call “cheering speech.” Cheering speech can be directed at teams, players, coaches, officials, executives, administrators, or other fans. It can be in support of one’s own players and team, against the opposing players and team, or even critical of one’s own players and team. It can be about events on the field or it can target broader social and political issues surrounding the game, the players, or sport in general.

In advising the University of Maryland that it could regulate cheering speech, Anderson insisted that fans at sporting events, particularly children, are “captive auditors.”¹¹ They are captives in the arena or stadium; the only way to avoid being

5. See Hoover, *Crying Foul*, *supra* note 2, at A37.

6. See Eric Hoover, *U. of Maryland Students Seek to Police Their Peers at Games*, CHRON. HIGHER EDUC., July 9, 2004, at A32 [hereinafter Hoover, *Policing Peers*].

7. See Hoover, *Crying Foul*, *supra* note 2, at A36.

8. See Hoover, *Policing Peers*, *supra* note 6, at A32 (discussing recommendation from student committee at the University of Maryland that the school suggest “creative witty cheers” for students to use); Hoover, *Crying Foul*, *supra* note 2, at A36–37 (discussing “avuncular letter” from former president of Duke University urging students to “clean up their language and . . . ‘taunt with style’”); *Id.* at A36 (describing situations in which university administrators have advised student fans when their chants cross the line or get too personal); *Id.* (describing efforts to “promote more tasteful cheering”); Mike Norris, *Knight Complimentary of Jayhawks After Game*, UNIV. DAILY KANSAN, Feb. 9, 2004, available at 2004 WL 59463433 (quoting University of Kansas Men’s Basketball Coach as saying “The crowd has the right to come, enjoy, and get after their opponent in a funny, clever, class[y] way”).

9. See Anderson, *supra* note 4, at 3–4 (rejecting the argument that fans expect foul language at the game and arguing that the university may respond to conduct that “continues to offend large numbers of fans”); *Id.* at 3 (emphasizing presence of children in the audience at basketball games as a basis for regulation).

10. See Hoover, *Crying Foul*, *supra* note 2, at A36.

11. See Anderson, *supra* note 4, at 3 (suggesting that the university “could adopt a policy to prohibit vulgar, profane, and indecent language at stadium events where ‘captive auditors,’ including children, would be subjected to it”).

offended by chants or signs is to leave the arena or stop coming to games.¹² This captive status, Anderson argues, alters the ordinary First Amendment burden. Rather than requiring objecting listeners to “avert their eyes” (or ears) to avoid objectionable speech,¹³ the university can force speakers, especially students, to alter their manner of communicating to protect the sensibilities of these captive fans.¹⁴

In reality, the captive audience doctrine is far more limited than Anderson suggests.¹⁵ Courts have found listeners to be captives in only four places: their own homes, the workplace, public elementary and secondary schools, and inside and around reproductive health facilities.¹⁶ And even in those places, captive audience status permits government to limit oral speech but not the same message in written form on pickets, signs, or clothing.¹⁷ One certainly could avert one’s eyes to avoid seeing the epithet written on a sign or on someone’s body.

Of course, one problem with cheering speech is that much of it is oral. There have been complaints not only about shirts and signs, but also about chants and taunts directed at players, coaches, and officials, which other fans may be unable to avoid no matter where in the arena they sit. Objecting listeners must perform the more difficult task of averting their ears to avoid offensive cheers, something that

12. *Id.* (“[P]eople attending the game . . . are captives whose only recourse is to leave the stadium or stop attending games.”).

13. *See* *Cohen v. California*, 403 U.S. 15, 21 (1971) (arguing that people “could effectively avoid further bombardment of their sensibilities simply by averting their eyes”); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 *TULANE L. REV.* 163, 228 (2002) [hereinafter Wasserman, *Compelled Expression*].

14. *See* Anderson, *supra* note 4, at 4 (“[I]t does not seem reasonable for the University to be utterly without any means to address a phenomenon that has proved to be upsetting to large numbers of fans.”).

15. *See* Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 *NW. U. L. REV.* 1009, 1023 (1996) (“The Court has never held that the mere presence of a captive audience justifies speech restrictions.”). *See also* *Cohen*, 403 U.S. at 21 (“[W]e have at the same time consistently stressed that ‘we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.’”).

16. *See* *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000) (recognizing government interest in protecting unwilling listeners from offensive messages on the sidewalk outside reproductive health clinics); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 767–68 (1994) (holding that patients and workers inside a reproductive health facility are captive); *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (emphasizing the different nature of protection for unwilling listeners in their homes); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (“[S]peech may be more readily subject to restrictions when a school or workplace audience is ‘captive’ and cannot avoid the objectionable speech.”); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (“Children in public schools are a ‘captive audience’ that ‘school authorities acting *in loco parentis*’ may ‘protect.’”); Volokh, *supra* note 15, at 1023 (“[I]t seems clear that workplace speech is generally protected despite the presence of an arguably captive audience.”). *See also* *Hill*, 530 U.S. at 718 (holding that the captive-audience exception applies when the degree of captivity makes it impractical for an unwilling viewer to avoid exposure).

17. *See* *Madsen*, 512 U.S. at 773 (“[I]t is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.”).

children may be particularly unable to do. Courts have upheld regulations on sound and noise levels to protect captive audiences.¹⁸ But government never has been permitted to protect captive auditors by doing what a stadium speech code entails: singling out particular profane or offensive oral messages for selective restriction while leaving related messages on the same subject, uttered at the same volume, undisturbed. In fact, the Supreme Court's captive audience cases have gone to great lengths to emphasize that audience-protecting prohibitions are valid precisely because they apply to all speech in that place, regardless of viewpoint, subject matter, or message.¹⁹

More importantly, the captive audience doctrine never has been applied to listeners in public places of recreation and entertainment, places to which people voluntarily go for the particular purpose of engaging in expressive activity, in this case cheering on their favorite college team. Fans who pay to attend a college basketball game at an on-campus arena are not captive auditors there, any more than an individual walking on a city street who stumbles across an objectionable political rally or an individual whose office sits above the route followed by an objectionable parade.

The Hobson's Choice that Anderson believes this creates for fans—leave the arena and stop attending games or tolerate offensive cheers—is precisely the choice people make in any public place at which expression occurs. It is the same choice that people in the California courthouse had to make when confronted with a jacket emblazoned with “Fuck the Draft,” a message and manner of expression that the Court in *Cohen v. California*²⁰ found to be protected from prosecution under a disturbing-the-peace statute.²¹ In fact, leaving was even less an option there for an objecting auditor whose job required her to remain in the courthouse or an objector having business before the court and likely required to be present on pain of contempt or default.²² It is inconceivable that “Fuck the Draft” is a protected message in a courthouse, but “Fuck Duke” is unprotected amid the cacophony of 20,000 screaming basketball fans. It is even more inconceivable that Paul Cohen's intellectual heir could be prohibited from wearing his jacket at a university sports arena governed by a fan speech code.

The real import of *Cohen* is the principle that a speaker's choice of words and

18. See *Madsen*, 512 U.S. at 772–73 (“The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.”); *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (holding that the city has a substantial interest in controlling sound volume at park band shell, both to protect residential neighbors and others using the park); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (“We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.”).

19. See *Hill*, 530 U.S. at 719–20 (emphasizing that restriction on speech outside reproductive health facilities was content-neutral, applying to any expression by any demonstrators); *Frisby*, 487 U.S. at 496 (Stevens, J., dissenting) (arguing that prohibition on “targeted picketing” outside house would outlaw sign reading “Get well Charlie—Our Team Needs You” held by fifth-grader outside his friend's house).

20. 403 U.S. 15 (1971).

21. See *id.* at 26; Ronald J. Krotoszynski, *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1252 (1996).

22. See Volokh, *supra* note 15, at 1023.

manner of communication are essential elements of the overall message expressed, and government cannot prohibit certain words or manner without also suppressing certain messages in the process.²³ A cheering fan's point of view is bound up in the decision to formulate a particular message by telling an opponent that he "sucks" or by targeting individual issues, such as an opposing player's legal or personal difficulties or an opposing coach's temper.²⁴ The choice of particular topics, words, or phrases in cheers reflects, in part, the intensity, passion, and emotion of fans' feelings in support of their team or in opposition to their rival.²⁵ "Fear the Turtle," "We Hate Duke," and "Duke Sucks" are three ways of cheering for the Maryland Terrapins, as well as expressing the different idea of cheering against Duke. But each conveys a distinct message and point of view and each must be protected within the expressive milieu of a college sports stadium.²⁶

Because word choice and communicative manner are essential components of free speech protection, it becomes impossible to enforce any fan conduct code in a uniform, non-arbitrary way. The state cannot neutrally define what words or manner are offensive, nor can it establish any meaningful standard to measure offensiveness.²⁷ That leads to Justice Harlan's memorable turn in *Cohen* that "one

23. See *Cohen*, 403 U.S. at 26 ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1350 (2002) (arguing that "the *Cohen* Court laid the doctrinal groundwork for the notion that the manner in which one chooses to express one's self can have as much communicative significance as one's underlying message . . ."); Krotoszynski, *supra* note 21, at 1253 ("Ultimately, the ability to define language becomes the ability to control thoughts."); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 388–89 (2004) [hereinafter Wasserman, *Symbolic Counter-Speech*] (arguing that "[p]oint-of-view includes everything surrounding and contributing to the message," including choice of words, choice of communicative manner, the choice to appeal to visceral emotion, and the time, place, and circumstance in which the message is presented).

24. See Hoover, *Crying Foul*, *supra* note 2, at A1 (describing controversial examples of cheering speech, including fans waving signs referencing an opposing player's girlfriend who had posed in *Playboy*, chanting "rapist" at a player who had pled guilty to sexual assault, and waving fake joints at a player with a history of drug use). See also JOHN FEINSTEIN, A SEASON ON THE BRINK 181 (1986) (describing students displaying signs at basketball game reading "Give Bobby Knight the chair" (a reference to the opposing coach having thrown a chair during a game the previous year) and "Extradite Bobby Knight" (a reference to the opposing coach having been arrested for assaulting a police officer in Puerto Rico several years earlier)).

25. As the *Cohen* Court stated:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen, 403 U.S. at 26; See Kitrosser, *supra* note 23, at 1349–50 ("[T]he Court's discussion suggested that word choice, and possibly other aspects of manner of speech, can have as much communicative significance . . . and thus should be similarly protected, regardless of the nomenclature used to categorize such communicative choices.").

26. See Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 390 ("[A] different speaker using a different communicative medium and manner . . . is, in fact, presenting a different point of view—something else worth saying and needing to be said.").

27. See Kitrosser, *supra* note 23, at 1394 ("It is far too easy . . . to transform an intuitive

man's vulgarity is another's lyric,"²⁸ and the inability to make principled distinctions means "the Constitution leaves matters of taste and style so largely to the individual."²⁹ Government cannot define a baseline for when particular protected content becomes too offensive or objectionable, thus the First Amendment refuses to allow government to even try.³⁰

The baseline for offensiveness cannot be the most sensitive person in the crowd; the level of permissible expression cannot be reduced to what the least tolerant listener will accept.³¹ Nor can offensiveness be measured from the standpoint of children in the crowd, because the level of discourse for adults cannot be reduced to what is fit or proper for children.³² The university sports arena exemplifies the problem of the mixed audience—how can government regulate speech in the interest of protecting children from harmful speech when the speech reaches a mixed audience of children and adults? The pithy answer is that it simply cannot do so.³³ There is no, and can be no, baseline for oral speech before a mixed audience; either children unavoidably hear some "adult" expression or we reduce the level of speech to what is suitable for a sandbox.³⁴

Moreover, even if government could define a baseline by reference to the target audience of particular expression (perhaps meaning that acceptable cheering

sense of dislike for, or unworthiness of, a particular instance of expression, into a conclusion that a restriction upon such expression is not particularly problematic.").

28. Cohen, 403 U.S. at 25.

29. *Id.*

30. This was the key point in *Hustler Magazine, Inc. v. Falwell*:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one. 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.

485 U.S. 46, 55 (1988).

31. See *Cohen*, 403 U.S. at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.").

32. See *Reno v. ACLU*, 521 U.S. 844, 875 n.40 (1997) ("Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'") (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (striking down a state law whose effect was to "reduce the adult population of Michigan to reading only what is fit for children" and stating that to do so was to "burn the house to roast the pig").

33. See *Reno*, 521 U.S. at 876 (stating that restricting speech whenever it is known that one member of the intended audience is a minor would burden adult-to-adult communication, where there is no effective way to filter out non-adult members of the mixed audience). See also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 256 (2001) ("The ponderous, humorless overliteralism of so much censorship directed at youth not only takes the fun, ambiguity, cathartic function, and irony out of the world of imagination and creativity; it reduces the difficult, complicated, joyous, and sometimes tortured experience of growing up to a sanitized combination of adult moralizing and intellectual closed doors.").

34. See *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

speech at a college basketball game is different from at a high school game or a little league game), the target audience for college athletics is not young children. The target is the university community, particularly eighteen to twenty-two-year-old undergraduate students, adults whom the team is thought to represent and on whose behalf the team is thought to be playing.³⁵ While families—including children of faculty, alumni, or area residents—perhaps are an expected part of that audience, they are not the target and should not provide the guidepost for the appropriate manner of fan expression.

In seeking to control abusive cheering speech, universities apparently fail to distinguish among expressive forms. On one hand is blatant profanity; on the other hand are epithets or chants that do not employ any of the seven dirty words, but that target opposing teams, players, coaches, or officials, perhaps with references to a player's personal life or legal difficulties. The presumption in Anderson's recommendation to the University of Maryland was that a public university could serve the same interest in protecting children through a single conduct policy that restricted "Fuck Duke" t-shirts and chants, as well as signs or taunts targeting a player accused of sexual assault. One can imagine efforts to require students to keep things "polite" or "positive"—cheer for your team and your players, but do not jeer or criticize the opponent, opposing coaches, or officials. Even conceding a governmental interest in protecting sensitive and juvenile ears from the seven dirty words in public spaces, government goes a step beyond when it begins to restrict particular non-profane messages that bear on the game played on the court or on the participants in that game.³⁶

Perhaps it turns on the subtlety of the cheers. Students are obvious when they use profanity, chant "rapist," or wave fake joints.³⁷ But what of Maryland students chanting or wearing t-shirts bearing the slogan "Duck Fuke?" This is an obvious play on the profanity that created controversy at Maryland, drawing meaning only by reference to that profanity, but it does not use (as opposed to hinting at) dirty words. Should hinting at profanity be enough to justify a restriction on a protected

35. See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 3–4 (2001) ("Sports can play an important role in creating a campus ethos—in part through public ritual (the Saturday afternoon game), but also through the banner on the dorm room wall and the stories on the back page of the student paper."). On the other hand, student attendance actually has declined in recent years. See *id.* at 273 ("The long-term decline in student attendance at college sporting events reminds us, however, that this contribution of intercollegiate competition to the campus ethos has become less and less important.").

36. The sexual assault example presents an additional wrinkle: Jeering or taunting a player who has been accused of sexual assault may be, at least in part, a social or political statement, protesting or drawing attention to the fact that this player continues to be allowed to play for the school despite his off-court conduct or to the problem of athlete misbehavior generally. In a similar vein, one might expect opposing fans to taunt University of Colorado football Coach Gary Barnett, who retained his job as of April 2005 despite reports of sex, drugs, and alcohol being used to recruit players, numerous allegations of sexual assault by female students against football players, and Barnett's own objectionable remarks about a female former football player. See *Colorado Reinstates Football Coach Despite Scandal*, N.Y. TIMES, May 28, 2004, at D7. Such jeers might function in part as criticism of Barnett's management (or lack thereof) of his players and program and a protest of his keeping his job despite the scandal.

37. See *supra* note 24 and accompanying text.

manner of expression? Or what if the offensiveness is lost on those who might otherwise be offended? Students at the University of Kansas were praised for their cleverness during the 2004 season when they chanted “salad tosser” at Texas Tech Basketball Coach Bob Knight.³⁸ On the surface, this was a reference to Knight’s infamous verbal altercation several days earlier with the Texas Tech chancellor at a salad bar in Lubbock, Texas.³⁹ But the phrase also is a slang term for a particular sexual act, a double entendre the students almost certainly knew (which explains why they chose that particular phrase), but many listeners likely did not.

Interestingly, Anderson supported his advice to the University of Maryland with reference to broadcast indecency cases. His argument was that, as with indecent radio broadcasts, offensive language at the basketball game comes without warning, is heard by children, and cannot be avoided by the captive audience.⁴⁰ This argument ignores the narrow context to which the Court took great pains to limit *Pacifica*—the “uniquely pervasive” broadcast medium of radio or television received in the privacy of the home⁴¹—and extends it to a heretofore-protected expressive forum. Anderson apparently defines “broadcast” to mean any loud oral expression directed to and heard by a large crowd, even if not through government-owned airwaves. By that expansive definition, any mass-dissemination of oral expression to a sizeable audience constitutes “broadcasting,” subject to the same child-protective limitations that long have applied only to radio and television broadcasting, never to other media or to public spaces at large.⁴²

At the same time, Anderson ignored the one case that arguably supports the university’s position. In upholding a state law requiring speakers to remain eight feet away from unwilling members of their target audience when leafleting, counseling, or protesting outside reproductive health facilities, the Supreme Court in *Hill v. Colorado*⁴³ emphasized a legitimate government interest in protecting unwilling listeners from being bombarded by unwelcome and objectionable messages even on public streets and sidewalks, those places historically intended and recognized as forums for expression.⁴⁴ *Hill* suggested that an objecting

38. See Norris, *supra* note 8.

39. *Id.*

40. See Anderson, *supra* note 4, at 3 (“Foul-mouthed fans ‘broadcast’ their words to the audience just as offensive language was broadcast by *Pacifica*.”) (referencing *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) and *FCC v. Pacifica Found.*, 438 U.S. 736 (1978)).

41. See *Pacifica*, 438 U.S. at 748; *Id.* at 744 (narrowing the prohibition to the factual context of that case); *Id.* at 750 (emphasizing the narrowness of the holding in the case); *id.* at 762 (Powell, J., concurring in part and concurring in the judgment) (“The result turns instead on the unique characteristics of the broadcast media”); Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606, 628 (1983) (“The Court’s opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication. . . . *Pacifica* is about dirty words on radio.”).

42. See *United States v. Playboy Entertainment Group*, 529 U.S. 803, 814 (2000) (stating that “unique problems” of cable and broadcast media may justify regulations that are unacceptable in other contexts).

43. 530 U.S. 703 (2000).

44. See *id.* at 717–18.

listener suffers a degree of captivity even in a public space, triggering a governmental interest in protecting that listener's sensibilities.⁴⁵ Of course, like *Pacific*, *Hill* may be limited to a specific context: face-to-face encounters between women seeking reproductive health care who do not wish to engage in conversation and anti-abortion advocates trying to "counsel" them or "educate" them against their choices.⁴⁶ But *Hill* recognizes (arguably for the first time) that government may, in a public forum, balance the interests of the speaker against those of the unwilling listener and cause the former to yield.⁴⁷ Cheering speech, however, generally will not entail such face-to-face, close-proximity encounters.

Dissenting in *Cohen*, Justice Blackmun derided Paul Cohen's conduct as "an absurd and immature antic."⁴⁸ By contrast, Justice Harlan's majority opinion insisted that the expression at issue was, in fact, of "no small constitutional consequence."⁴⁹ Free speech scholars rightly laud *Cohen* for recognizing and applying the principle that government must leave matters of expressive taste and style to the individual.⁵⁰ One could dismiss offensive or profane signs, t-shirts, and chants at college basketball games as similarly absurd and immature antics. However, like *Cohen*, the instant skirmish about what cheering speech should and will be permitted at public university sporting events is of no small constitutional consequence.

College sports have become, for better or for worse, a central part of college life

45. See *id.* at 718 ("[W]e are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'").

46. See *id.* at 718 n. 25. Justice Scalia argued in dissent:

What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.

Id. at 741 (Scalia, J., dissenting). See also Kitrosser, *supra* note 23, at 1406 (emphasizing that "the communicative impact of face-to-face speech is particularly direct, immediate, and personally focused").

47. Compare *Hill*, 531 U.S. at 718 (rejecting the suggestion that the interests of unwilling listeners cannot be balanced against the rights of speakers) with *id.* at 771 (Kennedy, J., dissenting) ("In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum."). See also Kitrosser, *supra* note 23, at 1369 (arguing that *Hill* is based on concerns that "close-proximity speech might prove emotionally disturbing to listeners").

48. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting). See also Krotoszynski, *supra* note 21, at 1254, 1254 n.24 (discussing Justice Blackmun's characterization of Cohen's actions).

49. See *Cohen*, 403 U.S. at 15. See also Krotoszynski, *supra* note 21, at 1255 (praising Justice Harlan's "ability to get beyond the strong emotional pull of the facts before the Court").

50. See HEINS, *supra* note 33, at 78 (arguing that *Cohen* was "an important step away from the notion that the First Amendment protected only polite and rational discourse"); Krotoszynski, *supra* note 21, at 1251 ("I like the case because it speaks eloquently to values that transcend its facts, and does so in a way that vindicates core civil liberties . . ."); Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 431 ("[C]ore free speech values typically leave to the individual speaker the choice of whether to be fully, or even minimally, effective or persuasive or simply obnoxious.").

and culture.⁵¹ The prevailing belief among university administrators is that successful athletic teams, particularly high-profile football and basketball teams, are a source of university pride, publicity, media attention, revenue, and increased donations.⁵² The non-athlete students who pack the stadium provide an essential ingredient of that overall culture. Students are encouraged to attend games and make noise, to be excited and passionate about their school, to cheer for their team and players (and against the opposing team and players), and to create a playing environment that will be intimidating or distracting to the opponent and will give their team a home-court advantage.⁵³ Indeed, it is somewhat ironic that Duke players were targets of the taunts that prompted schools to consider arena speech codes. Duke students have attained the widest notoriety for their sometimes-clever, sometimes-offensive cheering speech and the headaches they give to opposing teams and players.⁵⁴

The university-owned basketball arena is the vital forum at which fans (primarily, although not exclusively, student fans) engage in cheering speech. The controversy over what fans can say there brings us to public forum analysis.⁵⁵ The

51. See, e.g., SHULMAN & BOWEN, *supra* note 35, at 1 (“One fact is clear to all: however one feels about them, intercollegiate athletic programs have become thoroughly institutionalized within American higher education.”); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN COLLEGE SPORTS 12 (1999) (describing the “cultural dominance” of intercollegiate sports over campus life).

52. See SHULMAN & BOWEN, *supra* note 35, at 4 (“These ‘bonding’ effects can be important in attracting students and in making the campus a pleasant place for everyone. They are also thought to sustain alumni loyalty and, over the long run, contribute to the financial strength of the institution and to its reputations within its state and beyond.”); *Id.* at 273 (“Campus interest in attending sports events still serves as one way of bringing students, faculty, alumni/ae, and townspeople together under the school’s banner.”); *Id.* at xix–xx (describing how Northwestern University’s surprise run to the Rose Bowl in 1995 captured the imagination of college sports fans all over the country); ZIMBALIST, *supra* note 51, at 14–15 (“The logic is that athletic triumphs bring notoriety which, on the one hand, entice more student applications, thereby allowing for greater selectivity in admissions, and, on the other, stimulate alumnae and local boosters to open their wallets for the school’s endowment.”).

That the prevailing belief may be inaccurate, (see SHULMAN & BOWEN, *supra* note 35, at 309; ZIMBALIST, *supra* note 51, at 15) does not change the point that this is the basic theory under which colleges and universities operate big-time athletic programs and under which they construct arenas in which the games can be played before large crowds of screaming fans.

53. See DANIEL L. WANN, ET AL., SPORTS FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS 62 (2001) (“[F]ans often view their favorite teams as an extension of themselves. Fans experience the ‘thrill of victory’ when their team wins and the ‘agony of defeat’ when their team loses.”); *Id.* at 65 (noting that many college teams have built new arenas in recent years hoping to attract greater numbers of fans); Hoover, *Crying Foul*, *supra* note 2, at A36 (“[S]tudents know that administrators welcome most of the noise they make.”); *Id.* (describing students who view themselves as participants in the event and ways in which universities encourage that); *Id.* (stating that the student-section seats at Maryland’s on-campus arena rise at a steep angle to create a “wall of fans” on top of the action).

54. See Hoover, *Crying Foul*, *supra* note 2, at A36 (describing the views of one Duke student as to the effect student cheering has on opposing players and the efforts to keep students from crossing the line with their taunts).

55. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Ark. Educ. Television Comm’n*, 523 U.S. 666, 677 (1998); *Int’l Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of*

stadium grandstand should be understood as a limited designated public forum for fans and for cheering speech.⁵⁶ The university builds, owns, and operates the arena and intentionally invites fans to fill the stands for specifically expressive purposes—speaking at a high volume to support, oppose, cheer, jeer, praise, criticize, and even taunt teams, players, coaches, and officials in that game.⁵⁷

Seats at the arena are open to all members of the university community and public at large willing to pay a determinate admission fee.⁵⁸ Although space limits access to a first-come-first-serve basis, no special permission is necessary to purchase a ticket.⁵⁹ No inquiry is made into a fan's intended (legal) activities at the game, her intended cheering interests, or the content of her cheering speech; no one is asked which team she intends to root for or how she intends to root. Having designated a public forum for fans to express themselves on the game, a public university has ceded control over the manner in which they do so,⁶⁰ at least within the parameters of protected speech.⁶¹ Profanity or chants by members of a large audience, separated from the playing field, targeting the participants in the game on the field below cannot conceivably fall into any unprotected First Amendment categories. This is particularly true when the asserted government interest underlying the proposed limitation on the scope of the forum—protecting the captive auditor—is inapplicable.⁶²

That the manner of expressing a message affects the point of view expressed again becomes vital to the analysis. Although government can define the contours of a forum, it cannot define them as to allow some viewpoints and not others.⁶³

Property, 50 HASTINGS L.J. 309, 321–22 (1999).

56. See *Good News Club*, 533 U.S. at 106; *Ark. Educ. Television*, Comm'n., 523 U.S. at 677 (1998); *Lee*, 505 U.S. at 678; Massey, *supra* note 55, at 321–22.

57. See *Ark. Educ. Television*, 523 U.S. at 679 (holding that government creates a designated public forum when it makes its property generally available to a certain class of speakers or speech); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1570 (1998) (arguing for an analysis focusing on the physical and operative characteristics of the property and the compatibility between speech and other uses of the forum); Massey, *supra* note 55, at 323 (arguing that when the “public is invited in for some speech,” some type of public forum is created).

58. See *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133–34 (1992) (striking down county ordinance that allowed permit fee for public forum to vary based on the content of the speaker's expression); *Id.* at 130 (criticizing ordinance for leaving amount of fee to the discretion of the administrator).

59. See *Arkansas Educ. Television*, 523 U.S. at 679–80 (stating that general access for speakers to a location suggests the creation of a public forum).

60. See *Lee*, 505 U.S. at 696 (Kennedy, J., concurring in the judgments) (arguing for recognizing “limits on the government's control over speech activities on property suitable for free expression”); Massey, *supra* note 55, at 336 (“Since the objective of negative free speech theory is to prevent governmental departures from neutrality in public discourse, the first question is whether the purpose of any given speech restriction is to alter the content or outcome of public discourse.”).

61. See *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the profane message on Cohen's jacket did not fall into any categories of unprotected expression such as fighting words or words provoking a hostile crowd to imminent violence); Krotoszynski, *supra* note 21, at 1252 (emphasizing that *Cohen* was not about unprotected categories of speech).

62. See *supra* notes 11–19 and accompanying text.

63. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (stating that

The university could not define the forum as a place only for pro-Maryland cheering speech or as a forum only for positive, non-critical cheering speech—both are plainly viewpoint-discriminatory exclusions from the forum. That same limitation arguably denies the university the power to make the forum available for fans shouting “Go Terps,” but to exclude fans shouting the different viewpoint (on the same subject of cheering for Maryland) represented by “Fuck Duke.”⁶⁴

Alternatively, under a more speech-protective approach, government may limit a forum to particular speakers or subject matters only in very broad and general terms.⁶⁵ Government may create a limited public forum for “art,” but cannot limit it only to “decent art.”⁶⁶ Similarly, the university can open the arena as a forum for “cheering speech,” but cannot limit it only to “non-profane cheering speech.” Fans must remain free to jeer, as well as cheer, players and teams, and to do so in as blatant, obnoxious, or profane a manner as they wish.

A more expansive and speech-protective approach defines a public forum where speech is compatible with—or does not interfere with—other uses of the space.⁶⁷ For present purposes, that means actual interference with the game or with the ability of other fans to watch the game and to engage in their own cheering speech from their place in the stands. Because some cheering speech, in some form, is an expected, encouraged part of college sports, by definition no cheering speech can interfere or be incompatible with the game, unless the university impermissibly examines the substance of some expression. Interference must take the form of more than objecting fans “not liking” what is being said by other fans or being drowned out by louder chants; interference does not build a listener’s veto or heckler’s veto into the forum.⁶⁸ Rather, incompatibility or interference arises only

the state’s power to reserve a forum for certain groups or subjects does not allow the state to discriminate against speech on the basis of viewpoint); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995); *Massey*, *supra* note 55, at 322 (arguing that the Court has avoided inconsistencies in government behavior by concluding that “a limited public forum can be created by content-based but not viewpoint-based means”).

64. *Cf. Rosenberger*, 515 U.S. at 831 (holding that university had engaged in impermissible viewpoint discrimination in excluding speech about campus issues from a Christian perspective from a public forum created for discussion of campus issues).

65. *See Gey*, *supra* note 57, at 1608.

66. *Id.*; *Wasserman, Compelled Expression*, *supra* note 13, at 224.

67. *See Int’l Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 698–99 (1992) (Kennedy, J., concurring in the judgments) (emphasizing that a public forum should be defined by “whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property” and whether “expressive activity would be appropriate and compatible” with other uses); *Gey*, *supra* note 57, at 1576:

The question whether an instrumentality of communication is a public forum depends on whether expressive activity would tend to interfere in a significant way with the government’s own activities in that forum. If the government cannot prove the strong likelihood of significant interference, the forum is deemed ‘public’ and the speech must be permitted, subject only to the application of narrow time, place, and manner regulations.

See also Massey, *supra* note 55, at 328–29 (“The ‘incompatibility’ test appears to presume that all public property is open to speech unless the government can demonstrate that the particular speech is ‘incompatible’ with the ‘normal’ governmental uses of the public property.”).

68. *See Kitrosser*, *supra* note 23, at 1369–70, 1370 n.170 (describing listener’s veto as law allowing unwilling audience members legally to halt another’s expression); *Wasserman, Symbolic*

when one fan's expression or actions actually prevent others from watching the game or from engaging in their own cheering speech, as by blocking their view of the action.⁶⁹

This makes the forum about more than expression focused on the teams, players, coaches, officials, and game at hand. Speech about sport in general is compatible with this designated public forum. Messages of protest—be it Paul Cohen's anti-war jacket,⁷⁰ a chant criticizing the university's over-emphasis on athletics at the expense of academics,⁷¹ or a sign criticizing the funding of women's sports at the expense of men's sports⁷²—belong in this particular forum. In fact, most political speech and counter-speech becomes fair game at sporting events, given that the national anthem is played in a patriotic symbolic ritual prior to the start of every game.⁷³

One might suggest at this point that the university simply include on all tickets a warning to fans: "In purchasing this ticket, you agree to comport yourself in a proper, civil, and non-profane manner." Thus warned, fans cannot complain if they are excluded from the arena when their cheering becomes obnoxious or offensive. But the point of public forum analysis is that the First Amendment

Counter-Speech, *supra* note 23, at 416–17 ("The private listener's objections to offensive speech only become an impermissible heckler's veto when the listener causes government to exercise sovereign power to restrict that speech to protect her sensibilities.").

69. *Cf. Barrett v. Khayat*, No. CIV. A. 397CV211BA, 1999 WL 33537194, at *4 (N.D. Miss. 1999) (upholding state university ban on flags larger than twelve by fourteen inches at football stadium, grounded in concerns for safety and enjoyment of the game by other fans).

70. A present-day wearer might be protesting recent proposals to revive the draft or criticizing the policy of extending military reservists' tours overseas as a back-door draft. *See* Terence Neilan, *Kerry Turns Up the Volume with Litany of Critiques for Bush*, NYTIMES.COM, at <http://www.nytimes.com/2004/09/01/politics/campaign/01CNDKERR.html?ex=1110603600&en=f3470c7b0a58b2c1&ei=5070> (Sept. 1, 2004).

71. *See* KATHRYN JAY, *MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945* 193 (2004) ("The growing revenue streams available in college basketball led schools to make decisions based more on finances than on what might be best for their student-athletes."); SHULMAN & BOWEN, *supra* note 35, at 3 ("As many faculty critics have pointed out, there is no direct connection between organized athletics and the pursuit of learning for its own sake."); *Id.* at 27 ("As time passed, even the less intensive programs, which were once viewed as ancillary, consumed more and more institutional resources—money, admissions slots, and administration time."); ZIMBALIST, *supra* note 51, at 150–51 (describing disputes as to whether big-time athletic programs make profits or drain revenues).

72. *See* JAY, *supra* note 71, at 188 (describing arguments that notions of equality underlying support for women's sports should not take precedence over the demands of the marketplace and the creation of revenues); SHULMAN & BOWEN, *supra* note 35, at 124 ("[O]ne can empathize with the male athletes and coaches who feel that their sports programs now face restrictions, and who in some cases see gender equity as the cause of those restrictions . . ."); ZIMBALIST, *supra* note 51, at 6 (describing arguments by university athletic directors that "it is justifiable to put more resources into men's than women's sports, because men's sports generate more revenue"); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 732 (2003) (describing criticism of Title IX for guaranteeing female students proportional athletic opportunities even if they have lower levels of athletic interest and ability than male students).

73. *See* Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 392–93. *See also id.* at 395, 419, 443 (describing controversy surrounding female basketball player who turned her back to the flag during the national anthem as a protest against the war in Iraq).

prohibits the university from imposing this admission condition and from limiting the expression that occurs in the forum in this way. The problem is not one of notice or how that notice is provided; it is the impermissibility of the condition on speech.

Traditional public forums, such as streets and parks, possess special status because they “time out of mind, have been used for purposes of assembly.”⁷⁴ They attained that status because they historically had been the places that a speaker would go to communicate with the masses, to speak the truth, and to win (or maintain) support for her causes.⁷⁵ But speakers took to the streets in the first instance because that is where they would find an audience—that is where they could find people to whom to speak. The value of the street corner as an expressive forum lessens once the street corner ceases to be a primary relevant gathering place.⁷⁶ Instead, there must be new and alternative government-operated public forums at which that audience can be reached.⁷⁷ Because big-time college sports have become so central to the university community, the basketball arena has become that new public gathering place. It is the new public forum at which a speaker will find a mass audience, at least for speech consistent with the game and the broad mix of cheering speech that permeates the event. Having built and opened the forum, the university cannot exclude the speaker who wishes to engage in cheering speech merely because her message may be objectionable or offensive to others in that forum.

Perhaps one may not particularly enjoy sitting, or having one’s children sit, in an arena while students direct taunts and expletives at players, coaches, and officials throughout the game. But commitment to a neutral free speech principle means tolerating a great deal of speech that one personally does not like or support.

Moreover, there is nothing wrong with hortatory efforts by the university, coaches, and, most importantly, other students to encourage fans, especially student fans, to keep their cheering stylish, clean, classy, and creative.⁷⁸ The “voluntary compliance” policies recommended by the student committee at the University of Maryland included a profane-t-shirt exchange program, contests that

74. See *Int’l Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

75. See *Gey*, *supra* note 57, at 1538.

76. See *id.* at 1538–39 (arguing that “the street corner has long since ceased to be a focal point” of free speech, but that there necessarily are places within a society and culture in which uninhibited expression flows).

77. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 170–71 (1989) (arguing that government must provide new and different locations for expressive activity); Lillian R. BeVier, *Rehabilitating the Public Forum Doctrine*, 1992 SUP. CT. REV. 79, 101–02 (stating that the Enhancement Model of the First Amendment “sometimes imposes affirmative duties on government to maximize the opportunities for expression”); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1409 (2001) (“[T]he needs of individuals for free speech opportunities have not been satisfied by the traditional public forum.”); Massey, *supra* note 55, at 328 (arguing that under affirmative theories “[g]overnments are obligated to make every effort to promote more speech”); Wasserman, *Compelled Expression*, *supra* note 13, at 197 (“[D]emocratic government is obligated to provide such forums for private speakers and for private expression to ensure that people can speak and be heard . . .”).

78. See Hoover, *Crying Foul*, *supra* note 2, at A36; Norris, *supra* note 8.

would encourage students to create appropriate signs and banners, having coaches address students about the need for good sportsmanship and fan behavior, and distributing newspapers with “creative witty cheers” for students to use.⁷⁹ Perhaps it worked. Duke played at Maryland in men’s basketball in February 2005, and the Maryland fans reportedly behaved, for the most part.⁸⁰

The point is that a state university may not formally punish—even via non-criminal sanction such as removal from the arena—those students who depart from generally accepted norms by loudly wielding a particular loaded word to inform officials or opposing players that they are not very good at the game they play.

79. See Hoover, *Policing Peers*, *supra* note 6, at A32.

80. See Eric Prisbell, *Terps Topple No. 7 Duke*, Wash. Post, Feb. 13, 2005, at E1.

DEFENSES TO SEX-BASED WAGE DISCRIMINATION CLAIMS AT EDUCATIONAL INSTITUTIONS: EXPLORING “EQUAL WORK” AND “ANY OTHER FACTOR OTHER THAN SEX” IN THE FACULTY CONTEXT

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INTRODUCTION

The issue of gender equity has received much attention in the courts and on college and university campuses for the past several years, as male and female professors, athletic coaches, and staff members have sought to avail themselves of gender equity statutes in the employment context. Sex-based wage discrimination cases are based on the idea that men and women performing equal work have an enforceable federal right under the Equal Pay Act of 1963¹ and Title VII of the Civil Rights Act of 1964² to receive pay that is equal to that of the opposite sex. While salary differences among men and women persist in higher education³ despite efforts to equalize such pay disparities, courts are taking a closer look at what “equal work” means for professors and academic administrators.⁴ Specifically, courts have become willing to look well beyond the face of a professor’s “job description” or “job title” to consider factors that make one faculty position more challenging than another position that appears to be very similar. *Cullen v. Indiana University Board of Trustees*⁵ is a recent case that demonstrates

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1. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2000)).

2. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

3. Martha S. West, *Symposium: Faculty Women’s Struggle for Equality at the University of California Davis*, 10 UCLA WOMEN’S L.J. 260, 260–62 (2000) (citing Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 92–93 (1994)).

4. See, e.g., *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001); *Ramelow v. Bd. of Trs. of the Univ. of La. Sys.*, 870 So.2d 415, 421 (La. Ct. App. 2004) (holding the professor failed to establish a prima facie case under the Equal Pay Act because the actual jobs performed by the female plaintiff and the male comparator did not require equal skills).

5. 338 F.3d 693 (7th Cir. 2003).

the Seventh Circuit's willingness to examine the skills, efforts, and responsibilities that two jobs sharing the same title actually require. In this note, I will use *Cullen* to illustrate how the Seventh Circuit and other courts will likely approach sex-based wage discrimination claims brought against academic institutions.

In 2000, Deborah Cullen filed a sex discrimination claim against the Indiana University Board of Trustees alleging violations of the Equal Pay Act and Title VII.⁶ Dr. Cullen began working at Indiana University in 1990 as director of the respiratory therapy program at a salary of \$45,000.⁷ The university paid her male predecessor \$36,742.⁸ By 1998, Dr. Cullen was receiving a salary of \$63,240.⁹ Meanwhile in 1998, Indiana University hired Sandy Quillen, a male, as program director for physical therapy at a salary of \$90,000.¹⁰ Dr. Quillen's female predecessor had been paid \$85,696.¹¹ Using the pay disparity between herself and Dr. Quillen, Dr. Cullen alleged that the university paid a similarly situated male, Dr. Quillen, a higher salary to perform the same job as her own.¹² Cullen argued that the university intended to pay her less because of her gender.¹³ The university filed a motion for summary judgment, which the district court granted.¹⁴ In 2002, Dr. Cullen appealed, and the Seventh Circuit affirmed the judgment of the district court.¹⁵ In reaching its decision on the Equal Pay Act claim, the Seventh Circuit examined the levels of skill, effort, and responsibility required of Dr. Cullen's and Dr. Quillen's position before finding that the jobs were unequal.¹⁶ The Seventh Circuit added that even if Dr. Cullen had established that the jobs were equal, she did not refute the university's affirmative defense that the pay disparity was based on factors other than sex.¹⁷ With regard to the Title VII claim, the Seventh Circuit concluded that, for reasons similar to those that explain why the Equal Pay Act claim failed, Dr. Cullen did not present evidence of a "similarly situated" male that the university treated more favorably.¹⁸ Using *Cullen* and other cases, this note aims to identify which tangible and intangible aspects of a professor's job may lawfully be considered when determining faculty salaries so that educational institutions will know which factors other than sex can withstand a sex-based wage discrimination claim.

Part I of this note will review the history and purpose of the Equal Pay Act,

6. *Id.* at 695.

7. *Id.*

8. *Id.*

9. *Id.* at 696.

10. *Id.*

11. *Id.*

12. *Id.* at 697. Dr. Cullen, the plaintiff, must compare her salary to that of a "comparator," another employee of the opposite sex. In this case, the comparator is Dr. Quillen. Dr. Cullen must prove that her job requires equal skill, effort, and responsibility to that of Dr. Quillen. *See infra* Part II.E. for further explanation of the term comparator.

13. *Id.*

14. *Id.* at 695.

15. *Id.*

16. *Id.* at 699–700.

17. *Id.* at 702–03.

18. *Id.* at 704.

outline the prima facie case under the Equal Pay Act, and describe the relationship between the Equal Pay Act and Title VII. Part II will examine what constitutes equal work for faculty members under the Equal Pay Act by discussing various court decisions involving academic institutions. In particular, this note will analyze what facts courts have taken into consideration in addressing a plaintiff's prima facie case against a college or university under the Equal Pay Act. Part III assumes a plaintiff has proven a prima facie case under the Equal Pay Act and analyzes which factors other than sex courts have recognized as defenses or justifications to pay differentials in faculty salaries. This note concludes with a discussion of how the law might address pay disparities among professors and other faculty members in the future.

I. OVERVIEW OF EQUAL PAY ACT

A. Background

The Equal Pay Act was enacted in June 1963, as the first federal statute of the twentieth century addressing the issue of discrimination in the employment arena.¹⁹ The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938 and was originally enforced by the United States Department of Labor.²⁰ President Carter's Reorganization Plan No. 1 of 1978,²¹ however, reassigned enforcement of the Equal Pay Act to the Equal Employment Opportunity Commission ("EEOC"), the agency that is also responsible for interpreting and enforcing Title VII of the Civil Rights Act of 1964.²²

The scope of the Equal Pay Act is limited to pay discrimination between men and women.²³ Although the purpose of the Act was to remedy historical discrimination against women, the Act applies equally to men and women.²⁴ The Equal Pay Act provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the

19. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 4.02 (1988) (citing H.R. Rept. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 687).

20. *Id.*

21. 3 C.F.R. § 321 (1978).

22. PLAYER, *supra* note 19, § 4.02.

23. *Id.* § 4.01.

24. *See Bd. of Regents v. Dawes*, 522 F.2d 380 (8th Cir. 1975) (holding that the University of Nebraska violated the Equal Pay Act and unlawfully discriminated against the male professional employees of the college of agriculture and home economics when it implemented a formula for determining a minimum salary based on education, experience and merit for females but then refused to implement the same formula for determining the minimum salaries of males); 29 C.F.R. § 1620.1(c) (1987) ("Men are protected under the Act equally with women. While the [Equal Pay Act] was motivated by concern for the weaker bargaining position of women, the Act by its express terms applies to both sexes.").

performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .²⁵

To establish a prima facie case of wage discrimination under the Equal Pay Act, a plaintiff must prove: “(1) higher wages were paid to [an employee of the opposite sex within the same establishment], (2) for equal work requiring substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions.”²⁶ If the plaintiff can establish a prima facie case, then the burden shifts to the employer to justify the unequal pay for the equal work by proving one of the four statutory affirmative defenses listed in the next paragraph.²⁷ Numerous courts have struggled with defining the reach of the statutory terms, especially the term “equal work,” as well as the four defenses expressly set forth in the statute.

The Equal Pay Act identifies four defenses to sex-based wage discrimination. Different pay for apparently equal work does not violate the Act if the pay disparity is made “pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”²⁸ The first three defenses are rather non-controversial, but the fourth defense has generated a tremendous amount of litigation.²⁹ Accordingly, this note will focus on the fourth defense, particularly as it relates to faculty salaries.

B. Relationship to Title VII of the Civil Rights Act of 1964

The Equal Pay Act and Title VII of the Civil Rights Act of 1964 overlap in that they both prohibit sex-based wage discrimination.³⁰ Moreover, both statutes have the same broad purpose of abolishing stereotypes that relegate men and women to certain pre-ordained roles in the workplace.³¹ Title VII, however, is much broader in scope than the Equal Pay Act. While the Equal Pay Act reaches only pay discrimination between men and women, Title VII prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion.³² Title VII also applies to all employment terms and conditions, not just pay.³³ This note will discuss only the section of Title VII that prohibits discrimination “against any individual with respect to his compensation . . . because of such individual’s . . . sex”³⁴

Because both the Equal Pay Act and Title VII cover equal pay, a plaintiff

25. 29 U.S.C. § 206(d)(1) (2000).

26. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698–99 (7th Cir. 2003) (quoting *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998)).

27. *Id.* at 702.

28. 29 U.S.C. § 206(d)(1)(i)–(iv) (2000).

29. *See, e.g.*, *Wallace v. Bd. of Regents of the Univ. Sys. of Ga.*, 967 F. Supp. 1287 (S.D. Ga. 1997); *Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730 (Nev. 1997).

30. 4 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS § 20.06 (2003).

31. *Id.*

32. PLAYER, *supra* note 19, § 4.03.

33. COOK & SOBIESKI, *supra* note 30, § 20.06.

34. 42 U.S.C. § 2000e-2(a) (2000).

charging sex-based wage discrimination will often join a Title VII claim together with an Equal Pay Act claim in a single suit.³⁵ Allowing a plaintiff to bring a claim under Title VII and the Equal Pay Act essentially gives the plaintiff two opportunities to recover for the alleged sex-based wage discrimination. There are, however, important differences between the two statutes, which dictate whether a plaintiff may bring an action under one or both statutes.³⁶

One of the main differences between the two statutes is that the Equal Pay Act and Title VII have dissimilar proof requirements for establishing a prima facie case. For example, to establish a prima facie case of sex discrimination under Title VII,³⁷ when the plaintiff proceeds under the *McDonnell Douglas*³⁸ framework, the

35. PLAYER, *supra* note 19, § 4.03.

36. First, the coverage of the Equal Pay Act extends to employees “engaged in commerce” or in the “production of goods for commerce” regardless of the employer’s size. HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 8.2 (1997). In contrast, Title VII covers an employer if it has fifteen or more employees. *Id.* § 3.3, at 151. Therefore, if a plaintiff’s employer has less than fifteen employees, the plaintiff can bring a claim only under the Equal Pay Act.

Second, a private plaintiff does not need to exhaust state or federal administrative remedies before proceeding to court under the Equal Pay Act. *See, e.g., County of Wash. v. Gunther*, 452 U.S. 161, 175 n.14 (1981) (“[T]he Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts.”). Title VII, on the other hand, requires that the EEOC try to eliminate an unlawful practice through informal methods of conciliation first. 42 U.S.C. § 2000e-5(b). Thus, the Equal Pay Act does not require any prior administrative filing or informal conciliation while Title VII does.

Third, the Equal Pay Act and Title VII have different proof requirements. *See supra* Part I.A–B.

Fourth, the statute of limitations for an Equal Pay Act claim is two years, or three years if the violation is “willful.” 29 U.S.C. § 255(a) (2000). Under Title VII, however, the plaintiff has 180-day or 300-day administrative filing deadlines. 42 U.S.C. § 2000e-5(e) (2000).

Finally, the two statutes provide different remedies. The Equal Pay Act does not permit a private plaintiff to obtain injunctive relief. *Hildebrandt v. Ill. Dep’t of Natural Res.*, 347 F.3d 1014, 1031–32 (7th Cir. 2003); *Lyon v. Temple Univ.*, 507 F. Supp. 471, 475 (E.D. Pa. 1981). A private plaintiff, however, may recover liquidated damages under the Equal Pay Act in an amount equal to the unpaid wages. 29 U.S.C. § 216(b) (2000). In addition, attorney’s fees are available to the prevailing plaintiff in a private Equal Pay Act suit. *Id.* In a Title VII action, a plaintiff may obtain injunctive relief, back pay, and attorney’s fees, but not liquidated damages. *See* 42 U.S.C. § 2000e-5(g), (k) (2000). Also, the Civil Rights Act of 1991 added compensatory and punitive damages for intentional or “disparate treatment” violations under Title VII. 42 U.S.C. § 1981a(a) (2000). Although the remedies provided by the Equal Pay Act and Title VII are separate and distinct, a plaintiff may not obtain duplicative recovery for the same injury. PLAYER, *supra* note 19, § 4.03. A plaintiff may, however, receive the greater of the two amounts of back pay. *Id.*

37. Note that the elements for a Title VII discrimination case change depending on the nature of the claim. To prove a disparate impact discrimination claim under Title VII, for example, a plaintiff must prove that the employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

38. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973). The *McDonnell Douglas* framework applies in single-motive cases where only one reason, either discriminatory or nondiscriminatory, caused the adverse employment action. In addition to the *McDonnell Douglas* framework, there is another framework for bringing a sex discrimination claim under Title VII. The second framework is explained in *Price Waterhouse v. Hopkins*, and it applies in mixed-

plaintiff must prove: (1) the plaintiff was a member of a protected class, (2) the plaintiff was meeting the employer's legitimate expectations, (3) the plaintiff suffered an adverse employment action, and (4) the employer treated a similarly situated employee of the opposite sex more favorably.³⁹ If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to present legitimate nondiscriminatory reasons for the disparity.⁴⁰ If the employer presents legitimate reasons, then in order to prevail the plaintiff must prove that the proffered reasons are pretext for discrimination.⁴¹

Because Congress incorporated the Equal Pay Act's statutory defenses into Title VII, an employer can justify a pay disparity under Title VII if it is based upon seniority, merit, productivity, or any other factor other than sex.⁴² Thus, if a college or university can prove that an affirmative defense under the Equal Pay Act justifies a salary differential, then the college or university would presumably also prevail under Title VII.⁴³ Accordingly, the remainder of this analysis will focus on the Equal Pay Act.

motive cases where in addition to the discriminatory motive, a nondiscriminatory motive may have also caused the adverse employment action. 490 U.S. 228, 260 (1989), *modified by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified as amended at 42 U.S.C. § 2000e-2(m) (2000)). Under the *Price Waterhouse* framework, the plaintiff must prove that discriminatory intent was a motivating factor leading to the adverse employment action. 490 U.S. at 258. Once the plaintiff meets this burden, the defendant may avoid a finding of liability by proving that it would have taken the same action anyway, in the absence of the impermissible motivating factor, because it had a nondiscriminatory reason for taking the adverse employment action. *Id.* Stated another way, the defendant must prove that its alleged nondiscriminatory reason was a determinative cause for the adverse employment action. *Id.* at 244-45. *Desert Palace, Inc. v. Costa* clarifies the *Price Waterhouse* framework by saying that the plaintiff must prove by any available evidence, whether direct or circumstantial, that discriminatory intent was a motivating factor contributing to the adverse employment action. 539 U.S. 90, 99-100 (2003).

39. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 704 (7th Cir. 2003) (citing *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 742-43 (7th Cir. 1999); *Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 561 (7th Cir. 1998)).

40. *Cullen*, 338 F.3d at 704 (citing *Johnson v. Univ. of Wisconsin-Eau Claire*, 70 F.3d 469, 478 (7th Cir. 1995)).

41. *Id.*

42. See 42 U.S.C. § 2000e-2(h) (2000). Title VII states:

It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of [the Fair Labor Standards Act of 1938 as amended by the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (2000). This is the so-called Bennett Amendment. It effectively incorporates the Equal Pay Act's four affirmative defenses into the statutory regime for Title VII for wage discrimination claims. *County of Wash. v. Gunther*, 452 U.S. 161, 168 (1981).

43. See 42 U.S.C. § 2000e-2(h) (2000). See also *Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1187 (D.R.I. 1985) ("Thus, an employer who proves that a controverted salary differential is the product of a valid exemption to the Equal Pay Act absolves itself of liability therefor under Title VII as well.").

II. EQUAL WORK

In a sex-based wage discrimination claim under the Equal Pay Act, the plaintiff must prove that a person of the opposite sex is paid more for performing “equal work.” The equal work requirement is the most complicated element of the plaintiff’s cause of action,⁴⁴ and parties have frequently litigated its meaning.⁴⁵ Although the Act uses the word “equal,” the Act does not require that jobs be identical because that would allow employers to circumvent the equal pay requirement.⁴⁶ Rather, the plaintiff has to “show that the jobs compared are substantially equal, ‘based upon actual job performance and content—not job titles, classifications or descriptions.’”⁴⁷ Therefore, “job titles and job descriptions are relevant, but not controlling.”⁴⁸ To determine whether work is equal, courts focus on the duties that an employee actually performs.⁴⁹ For example, one district court concluded that the plaintiff failed to prove equal work because “[t]here was no evidence comparing the relative teaching loads at the relevant period; nothing was offered to explain the expectations directed at faculty members regarding research, publication, committee service, or any other of those extra-curricular activities which obviously make up the job content of a college professor.”⁵⁰ Under the Act, the jobs must involve equal skill, effort, and responsibility, and the jobs must be performed under similar working conditions.⁵¹ The applicable EEOC regulations indicate that the terms equal skill, equal effort, and equal responsibility “constitute separate tests, each of which must be met in order for the equal pay standard to apply.”⁵²

A. Skill

The positions in question for equal pay must involve the same level of skill.⁵³ In assessing skill required for the performance of a job, the comparison is between positions, not a comparison of skills possessed by individuals.⁵⁴ “Skill includes

44. COOK & SOBIESKI, *supra* note 30, § 20.14[A].

45. *See, e.g.*, Howard v. Lear Corp. Eeds & Interiors, 234 F.3d 1002 (7th Cir. 2000); Peters v. City of Shreveport, 818 F.2d 1148, 1155 (5th Cir. 1987); Hoban v. Tex. Tech. Univ. Health Scis. Ctr., No. EP-02-CA-345(KC), 2004 WL 594449 (W.D. Tex. Mar. 12, 2004); Hofmister v. Miss. State Dep’t of Health, 53 F. Supp. 2d 884 (S.D. Miss. 1999).

46. PLAYER, *supra* note 19, § 4.11. *See also* 29 C.F.R. 1620.13(a) (2004) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”).

47. Markel v. Bd. of Regents of the Univ. of Wis. Sys., 276 F.3d 906, 913 (7th Cir. 2002) (quoting EEOC v. Mercy Hosp. & Med. Ctr., 709 F.2d 1195, 1197 (7th Cir. 1983)) (internal citations omitted).

48. PLAYER, *supra* note 19, § 4.11.

49. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461 (7th Cir. 1994).

50. Thomasko v. Univ. of S.C., Coastal Carolina Coll., No. CIV.A.82-1840-2, 1985 WL 6455 (D.S.C. 1985).

51. 29 U.S.C. § 206(d)(1) (2004).

52. Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 686 (7th Cir. 1998) (quoting 29 C.F.R. § 1620.14(a) (2004)).

53. 29 C.F.R. § 1620.14(a).

54. *See id.*

consideration of such factors as experience, training, education, and ability.”⁵⁵ A skill that is not needed to meet the requirements of the job, however, should not be considered in determining equality of skill.⁵⁶ For example, the Seventh Circuit in *Cullen* explained that no facts suggested that Dr. Quillen’s position, as the physical therapy program director, required more academic degrees than Dr. Cullen’s position, as the respiratory therapy program director.⁵⁷ Nonetheless, the positions themselves involved different levels of skill because Dr. Quillen’s position required the creation of a new graduate program while Dr. Cullen’s position did not.⁵⁸ Similarly, the Eighth Circuit in *Horner v. Mary Institute*⁵⁹ found different skill requirements between two positions of physical education teachers because one teacher was required to teach courses selected by someone else while the other teacher was required to develop and implement a physical education curriculum.⁶⁰ Thus, two positions may be superficially similar and still not be substantially equal.

In *Spaulding v. University of Washington*,⁶¹ the nursing faculty plaintiffs argued that they performed substantially equal work to that performed by faculty members in other departments—such as social work, urban planning, speech and hearing, health services, architecture, and environmental health—because all these jobs require preparation and teaching of courses, advising of students, committee work, research and publication, and community service.⁶² The Ninth Circuit agreed with the nursing faculty plaintiffs that “teaching is teaching,” but concluded that the plaintiffs did not show substantial equality because the other departments placed different amounts of emphasis on research, training, and community service.⁶³

B. Effort

The equal pay standard applies to jobs that require equal effort to perform.⁶⁴ “Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job.”⁶⁵ In determining the level of effort, courts should consider whether a job causes mental fatigue.⁶⁶ For instance, the Seventh Circuit in *Cullen* agreed with the district court that the effort required for Dr. Cullen (the plaintiff) to secure outside funding by means of grants for the respiratory therapy department was less than the effort required for Dr. Quillen (the comparator) to create Master’s and Doctoral courses of study in the physical

55. *Id.* § 1620.15(a).

56. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003) (citing *COOK & SOBIESKI*, *supra* note 30, § 20.15[B], at 20-123-124).

57. *Id.*

58. *Id.*

59. 613 F.2d 706 (8th Cir. 1980).

60. *Id.* at 714.

61. 740 F.2d 686 (9th Cir. 1984).

62. *Id.* at 696-97.

63. *Id.* at 698.

64. 29 C.F.R. § 1620.16(a) (2004).

65. *Id.*

66. *Id.*

therapy program, which was on probation when Dr. Quillen was hired.⁶⁷

In *Mehus v. Emporia State University*,⁶⁸ the district court further explained that “[i]f the difference in effort is only in the kind of effort required, not the amount or degree, a wage differential is not justified.”⁶⁹ The district court in *Mehus* had several reasons for finding that genuine issues of material fact existed regarding the question whether the head basketball and volleyball coach positions required substantially equal effort.⁷⁰ Among the court’s reasons was the fact that the university had not provided any evidence that coaching a broadcast sport required more effort than coaching a sport that was not broadcast, or that coaches who had to participate in radio programs exerted substantially more effort than coaches who did not.⁷¹ In addition, the court noted that the record had no evidence that “ticket sales, or large numbers of fans, require basketball coaches to exert substantially more effort than coaches with no ticket sales and fewer fans.”⁷²

C. Responsibility

For purposes of equal pay analysis, the positions must also impose the same level of responsibility.⁷³ In conducting this analysis, the Seventh Circuit in *Cullen* looked at “the duties actually performed by each employee.”⁷⁴ The Seventh Circuit reasoned that Dr. Quillen’s position involved greater responsibility because he created and launched a graduate program, supervised 116 students and six faculty members, and generated six times the tuition that Dr. Cullen’s program produced.⁷⁵ Meanwhile, Dr. Cullen was not required to initiate a new graduate program, and she had to supervise only fifty-seven students and three faculty members.⁷⁶ The Seventh Circuit noted, moreover, that the most important factor in this responsibility comparison was the difference in tuition revenue because the department would not be able to operate without a thriving physical therapy program, and this imposed additional pressure and responsibility on the physical therapy director.⁷⁷

67. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003).

68. 222 F.R.D. 455 (D. Kan. 2004).

69. *Id.* at 475.

70. *Id.*

71. *Id.*

72. *Id.*

73. 29 C.F.R. § 1620.14(a) (2004).

74. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003) (quoting *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1461 (7th Cir. 1994)).

75. *Id.*

76. *Id.*

77. *Id.* (citing *Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313 (9th Cir. 1994) (holding that university’s men’s basketball coach had additional pressure to win because the men’s program generated ninety times more revenue than the women’s program, which imposed greater responsibility and created different working conditions for the men’s coach). *But see* EEOC, *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, EEOC Notice No. 915.002, at 9, available at <http://www.eeoc.gov/policy/docs/coaches.html> (Oct. 29, 1997) [hereinafter EEOC Guidelines] (stating that the EEOC will “carefully analyze an asserted defense that the production of revenue is a factor other than sex to determine whether the institution has provided discriminatorily reduced support to a female

In *E.E.O.C. v. TXI Operations*,⁷⁸ the district court stated, “Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”⁷⁹ The district court found substantial differences in job responsibility between Julie Fundling, the plaintiff, and Wes Schlenker, the male comparator,⁸⁰ even though both Fundling and Schlenker were attorneys in TXI’s legal department, and they both reported to Robert Moore, TXI’s general counsel.⁸¹ The district court concluded that Fundling and Schlenker had different levels of responsibility because Fundling admitted that Schlenker handled more complex legal matters, and Schlenker had served as General Counsel during Moore’s two-month leave of absence whereas Fundling “never had the responsibility to act as the general counsel on TXI’s behalf.”⁸²

D. Similar Working Conditions

The jobs must be performed under similar working conditions in order for the Equal Pay Act to require equal pay.⁸³ “The mere fact that jobs are in different departments . . . will not necessarily mean that the jobs are performed under dissimilar working conditions.”⁸⁴ Similar working conditions entail surroundings and hazards.⁸⁵ In *Cullen*, for example, the Seventh Circuit found that Dr. Cullen and Dr. Quillen were working under similar conditions because no evidence suggested that they were exposed to different physical surroundings or hazards in performing their duties.⁸⁶

Unlike *Cullen*, *Pfeiffer v. Lewis County*⁸⁷ is an example of a case in which the court found that two positions, the dispatcher/correction officer (“D/CO”) position and the full-time corrections officer (“CO”) position, were performed under dissimilar working conditions.⁸⁸ The court in *Pfeiffer* reasoned that the two positions had dissimilar working conditions, particularly the hazards associated with each position, because “the COs worked directly with the inmates in the cell blocks, whereas the D/COs work primarily in the secure control room.”⁸⁹

coach to produce revenue for her team.”) The EEOC will, therefore, inquire whether the university has provided considerably more support to the man than the woman in raising revenue. *Id.* According to these EEOC guidelines, a university cannot consider revenue as a factor other than sex to justify a wage disparity if the plaintiff and the comparator of the opposite sex are not given the same support to enable him or her to raise revenue.

78. No. 3:03-CV-1868-P, 2005 WL 81712 (N.D. Tex. Jan. 13, 2005).

79. *Id.* at *8 (quoting 29 C.F.R. § 1620.17(a) (2004)).

80. *Id.*

81. *Id.* at *2.

82. *Id.* at *8.

83. 29 C.F.R. § 1620.18(a) (2004).

84. *Id.*

85. *Id.* (“‘Surroundings’ measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency. ‘Hazards’ take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause.”)

86. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003).

87. 308 F. Supp. 2d 88 (N.D.N.Y. 2004).

88. *Id.* at 101.

89. *Id.* (internal citation omitted).

E. Comparator

A plaintiff must identify a particular “comparator” of the opposite sex and prove that the comparator’s job required equal skill, effort, and responsibility to that of the plaintiff, and that both jobs were performed under similar working conditions.⁹⁰ Several equal pay claims brought against colleges and universities have failed because the plaintiffs have not been able to produce evidence that they performed work equivalent to that of their comparators.⁹¹ Although statistical evidence of a gender-based salary disparity among comparable professors may contribute to a plaintiff’s case, the plaintiff is still required to identify a specific comparator of the opposite sex.⁹² In other words, a plaintiff cannot compare himself or herself to a hypothetical comparator with a composite average of a group’s skill, effort, and responsibility.⁹³

III. FACTORS OTHER THAN SEX

Assuming a professor is able to establish a prima facie case, the college or university has the burden of rebutting the presumption of gender discrimination by proving one of four statutory affirmative defenses: seniority, merit, productivity, or a factor other than sex.⁹⁴ The college or university may avoid liability for unequal pay if it can submit evidence that undercuts the plaintiff’s proof of the prima facie elements, or if it can prove one of the four defenses under the Equal Pay Act. The focus of this note is on the fourth affirmative defense, which permits a pay differential “based on any other factor” as long as that factor is one “other than sex.”⁹⁵ “Any other factor other than sex” is open-ended. As one court explained,

90. *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001) (citing *Strag v. Bd. of Trs.*, 55 F.3d 943, 948 (4th Cir. 1995)).

91. See *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1452 (2d Cir. 1995); *Strag v. Bd. of Trs.*, 55 F.3d 943, 950 (4th Cir. 1995) (rejecting a comparison between plaintiff’s mathematics department and a male professor’s biology department without proving that the two positions were substantially equal in skill, effort, and responsibility); *Soble v. Univ. of Md.*, 778 F.2d 164, 167 (4th Cir. 1985) (rejecting a comparison between plaintiff and assistant professors outside the dentistry school); *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 697–98 (9th Cir. 1984) (rejecting a comparison between the school of nursing and other schools in the university); *Pepper v. Miami Univ.*, 246 F. Supp. 2d 854, 861 (S.D. Ohio 2003) (rejecting a comparison between plaintiff and male professor comparator because plaintiff made no effort to establish the equality of their work); *Fitzgerald v. Trs. of Roanoke Coll.*, No. CIV.A.95-1049-R, 1996 U.S. Dist. LEXIS 16419 (W.D. Va. Aug. 29, 1996) (rejecting comparison between professor in fine arts department and a professor in the history department because no evidence indicated that the skills and responsibilities were sufficiently similar).

92. *Lavin-McEleney*, 239 F.3d at 481–82 (allowing the use of statistical analysis to establish gender-based discrimination and to calculate damages, after identifying a specific male comparator); *Cullen*, 338 F.3d at 701 (requiring plaintiff to identify a specific male comparator, and then allowing statistical evidence of a gender-based salary disparity among comparable professors to contribute to plaintiff’s case).

93. See *Lavin-McEleney*, 239 F.3d at 481; *Houck v. Va. Polytechnic Inst. & State Univ.*, 10 F.3d 204, 206 (4th Cir. 1993); *Pollis v. New Sch. for Soc. Research*, 913 F. Supp. 771, 784 (S.D.N.Y. 1996).

94. See 29 U.S.C. § 206(d)(1) (2000).

95. *Id.* § 206(d)(1)(iv) (2000).

the fourth exception to equal pay “is a broad ‘catch-all’ exception [that] embraces an almost limitless number of factors, so long as they do not involve sex.”⁹⁶ The factor does not need to relate to the requirements of the position in question.⁹⁷ In general, as courts think it is not their place “to second-guess the employer’s business judgment, [courts] ask only whether the factor is bona fide, whether it has been discriminatorily applied, and in some circumstances, whether it may have a discriminatory effect.”⁹⁸ Although any number of things could, in principle constitute “any other factor other than sex,” the history of college and university-related litigation under the Equal Pay Act reveals that only a few “other factors other than sex” have been asserted in defense of equal pay. This section will separately discuss the most frequently offered factors under the catch-all exception to equal pay in faculty salary.

A. Experience, Education and Training

In establishing equal work as part of the prima facie case, a court will compare the skills required by the job, not the skills possessed by the individual employees. A difference in experience, education and training, however, is relevant as an affirmative defense if the experience or education relates to the responsibilities and duties that the employees must perform in their jobs.

Indiana University recently asserted this affirmative defense in *Cullen*.⁹⁹ The Seventh Circuit in *Cullen* stated, “Education is a relevant consideration in determining whether disparate salaries exist for reasons other than sex.”¹⁰⁰ Dr. Cullen, the plaintiff, held a Bachelor of Science degree in Respiratory Therapy, a Master of Arts in Education, and a Doctor of Education degree.¹⁰¹ In comparison, Dr. Quillen, the male comparator, held five degrees, including a Ph.D. in Sports Medicine.¹⁰² The Seventh Circuit concluded that education was a valid reason other than sex for the pay disparity because Dr. Quillen held more degrees in his discipline.¹⁰³

In *Strag v. Board of Trustees*,¹⁰⁴ Craven Community College introduced

96. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (quoting *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989)).

97. *Id. But see Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730, 737 (Nev. 1997) (holding that “the proper legal standard underlying the factor-other-than-sex defense requires, at a minimum, that an employer demonstrates a business-related reason for the wage disparity”); *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (noting that the defendant must establish a legitimate business reason for satisfying the factor other than sex defense); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (same); *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (noting that the defendant must establish organizational needs to satisfy the factor-other-than-sex defense); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (noting that sex-based wage differential must be based on an acceptable business reason).

98. *Dey*, 28 F.3d at 1462 (citing *Fallon v. State of Ill.*, 882 F.2d 1206, 1211 (7th Cir. 1989)).

99. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 702 (7th Cir. 2003).

100. *Id.* (citing *Covington v. Southern Ill. Univ.*, 816 F.2d 317, 323 n.9 (7th Cir. 1987)).

101. *Id.* at 696.

102. *Id.* at 702.

103. *Id.* at 702–03.

104. 55 F.3d 943 (4th Cir. 1995).

affidavits to show that teaching experience and reputation were the gender-neutral reasons for the pay differential between the plaintiff and the comparator.¹⁰⁵ In this case, the Fourth Circuit found that differences in experience accounted for part of the wage differential because Thurza Strag, the plaintiff and mathematics instructor, had nine years of teaching experience, whereas Linwood Swain, the male comparator and biology instructor, had twenty-four years of teaching experience.¹⁰⁶ Additionally, Swain was very well known in the community for his innovative teaching methods, which incorporated state-of-the-art technology that other teachers did not use, and he had been awarded the Outstanding Biology Teacher in the state of North Carolina.¹⁰⁷ Craven Community College also argued that because Swain was better known than Strag, having him on the staff would attract more students to the college.¹⁰⁸ In all, the Fourth Circuit concluded that the college had proven that the salary differential was based on factors other than sex.¹⁰⁹

In *Covington v. Southern Illinois University*,¹¹⁰ Patricia Covington, an assistant professor of art, sued the university alleging sex-based wage discrimination for paying her less than her male predecessor, Donald Lemasters.¹¹¹ The Seventh Circuit affirmed the district court's finding that the university had met its burden of proving that the wage differential was due to a factor other than sex because the salary that Lemasters last earned was based on his five years of experience at Southern Illinois.¹¹² In contrast, Covington had little teaching experience when she was hired.¹¹³ The Seventh Circuit also considered the fact that Lemasters had a masters degree in music, a degree that qualified him for promotion and tenure at the university.¹¹⁴ Covington, on the other hand, was in the process of completing a masters degree in education, a degree that did not qualify her for tenure or promotion within the School of Art.¹¹⁵ Thus, the Seventh Circuit in *Covington* accepted experience and education as factors other than sex that explained the disparity in salary.

B. Revenue Generation

Cullen is a recent case in higher education law to recognize revenue generation as a legitimate factor other than sex that can explain a pay disparity in faculty salary. The Seventh Circuit concluded that the pressure imposed on Dr. Quillen, as the director of the physical therapy program that generated six times as much revenue in tuition as Dr. Cullen's respiratory therapy program, was another factor

105. *Id.* at 951.

106. *Id.* at 945–46.

107. *Id.* at 951.

108. *Id.*

109. *Id.*

110. 816 F.2d 317 (7th Cir. 1987).

111. *Id.* at 318.

112. *Id.* at 321.

113. *Id.* at 324.

114. *Id.*

115. *Id.*

that explained the difference in salaries.¹¹⁶ The Seventh Circuit emphasized the fact that the physical therapy program generated nearly 30% of the tuition revenue of the school of allied health sciences, and that the school relied on this revenue to sustain itself.¹¹⁷ Based on the court's holding in *Cullen*, another college or university could arguably justify a wage differential between one faculty member who is responsible for a department that generates more revenue in tuition and another faculty member of a different sex who does not have the added responsibility of generating a substantial portion of the revenue.

Revenue generation also arises in cases involving athletic coaches in college sports programs. One such case is *Stanley v. University of Southern California*.¹¹⁸ In this case, however, the University of Southern California ("USC") discussed revenue generation as evidence of a difference in job responsibilities and working conditions rather than as an affirmative defense. Accordingly, the Ninth Circuit in *Stanley* compared the responsibilities of the head coaches of the women's and men's basketball teams.¹¹⁹ The men's coach was required to perform public relations and promotional activities, such as outside speaking engagements and interviews with the media, to generate revenue for the university.¹²⁰ These activities contributed to the men's team's ability to generate ninety times the revenue that the women's team was able to generate.¹²¹ Because the women's coach was not required to perform the same level of "promotional and revenue-raising activities," the Ninth Circuit found that the difference in responsibilities was a reason for the pay differential.¹²² Essentially, the head coaches had the same title, but they had different levels of responsibility, and the jobs therefore constituted unequal work. The court stated, "revenue generation is an important factor that may be considered in justifying greater pay."¹²³ In *Stanley*, the Ninth Circuit concluded that plaintiff did not prove her prima facie case.¹²⁴ Specifically, the Ninth Circuit found that the pay disparity between the men's and women's coaches salaries was due to the differences in responsibilities and working conditions rather than the gender of the coach.¹²⁵ Nevertheless, a different outcome might have resulted if the women's coach had, for example, proven that the university allocated more resources to the men's basketball team, thereby enabling it to generate more revenue.¹²⁶

116. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 703 (7th Cir. 2003).

117. *Id.* at 700.

118. 13 F.3d 1313 (9th Cir. 1994). For a discussion of the Title IX aspects of this case, see Catherine Pieronek, *Title IX and Gender Equity in Science, Technology, Engineering, and Mathematics Education: No Longer an Overlooked Application of the Law*, 31 J.C. & U.L. 291, 325 (2005).

119. *Id.* at 1321.

120. *Id.*

121. *Id.* The women's basketball team produced \$50,262 in revenue during Coach Stanley's four years while the men's team produced \$4,725,784 during the same four years. *Id.* at 1322.

122. *Id.* See *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791, 797 (E.D. Va. 1980) (noting that the duty to generate revenue shows that coaching jobs are not substantially equal).

123. *Stanley*, 13 F.3d at 1323.

124. *Id.*

125. *Id.*

126. See EEOC Guidelines, *supra* note 77, at 10.

C. Salary Retention Policy

A salary retention policy allows an employee to transfer to a new position within the college or university while retaining his or her prior pay, even if the employee's prior pay is more than the pay rate for the new position. Employers generally use salary retention policies to retain qualified employees or to induce employees to transfer to positions where they are most needed.¹²⁷ Federal regulations call salary retention policies "red circle" rates and state:

[M]aintaining an employee's established wage rate, despite a reassignment to a less demanding job, is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be 'red circled' in order to comply with the [Equal Pay Act].¹²⁸

In *Covington v. Southern Illinois University*,¹²⁹ the university argued that its policy of retaining the salary of employees who change assignments within the university was a factor other than sex that justified a pay disparity between two professors who performed the same work.¹³⁰ The university also explained that its reason for the salary retention policy was to promote employee morale.¹³¹ The Seventh Circuit agreed with the university's argument and held that "[t]he present employer should be permitted to consider the wages it paid an employee in another position unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex."¹³² Thus, a college or university that has a policy of not reducing salaries when faculty members transfer to other positions may offer this as a factor other than sex in explaining a pay disparity, but the policy must apply to all transfers and must not have a discriminatory effect.¹³³

Although a salary retention policy such as the one in *Covington* may constitute

127. See *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988).

128. 29 C.F.R. § 1620.26(a) (2004).

129. 816 F.2d 317 (7th Cir. 1987).

130. *Id.* at 321–22.

131. *Id.* at 322.

132. *Id.* at 323. *But see Glenn*, 841 F.2d at 1571 (rejecting *Covington* because "it ignores that prior salary alone cannot justify pay disparity"). The fear is that "a factor like prior salary . . . [can] be used to capitalize on the unfairly low salaries historically paid to women." *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982). These cases suggest that "the policy of considering an employee's prior salary in setting his or current wage . . . may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a previous employer." *Covington*, 816 F.2d at 322. *Covington*, however, can be distinguished from these cases because the salary retention policy in *Covington* considered what the university paid the professor in a previous position at the university. It did not consider what a previous employer paid the professor.

133. If a plaintiff can prove that a college or university's salary retention policy has a discriminatory effect, then the plaintiff could challenge the policy by bringing a disparate impact claim under Title VII. See *supra* note 37.

a factor other than sex, an employee's starting salary standing alone does not constitute a factor other than sex. For example, the Ninth Circuit in *Hein v. Oregon College of Education*¹³⁴ held that pay disparities based on unequal starting salaries do not violate the Equal Pay Act if the employer can show the original pay differential was based on a legitimate factor other than sex.¹³⁵ In *Hein*, the Ninth Circuit remanded the case to the district court to determine whether the employer could show that at the time of hiring, "the male comparators deserved higher salaries than their respective female counterparts based on the abilities or capabilities of the teachers or the needs of the institution."¹³⁶ The Ninth Circuit further instructed that the principal question for each plaintiff should be: "Can [the employer] justify a starting wage lower than her comparator?"¹³⁷ The unequal starting salary must not be based upon cultural and social influences that artificially inflate the salary of one gender and not the other.¹³⁸ Thus, if the employer can justify unequal starting salaries based on a legitimate factor other than sex, then a court will likely allow unequal starting salaries to explain later pay differentials.

D. Policy of Responding to Outside Offers

Professors commonly use attractive offers from other colleges and universities to negotiate higher salaries from their current employers. If the current employer wants to keep the professor, the institution will match the offer or present a more attractive compensation package. As expected, colleges and universities have used outside offers as a factor other than sex to explain pay disparities, especially when the comparator receives a higher salary because he or she has obtained an outside offer.

In *Winkes v. Brown University*,¹³⁹ for example, Brown offered evidence of a "de facto policy of responding to outside offers from other universities when it desired to keep the professor and his or her qualities merited such action."¹⁴⁰ This issue arose when Catherine Wilkinson-Zerner, the comparator and associate professor who had recently been awarded tenure in the art department at Brown, received an offer from Northwestern University for an equivalent position at a significantly higher salary.¹⁴¹ Brown's chairman told the provost about the offer and recommended that Brown match the offer because the position at Northwestern was comparable in every regard except salary.¹⁴² The art department chairman also informed Brown's provost that, in his opinion, there was nothing to negotiate and that Brown should match Northwestern's offer because Zerner seemed willing

134. 718 F.2d 910 (9th Cir. 1983).

135. *Id.* at 920.

136. *Id.*

137. *Id.* at 921.

138. *See id.*

139. 747 F.2d 792 (1st Cir. 1984).

140. *Id.* at 793.

141. *Id.*

142. *Id.* at 793-94.

to move.¹⁴³ Then in an effort to convince Brown's provost that Zerner was a "desirable faculty member," the art department's chairman told the provost about the quality of Zerner's performance and qualifications.¹⁴⁴ After these discussions, Brown offered to match Northwestern's salary, and Zerner accepted Brown's offer to stay.¹⁴⁵ The plaintiff in this case, Rudolf Winkes, was the only other associate professor in the art department.¹⁴⁶ Winkes brought an Equal Pay Act claim against Brown University challenging the pay differential between him and Zerner, the comparator, as based solely on gender.¹⁴⁷ Brown University raised several defenses, one of which was a policy of responding to outside offers.¹⁴⁸ The First Circuit found that although Brown did not always match outside offers, Brown had, in effect, a de facto practice of awarding merit raises to faculty members who received outside offers and whom Brown wanted to keep.¹⁴⁹ The dissent in *Winkes* raised questions about Brown's lack of negotiations with Zerner and about the speed in which Brown responded to Northwestern's offer, but the majority in *Winkes* held that Brown's de facto policy of responding to outside offers from other universities constituted a pay differential based on a factor other than sex.¹⁵⁰

E. Market Forces at Time of Hire

Courts have rejected pay disparities on the basis of market forces when an employer takes advantage of a situation where women are willing to work for less than men, or where women are paid less than men merely because the market will allow it.¹⁵¹ For these reasons, courts are wary about the market-forces or market-value argument as a factor other than sex. This section discusses one case in which the market-forces argument failed and then analyzes other cases in which the market-forces argument prevailed.

143. *Id.*

144. *Id.* at 796.

145. *Id.* at 793.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 795.

150. *Id.* at 793.

151. *See, e.g.,* *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974). The Supreme Court held that Corning Glass Works violated the Equal Pay Act by paying the male night shift inspectors a separate night shift differential in addition to an already higher base wage than what it paid the female inspectors who performed the same tasks during the day shift. *Id.* at 190. The Court explained:

The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

Id. at 205. *See also* *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) (stating that "it is important to ensure that employers do not rely on the prohibited 'market force theory' to justify lower wages for female employees simply because the market might bear such wages"); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570-71 (11th Cir. 1988) (same).

In *Brock v. Georgia Southwestern College*,¹⁵² market forces were held not to constitute a factor other than sex to justify pay differentials between female and male faculty.¹⁵³ In *Brock*, the district court had determined that six female faculty members had established a prima facie case of sex-based wage discrimination under the Equal Pay Act against Georgia Southwestern College for paying female faculty members less than male faculty members for “equal work” and that the college had failed to rebut that case.¹⁵⁴ On appeal the college claimed, as an affirmative defense, that it paid professors according to the market’s supply and demand.¹⁵⁵ The college argued “the marketplace for higher education dictates different salaries for different individuals based upon simple competition, differences in backgrounds, or differences in subject matter taught.”¹⁵⁶ The Eleventh Circuit, however, reasoned that the college could not just assert that certain qualifications or professors of certain subject areas were worth more without explaining how those market forces resulted in one employee earning more than another.¹⁵⁷ The court found the college’s argument especially unpersuasive because evidence showed that women with equal or greater qualifications teaching the same subjects were paid less than male comparators.¹⁵⁸ Also, the Eleventh Circuit noted that the college’s hiring process was not standardized in any way, for example, by having no salary scales.¹⁵⁹ Instead, the individual professor and the chairperson of each division within the college would simply agree upon the salary.¹⁶⁰

In *Brock*, the Eleventh Circuit agreed with the district court that:

any credibility that the market force defense might have is diminished by the fact that those charged with hiring did not inform themselves of the market rates of particular expertise, experience, or skills. The hiring process is devoid of any bargaining over initial salaries, a process one would normally expect in the context of a competing market place.¹⁶¹

Thus, the Eleventh Circuit found no basis for the college’s reliance on market forces as an affirmative defense to the pay differentials in question.¹⁶² In addition, the court stated: “[t]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected.”¹⁶³

152. 765 F.2d 1026 (11th Cir. 1985).

153. *Id.* at 1037.

154. *Id.* at 1029, 1032.

155. *Id.* at 1037.

156. *Id.* (quoting Appellant’s brief).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Marshall v. Ga. Southwestern Coll.*, 489 F. Supp. 1322, 1331 (N.D. Ga. 1980)).

163. *Id.* (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974); *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th

Unlike the employers in *Brock*, other educational institutions have won with the market-forces argument to justify pay differentials. The market-forces argument has succeeded in these other cases in which the market forces were not tied to one sex. For example, the Seventh Circuit in *Cullen* considered the market forces operating at the time of hiring the male comparator as a factor other than sex to explain why the university had “found it necessary” to offer the male comparator a higher salary than what it paid Dr. Cullen.¹⁶⁴ To justify the pay differential, the university described the circumstances in which it hired Dr. Quillen, the male comparator.¹⁶⁵ These circumstances involved a small applicant pool, a physical therapy program that was on probation, and the university’s need for a new director who was willing to assume responsibility for a failing department, to try to revive it, and then to create a graduate program.¹⁶⁶ Given these circumstances, the court said, market forces at the time of hire mandated that the university offer a large salary to Dr. Quillen.¹⁶⁷ Most important, the university demonstrated that the market forces were unrelated to Dr. Quillen’s gender and that the university offered him a higher salary to persuade him to accept the position.¹⁶⁸

Similarly, the Eighth Circuit in *Horner v. Mary Institute*¹⁶⁹ found that market forces accounted for the pay differential between Ralph Thorne, the male comparator, and Arlene Horner, the plaintiff.¹⁷⁰ The evidence showed that the headmaster at Mary Institute¹⁷¹ had tried to hire Thorne at \$7,500, which was the starting salary for male and female teachers.¹⁷² Thorne, however, was able to demand a higher salary because he had an offer to teach at another elementary school for \$9,000.¹⁷³ The Eighth Circuit concluded from this fact that the headmaster matched the \$9,000 offer not because of Thorne’s gender but because Thorne’s “experience and ability made him the best person available for the job and because a higher salary was necessary to hire him.”¹⁷⁴ In closing, the Eighth Circuit stated, “an employer may consider the market place value of the skills of a

Cir. 1970). *See also* *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2002) (stating that “the University’s market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the [Equal Pay Act]”). *But see* *Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313 (9th Cir. 1994) (holding that “unequal wages that reflect market conditions of supply and demand are not prohibited by the [Equal Pay Act]”) (citing *E.E.O.C. v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577, 580 (7th Cir. 1987)).

164. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 703 (7th Cir. 2003) (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994) and *Ross v. Univ. of Tex. at San Antonio*, 139 F.3d 521, 526, 549 (5th Cir. 1998)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. 613 F.2d 706 (8th Cir. 1980).

170. *Id.* at 714.

171. Mary Institute is a non-profit corporation that operates three private schools: a lower school for kindergarten through fourth grade, a middle school for fifth through eighth grades, and an upper school for ninth through twelfth grades. *Id.* at 709.

172. *Id.* at 714.

173. *Id.*

174. *Id.*

particular individual when determining his or her salary.”¹⁷⁵

In *Fitzgerald v. Trustees of Roanoke College*,¹⁷⁶ Mary Fitzgerald, an assistant professor in the fine arts department, argued that Roanoke College had violated the Equal Pay Act because the college was paying her less than two male professors who started the same year as Fitzgerald in the college’s history department.¹⁷⁷ The district court found that Roanoke College met its burden of proving that the disparity in faculty salary was based on the market demand for history professors versus fine arts professors.¹⁷⁸ The district court rested its finding on the fact that the faculty salary ranges for fine arts and history were based on “published national faculty salary data.”¹⁷⁹ A greater demand for history professors the year Fitzgerald was hired resulted in a “correspondingly higher salary in order to attract more qualified candidates.”¹⁸⁰ Thus, Roanoke College showed that market demand constituted a factor other than sex that justified the higher pay for the male comparators.

In *University and Community College System of Nevada v. Farmer*,¹⁸¹ Yvette Farmer, the plaintiff, compared herself to Johnson Makoba, an African male immigrant.¹⁸² Farmer showed that her starting annual salary was 17.5% less than Makoba’s,¹⁸³ even though they were both assistant professors of sociology and did comparable work.¹⁸⁴ At the district court level, Farmer received damages for violations of the Equal Pay Act pursuant to a jury verdict, and the University of Nevada, Reno’s motion for judgment notwithstanding the verdict was denied.¹⁸⁵ The Supreme Court of Nevada, however, reversed and concluded that Farmer had failed to prove that the pay differential was rooted in gender discrimination.¹⁸⁶ The Supreme Court of Nevada held that the university had succeeded in demonstrating a legitimate business-related reason for the pay disparity.¹⁸⁷ More specifically, the court held that the university had demonstrated that “manifest racial imbalance and market factors” were factors other than sex that explained the pay differential.¹⁸⁸ Most relevant to the court’s decision was the fact that “only one percent of the University’s faculty were black while eighty-seven percent were white.”¹⁸⁹ At the same time, women held about twenty-five percent of the full-

175. *Id.* (citing *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977)).

176. No. CIV.A.95-1049-R, 1996 U.S. Dist. LEXIS 16419 (W.D. Va. Aug. 29, 1996).

177. *Id.* at *2.

178. *Id.* at *12.

179. *Id.* Although the case did not specify the source of the “published national faculty salary data,” the facts indicated that the dean of the college consulted the published data and then set the salary ranges for the new faculty. *Id.* at *3.

180. *Id.*

181. 930 P.2d 730 (Nev. 1997).

182. *Id.* at 733.

183. *Id.* The University of Nevada, Reno started Makoba at \$40,000 and Farmer at \$33,000, a \$7,000 difference.

184. *Id.* at 736.

185. *Id.* at 732.

186. *Id.* at 737–38.

187. *Id.* at 737.

188. *Id.*

189. *Id.*

time faculty positions.¹⁹⁰ Considering these statistics, the court held that the university had:

a bona fide business-related reason for attaining a culturally diverse faculty. It is undisputed that qualified minority applicants, who are in short supply, can command premium salaries in the open market. The search committee elected to avoid an all-out bidding war with other educational institutions by offering Makoba a salary commensurate with his credentials, his minority status, and his overall marketability.¹⁹¹

Consequently, the court held that market forces constituted a factor other than sex that dictated a higher salary for the male comparator because there was a short supply of qualified minority applicants, regardless of gender.¹⁹²

In *Fenrick v. Wichita State University*,¹⁹³ the district court stated that an employer does not violate the Equal Pay Act when it is forced to pay more in order to “fill a particular need.”¹⁹⁴ The court reasoned that because the mathematics department needed another statistician, the university was justified in hiring the male comparator statistician at a higher starting salary than what it paid the female mathematics professor plaintiff.¹⁹⁵ The court held that the college appropriately considered the market demand for statisticians, regardless of sex, in calculating the male comparator’s starting salary.¹⁹⁶ Thus, the college in *Fenrick* could rely on market demand as a nondiscriminatory explanation for the salary difference.

F. Miscellaneous

Some colleges and universities offer various, unrelated factors other than sex to explain wage differentials among faculty. *Schwartz v. Florida Board of Regents*¹⁹⁷ illustrates this catch-all category of cases. In *Schwartz*, Florida State University (“FSU”) offered six seemingly unrelated factors to justify a pay disparity.¹⁹⁸ In *Schwartz*, a male professor in the college of education brought suit against the Florida Board of Regents for allegedly paying female professors in the college of education a higher salary than comparable male professors.¹⁹⁹ The defendant argued that the salary disparity “resulted from raises given to the faculty based upon service to the university, publication, administrative duties, meritorious

190. *Id.*

191. *Id.*

192. *Id.* A wage discrimination claim under the Equal Pay Act is different from a discriminatory hiring claim under Title VII. For a recent discriminatory hiring case against a university, see *Hill v. Ross*, 183 F.3d 586 (7th Cir 1999). In *Hill*, the court held the university’s affirmative action plans could justify its employment decision not to offer a male plaintiff applicant a tenure track position if it could articulate a nondiscriminatory rationale for its decision. *Id.* at 590.

193. No. 83-1891-C, 1988 WL 131641 (D. Kan. Nov. 10, 1988).

194. *Id.* at *8 (citing *Ratts v. Bus. Sys., Inc.*, 686 F. Supp. 546, 552 (D.S.C. 1987)).

195. *Id.*

196. *Id.*

197. 954 F.2d 620 (11th Cir. 1991).

198. *Id.* at 623.

199. *Id.* at 622.

research, supervision of doctoral students, and performance.”²⁰⁰ The Eleventh Circuit rejected Schwartz’s argument that these factors were too subjective and could only be relied upon if they were part of a merit system.²⁰¹ Instead, the court held that the pay disparity was justified by factors other than sex.²⁰²

Analyzing FSU’s arguments in light of the Seventh Circuit’s guidance in *Cullen* suggests that a university, if litigating *Schwartz* today, might want to argue differently from the way FSU organized its arguments in *Schwartz*. *Cullen* clarifies whether a factor refutes an element of the prima facie case or applies as an affirmative defense. Colleges and universities should know whether to assert a factor to disprove the prima facie case or as an affirmative defenses because factors that address the level of skill, effort, and responsibility required for a job, for instance, can defeat the plaintiff’s prima facie case outright without even asserting an affirmative defense. In other words, if colleges and universities assert the factors that most appropriately refute the elements of the plaintiff’s prima facie case, then the college or university will not have to assert other factors as affirmative defenses because the case will have failed already. Applying the Seventh Circuit’s reasoning in *Cullen*, FSU today would want to discuss the comparators’ service to the university, administrative duties, and supervision of doctoral students as a response to the plaintiff’s prima facie case. Then FSU would reserve only the publication, meritorious research, and performance arguments for the factors other than sex in its affirmative defenses. In view of *Cullen*, colleges and universities should allocate arguments appropriately to either the prima facie case or the affirmative defense rather than group all the arguments together as factors other than sex to justify a pay disparity, as FSU did in *Schwartz*.

CONCLUSION

To refute a sex-based wage discrimination claim under the Equal Pay Act, a college or university may first establish that the plaintiff and the comparator do not perform “equal work.” Equal work requires a substantially similar level of skill, effort, and responsibility; and the jobs must be performed under similar working conditions. Second, a college or university can justify a pay differential by proving one of the four affirmative defenses under the Equal Pay Act. In particular, the college or university has to prove that the higher pay was “made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”²⁰³ The cases discussed in this note show the breadth of the any-other-factor-besides-sex defense. *Cullen*, in particular, illustrates that courts will consider the unique characteristics of professors and faculty members’ jobs in appraising the prima facie case as well as affirmative defenses.

This note shows that a college or university may justify a salary differential based on a factor other than sex, such as a difference in experience, education, training, revenue generation, an academic institution’s salary retention policy, an

200. *Id.* at 623.

201. *Id.*

202. *Id.*

203. 29 U.S.C. § 206(d)(1)(i)–(iv) (2000).

academic institution's policy of responding to outside offers, or market forces at the time of hire. These factors, however, must reasonably explain the pay disparity, and the factors may not be used as pretext for sex discrimination. Although courts are not likely to intervene in the affairs of a college or university if there are legitimate differences that justify a pay disparity, the courts will not tolerate unlawful behavior. A college or university should consider the factors other than sex discussed in this note when it determines faculty pay and when it needs to defend itself against a sex-based wage discrimination claim.

ATTACKING “DIVERSITY”: A REVIEW OF PETER WOOD’S *DIVERSITY: THE INVENTION OF A CONCEPT*

ROGER CLEGG*

The word “diversity” is ubiquitous these days, especially in academia. Peter Wood, a professor of anthropology at Boston University, has written an invaluable book, *Diversity: The Invention of a Concept*,¹ that explores the rise of the concept and, one hopes, will hasten its demise. There is, I must quickly add, nothing wrong with diversity per se, meaning a variety of people, with different skin colors and national origins, outlooks, and experiences. The trouble is that, whenever one hears the term, it is almost certainly because the speaker has an agenda that favors racial and ethnic discrimination in order to achieve a particular and predetermined demographic mix, while opposing merit and assimilation to American culture.²

This brief review is divided into three parts. Part I summarizes and discusses Wood’s book, with particular emphasis on its treatment of the Supreme Court’s *Bakke* decision;³ part II adds some additional criticisms of the diversity agenda; and part III discusses how the Supreme Court’s recent acceptance of the diversity rationale as “compelling” might be attacked in future litigation.

I. REVIEW OF PETER WOOD’S *DIVERSITY: THE INVENTION OF A CONCEPT*

Peter Wood begins his book by discussing Martin Luther King’s repeated declaration that all people are tied together in a “single garment of destiny,” which Wood finds to be a “striking image of human unity.”⁴ It is, however, to be contrasted with the current concept of “diversity,” which, Wood says, “bids us think of America not as a single garment, but as divided into separate groups—on the basis of race, ethnicity or sex, for starters—some of which have historically enjoyed privileges that have been denied the others.”⁵ Moreover, the concept “is more than a propensity to dwell on the separate threads that make up the social

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1. Peter Wood, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003).
2. See Roger Clegg, *Why I’m Sick of the Praise for Diversity on Campuses*, CHRON. HIGHER EDUC., July 14, 2000, at B8.
3. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
4. WOOD, *supra* note 1, at 3.
5. *Id.* at 5.

fabric.”⁶ Rather, “[i]t is above all a political doctrine asserting that *some* social categories deserve compensatory privileges”⁷ But this is “more than a matter of government mandates.”⁸ It is “also a *belief* that the portion of our individual identities that derives from our ancestry is the most important part, and a *feeling* that group identity is somehow more substantial and powerful than either our individuality or our common humanity.”⁹ “The new movement is something different, and in some ways a repudiation of the older attempts”—like Dr. King’s—“to find a oneness in our many-ness.”¹⁰ Rather, it “tends to elevate many-ness for its own sake.”¹¹

Accordingly, Wood states early on that he “aim[s] to show that, in one area of American life after another,” the principle of diversity “represents an attempt to alter the root cultural assumptions on which American society is based.”¹² Indeed, the diversity mindset “already has achieved a substantial record of increased social discord and cultural decline.”¹³ The diversity movement:

has contributed significantly to falling educational performance and lower academic standards (e.g. attacks on the SAT as a tool for identifying high school students who have the aptitude to succeed in college); undermined love of country (by elevating racial separatism); trivialized art (by emphasizing the social identity of the artist, e.g. Toni Morrison); and made certain forms of racialism respectable again.¹⁴

While it may occasionally have made matters better instead of worse, Wood believes that in general the diversity mindset “is a challenge to higher virtues and greater goods. We jeopardize liberty and equality by our friendship with this new principle. It is an unruly guest in our house, and the time may have come to call a cab and send it home.”¹⁵

In the first three chapters, Wood traces the different meanings of the word diversity and how the concept of diversity has changed over the years, with a special focus—appropriately enough—on diversity in terms of a variety of races and cultures. The spirit of our age would, of course, paint a picture of earlier generations that view the Other—really, all Others—as not only different but inferior, even subhuman, with gradual progress to our own current enlightened state of seeing all races and cultures as not so different and certainly with none—save the Western white Christian, perhaps—as inferior.

But Wood sees that it is more complicated than this, and that the rise of diversity has not always meant a rise of tolerance or heightened appreciation of other cultures. “The diversiphiles,” Wood writes, using one of his neologisms,

6. *Id.*

7. *Id.*

8. *Id.* at 11.

9. *Id.*

10. *Id.* at 8.

11. *Id.*

12. *Id.* at 3.

13. *Id.*

14. *Id.*

15. *Id.*

“hope to replace America’s live-and-let-live pluralism with an edgier respect-my-group-or-else pluralism.”¹⁶ And, for instance, in the theological context, “the differences among American religions are small though important; but construed through the lens of *diversity*, the inverse image appears: the differences are huge yet somehow inconsequential,” since it is considered disrespectful to minimize differences but unacceptable to critique them.¹⁷ In chapter four, Wood discusses the way that the word is now most often used (in order to distinguish the word when used with the old meaning from the way it is used now, throughout the book Wood italicizes the word whenever used in the new way—as you can see in the preceding sentence).

Chapter five, “*Bakke* and Beyond,” is the book’s pivotal chapter.¹⁸ It discusses the litigation in *Regents of the University of California v. Bakke* and the culminating Supreme Court decision in 1978.¹⁹ In that case, a badly fractured Court struck down the admissions system at the University of California-Davis (“UC-Davis”) medical school.²⁰ That system had set aside a certain number of slots for members of certain racial groups.²¹ Four justices (Brennan, White, Marshall, and Blackmun) would have reversed the lower court decision striking down the system;²² four (Stevens, Stewart, Rehnquist, and Chief Justice Burger) would have invalidated the system,²³ resting their decision on the unambiguous language in Title VI of the 1964 Civil Rights Act,²⁴ that flatly prohibits what the school did: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁵

The deciding vote, however, was cast by Justice Lewis Powell. He agreed with Brennan et al. that the plain language in Title VI didn’t mean what it said, and was instead supposed to prohibit discrimination only to the extent that it would be barred by the Equal Protection Clause.²⁶ But, unlike the Brennan group, Justice Powell found that the UC-Davis system was illegal because it failed to pass the “strict scrutiny” he thought was demanded by this standard.²⁷ That standard required that the discrimination be narrowly tailored to the achievement of a compelling interest.²⁸ The overt quotas set by the UC-Davis were not narrowly tailored, even though Powell did find there to be a compelling interest—namely

16. *Id.* at 168.

17. *Id.* at 169.

18. *Id.* at 99–145.

19. 438 U.S. 265 (1978).

20. *Id.* at 271.

21. *Id.* at 276–77.

22. *Id.* at 267.

23. *Id.*

24. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

25. 42 U.S.C. § 2000d (2000).

26. *Bakke*, 438 U.S. at 287–88.

27. *Id.* at 289–90.

28. *Id.* at 299.

diversity.²⁹

That the diversity rationale should carry the day came as a shock even to supporters of racial preferences, concludes Wood. This may seem implausible to some in retrospect, now that the word has become so ubiquitous in our culture, but it fits in with my own experience. I remember first reading the decision. Justice Powell's opinion lays out the legal framework, discusses the general requirement of a compelling interest, and then posits four possible candidates for such an interest in this case. He rejected the first three in less than five pages: "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," "countering the effects of societal discrimination," and "increasing the number of physicians who will practice in communities currently underserved."³⁰ Well, I thought, those are not frivolous claims, and yet Justice Powell has quickly given them the back of his hand. He must be saving the weakest for last, the puny "educational benefits that flow from an ethnically diverse student body."³¹ I remember my eyes growing wide with disbelief as I read further and, astonishingly, the diversity rationale was accepted.

As Wood writes:

Powell cannot be credited with having invented the idea. Diversity as a cultural principle—including the idea that ethnically and racially mixed classrooms are educationally stimulating—had been floating around in leftist American intellectual culture for about a decade. The immediate reaction to Powell's opinion suggests that leftist intellectuals were taken by surprise that such an incidental concern—that racially mixed classrooms might benefit white folks too—should have played a significant role in rescuing affirmative action from the conservative justices. It took a while for the Left to realize that it had been handed a potentially powerful new weapon in the culture wars.³²

But catch on they did. Nor did college and university admission officials, in particular, have to do much in order to provide the necessary fig leaf for their ethnically preferential policies. "They simply nodded to the *Bakke* decision by disguising their old racial quotas as 'plus factor' systems and got on with the business of discriminating."³³ Wood concludes the *Bakke* chapter on an even more somber note:

In the end, Justice Powell's *Bakke* decision was a case of wish fulfillment: a search for a painless way to accelerate racial and ethnic integration by detouring around academic standards. But "race" is *not* a "plus factor" in performing surgery, practicing law, or any other form of advanced study; it is an irrelevancy. And the kind of *diversity* achieved by racially preferential admissions is not educationally invigorating; it is intellectually threadbare and ethically contemptible.

29. *Id.* at 314–15.

30. *Id.* at 306.

31. *Id.*

32. WOOD, *supra* note 1, at 113–14.

33. *Id.* at 123.

Far from being a painless solution to the nation's racial divisions, Powell's exaggeration of the importance of *diversity* only deepened our racial problems, and affirmative action remains an unsettled and vexing issue. But as large and important as it is, that debate is not the central legacy of *Bakke*, or the primary subject of this book. The *Bakke* decision's even larger legacy was to give scope, legitimacy, and force to a new way of thinking about social diversity, which would prove to have cultural applications far beyond college admissions and even race.³⁴

Those last two sentences provide the roadmap that Wood follows for the rest of the book: the impact of the diversity mindset on religion (or, at least, religion's bureaucracies—chapter six),³⁵ the arts (chapter seven),³⁶ business (chapter eight),³⁷ the campus beyond student admissions (chapter nine),³⁸ and even consumer goods (chapter ten).³⁹ Chapter eleven is about how the diversiphiles—that Wood neologism again—have pervaded women's colleges, which have embraced it even as they still reject the obvious diversification that would ensue if they went co-ed.⁴⁰ Chapter twelve brings us up-to-date, with a section on “Diversity After 9-11” and some concluding prognostications.⁴¹

Let me conclude my brief summary of Wood's book by quoting his own:

President Johnson inaugurated legalized racial preferences in 1965, but “affirmative action” met increasing popular resistance and legal challenges, culminating in the Supreme Court's split decision in the 1978 *Bakke* case. The outcome of that case included a one-man opinion drafted by Justice Powell in which he declared that race preferences in college admissions are unconstitutional under most circumstances, but that the minority racial status of an applicant could be considered as “a plus factor” if the college was seeking to increase its intellectual “diversity.” Powell's *diversity* argument, though eccentric, connected to some cultural currents in leftist politics, in American churches and among education theorists. (Perhaps it connected as well with the strain of American pragmatism extending back through John Dewey to William James, in which “pluralism” was rated as among the highest educational values.) In any case, within a few years of the *Bakke* case, most colleges and universities relabeled their racial preferences in admissions as programs intended to enhance *diversity*.

The *diversity* movement grew quietly until it burst into prominence in 1987. That year, the Hudson Institute [a conservative think tank, ironically—mirroring the irony that Justice Powell was a Nixon

34. *Id.* at 145.

35. *Id.* at 146–74.

36. *Id.* at 175–200.

37. *Id.* at 201–25.

38. *Id.* at 226–56.

39. *Id.* at 257–72.

40. *Id.* at 273–87.

41. *Id.* at 288–309.

appointee] issued its *Workforce 2000* report, which provided the business world with a demographic excuse to switch from affirmative action rationales for ethnic preferences in hiring and promotion, to *diversity* preferences—said to be prudent planning for the future. Higher education and the business sector thus discovered common cause: in order to have the ethnically diverse workers that business would need, universities would have to admit and graduate more minority students, even at the cost of lowering admission standards. The Business-Higher Education Forum's January 2002 report, *Investing in People*, is a late reverberation of the alliance that has made *diversity* a pivotal idea in American life. In the meantime, the ideology of *diversity* has continued to shape much of American culture, including religion, the arts and personal consumption.⁴²

II. ADDITIONAL THOUGHTS ON “DIVERSITY”

As discussed above, Peter Wood weaves a persuasive critique of the “diversity” mindset into his description of its origin and growth, but I would add a few other observations to his.

First, while of course Wood is correct that diversity proponents tend to be “leftist,” they are also, literally but ironically, reactionary in this sense. No one in his right mind can really believe that all cultures are of equal worth. Malcolm Muggeridge once observed on the television show *Firing Line* that one can believe that all men are brothers, but not that all men have equal talents. Likewise, the individuals of any culture are human beings and entitled to decent treatment, and there may be elements of most cultures worthy of interest and even of emulation—but not all, and at the end of the day it is difficult not to believe that the West is best.

The problem is that the West has a history that includes racism and oppression (as do most civilizations, incidentally, which have a less impressive record than the West in eventually embracing liberty and tolerance). Those who oppose and lament this high-handed supremacy rather naturally find themselves arguing that it is unjustified because the West has nothing to feel superior about. That is a tempting argument in reaction to the excesses of imperialism and the horrors of Jim Crow, but it is just not true.

Put another way, the correct reaction to the powers that treat certain people as incapable of meeting the standards of civilization is to insist that those people be given the chance to meet those standards, not to deny the worth of the standards themselves. Indeed, one suspects that, deep down inside, many diversiphiles fear that, if they preserve the standards, those other people will not be able to meet them, and that this will vindicate the bigots and, what is worse, make the diversiphiles look silly. That is why, as I wrote in this review's first paragraph, the diversity movement is anti-merit, pro-preference, and anti-assimilationist.

It should be noted that diversity is more likely to appeal to those who don't really believe in truth. If there are only subjective feelings, if “stories” and

42. *Id.* at 289–90.

“narratives” are more persuasive than evidence, then why should a school waste its time trying to find and admit the students best able to pursue truth—that is, those smartest and hardest working? It should simply make sure that all stories get told. On the other hand, if the truth is out there, and if finding it requires intelligence and diligence, then schools should try to find and train the most intelligent and diligent scholars they can even if the resulting student body and faculty lack the desired “diversity.”

In some areas—cuisine, say—diversity may be desirable in and of itself, but in the college or university, diversity is desirable principally as a means. A means, that is, to the truth. The marketplace of ideas is similar in this respect to the regular marketplace. In the latter, we want a variety of companies not because we think they all will be equally good, but because they will compete and are more likely to market the products that consumers want. Likewise, we want professors with different approaches to research not because we think they will all be equally successful; we want that variety precisely because we do not know which *one* will be most successful. If we know beforehand that certain approaches are false, they should not be encouraged simply because we like variety.

We should not want diversity in all things, after all. We want all our students and professors to be civil and smart. We want them all to tell the truth and to be committed to finding it. We want them to have the requisite foundation-level of knowledge. We want them to be not only able, but also willing, to do the research and study required by their discipline. And some ideas are too bizarre to be entertained: No flat-earthers, no Nazis need apply. Some institutions—particularly private ones—may have stricter limitations on the common ground to be held: Only Christians at some schools, only non-Marxists at others. William F. Buckley, Jr., was right in *God and Man at Yale* that the truth can be pursued vigorously without allowing every fundamental tenet to be reargued or rejected.⁴³ Indeed, at some point that becomes a waste of time. And different institutions can draw the line in different places when it comes to deciding which approaches are not worth paying for.

But perhaps the more critical point is that there is no reason to suppose that the kind of intellectual diversity that we do welcome—of viewpoints and experiences—can be achieved by using skin color and ancestors’ national origins as proxies for thought and life. Do we really believe that skin color can serve as the best proxy for different outlooks and experiences? And do we really believe that those different outlooks and experiences are so educationally valuable that they justify (a) the relative devaluation of academic qualifications, and (b) racial discrimination?

This proxy approach is becoming more and more unreliable as time goes by. There is less and less that being black tells us about a person’s outlook and experience. And are we to believe that *that* lesson can be taught only by meeting different blacks face to face, and that it is critically important to do so? Likewise, are we to believe that the best—the only—way to learn to deal with Latinos, say, is by meeting some on campus? But now we are getting into the dubious arguments

43. WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF “ACADEMIC FREEDOM”* (1951).

unfortunately accepted by the Supreme Court in its *Grutter* decision, which takes us to the next part of this review.

III. SIX SUGGESTIONS FOR THE NEXT LEGAL ASSAULT ON “DIVERSITY”

While Wood is correct that the diversity mantra is now chanted outside of academia, it is nowhere chanted louder. For this reason, and because the Supreme Court’s own recent (2003) affirmation of the approach took place in the college and university context, it is there that a successful counterattack would be most welcome. And, with a new Justice or two, this is a real possibility.

Herewith a quick review of the Supreme Court’s decisions in *Grutter v. Bollinger*⁴⁴ and *Gratz v. Bollinger*.⁴⁵ In *Grutter*, the Court upheld the use of racial and ethnic preferences in law-school admissions at the University of Michigan.⁴⁶ It applied the two prongs of strict scrutiny, requiring the school to show a compelling interest for its discrimination and that only narrowly tailored means were used to achieve it.⁴⁷ For purposes of this review, the most important part of the Court’s decision was its conclusion—which the Court justified for the reasons discussed in more detail below—that student body “diversity” is a compelling interest.⁴⁸ Having swallowed that camel, the Court had no trouble with the gnat of determining that the law school’s discrimination was narrowly tailored⁴⁹—that it gave “individualized consideration” to students,⁵⁰ was flexible,⁵¹ eschewed quotas,⁵² gave sufficient consideration to race-neutral means of achieving diversity,⁵³ did not “unduly” harm non-minority applicants,⁵⁴ and was limited in time.⁵⁵ In *Gratz*, the Court struck down as unconstitutional (and, therefore, also violative of Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981) the use of racial and ethnic preferences in undergraduate admissions to the University of Michigan.⁵⁶ Because the Court had accepted the diversity interest as compelling in *Grutter*, it focused in *Gratz* on the narrow tailoring prong of strict scrutiny. The Court concluded that the university—by, in particular, its automatic award of twenty points, or one-fifth of the number required for admission, to black, Latino, and Native American applicants on the basis of their ethnicity alone—failed to provide the “individualized consideration” necessary to pass constitutional muster.⁵⁷

44. 539 U.S. 306 (2003).

45. 539 U.S. 244 (2003).

46. *Grutter*, 539 U.S. at 307.

47. *Id.* at 326.

48. *Id.* at 328.

49. *Id.* at 334.

50. *Id.* at 337.

51. *Id.* at 337.

52. *Id.* at 335.

53. *Id.* at 339.

54. *Id.* at 341.

55. *Id.* at 343.

56. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

57. *Id.* at 271.

Like generals, lawyers often err by preparing to fight the just-past war rather than the next one, but it stands to reason that, in order to persuade the Court that it got things wrong in *Grutter* when it found a university's interest in student-body diversity to be "compelling," the opinion there will have to be refuted. The six suggestions below will do that; of course, if one is arguing to a lower court (and maybe even to the Supreme Court), then one is advised to present these arguments in a way that might only limit the opinion's reach implicitly, rather than attack it explicitly.

1. Attack the social science evidence that diversity provides "educational benefits."

The Court's *Grutter* opinion found that student-body diversity provides "educational benefits."⁵⁸ It began by noting that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"⁵⁹ Additionally, the Court noted that "classroom discussion" is improved.⁶⁰ All this according to "expert studies and reports."⁶¹

The next time around, then, the social science evidence cited in support of this notion needs to be attacked aggressively, and the counterevidence marshaled for the deleterious effects of preferences, particularly with regard to the members of those groups supposedly being benefited. The Court thought that law schools, and particularly selective law schools, are the ticket to leadership, and that leadership "visibly open" to all—that is, leadership with plenty of diversity—is needed for "legitimacy in the eyes of citizenry"⁶² Accepting this dubious and unsubstantiated claim arguendo, it can be countered that, for instance, a comprehensive study by Dr. Richard H. Sander of the University of California-Los Angeles Law School shows that preferences have actually resulted in *fewer* black lawyers.⁶³ At the end of the day, the Court should at least be left with a sense of the indeterminacy of the social science evidence here.

In his recent and important article, Dr. Sander concludes:

What I find and describe in this article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries. The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences. The net tradeoff of higher prestige but weaker academic performance substantially harms black performance on bar exams and harms most new black lawyers on the job market. Perhaps

58. *Grutter*, 539 U.S. at 328.

59. *Id.* at 330.

60. *Id.*

61. *Id.*

62. *Id.* at 332.

63. Richard H. Sander, *Systemic Analysis*, 57 STAN. L. REV. 367 (2004).

most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system. Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.⁶⁴

Professor Sander is not alone. Recent papers by Russell Nieli of Princeton University⁶⁵ and Marie Gryphon of the Cato Institute⁶⁶ summarize a variety of other empirical studies, all concluding in one way or another that the use of racial preferences has many harms and few if any benefits, even for those they are, in Dr. Sander's words, "most designed to help."⁶⁷

64. *Id.* at 371–72 (internal citation omitted).

65. Russell Nieli, *The Changing Shape of the River: Affirmative Action and Recent Social Science Research*, available at http://www.nas.org/reports/river_change/affirm-act_soc-sci.pdf (Oct. 4, 2004).

66. Marie Gryphon, *The Affirmative Action Myth* (forthcoming April 2005) (manuscript on file with author).

67. Sander, *supra* note 63, at 372. Among the works summarized by Nieli are Stacy Berg Dale & Alan Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. ECON. 1491 (2002) (arguing that going to a more selective school generally does not result in higher income, if academic qualifications are controlled for); STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS (2003) (arguing that preferences have resulted in fewer minority academics); and Stanford psychologist Claude Steele's work on "stereotype threat," including Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips, eds., 1998) (arguing that students who fear that they are academically less qualified will actually do worse on tests than they would if they lacked this fear)—and, of course, this fear is fed by the use of racial preferences, as suggested by Douglas Massey et al. in *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (2003). Nieli, *supra* note 65, at 2–21. Massey also found that there is considerable resentment held by white and Asian students toward the black and Latino beneficiaries of racial preference policies, and Roper and Gallup surveys likewise find that most Americans dislike the use of racial preferences, as did a survey by the research firm of Angus Reid. *Id.* at 22–23.

Nieli also discusses John Ogbu's Black American Students in an Affluent Suburb—A Study of Academic Engagement and Black Students' School Success: Coping with the Burden of Acting White on the phenomenon of African Americans believing that studying hard is "acting white." *Id.* at 36, 50 n.25 (internal citations omitted). Nieli observes that:

Ogbu does not speculate on the effect that affirmative action policies at America's better colleges may have on th[is] tendenc[y], but it is hard to imagine that such policies do not negatively impact the work ethic of the more academically talented black students in communities like Shaker Heights and other integrated suburbs.

Id. Nieli also notes that other researchers have recently documented this latter tendency, likely fueled by affirmative action's perverse incentives for black students to study less diligently—and for black parents to demand less diligent study—than members of other races. *Id.* at 36–37. See LAURENCE STEINBERG, *BEYOND THE CLASSROOM* (1996); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING* (2003).

Gryphon collects evidence that preferences have not increased the number of minority students attending college, have not increased their earning power, and are not popular. Gryphon, *supra* note 66, at 1–6. See also Karlyn Bowman, *Opinion Pulse: Attitudes Toward the Supreme*

Nor is the evidence of benefits from student-body diversity persuasive, even if we ignore the more recent studies. As discussed above, the Court noted in the Michigan cases that the university proffered social-science evidence to buttress its claim that its interest in a diverse student body is compelling. But such evidence should not be sufficient to justify governmental action as divisive, disturbing, and damaging as racial discrimination. After all, claims of educational benefit arising from a particular teaching technique, or creating a particular school environment, are frequently made, but they are also frequently controversial and disputed.⁶⁸

That was certainly the case in *Grutter*. The evidence presented by Professor Patricia Gurin on behalf of the university was strongly criticized in at least two studies cited to the court of appeals. *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, by Dr. Robert Lerner and Dr. Althea K. Nagai, concluded: "There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students."⁶⁹ Likewise, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, by Dr. Thomas E. Wood and Dr. Malcolm J. Sherman, painstakingly reviews the data available and concludes: "The central problem that Gurin faced in producing her Expert Report is that the national database on which she had to rely actually *disconfirms* the claim that she was asked by the University to defend."⁷⁰ Yet another study contradicting the Gurin

Court, AM. ENTERPRISE, Jan./Feb. 2005, at 60–61 (stating that 76% of Americans surveyed disagreed, while only 19% agreed, with the Supreme Court's ruling that "A university is allowed to use race as one of several factors when deciding whom to admit"). Gryphon also discusses evidence that preferences are likely to increase dropout rates (citing Audrey Light & Wayne Strayer, Determinants of College Completion: School Quality or Student Ability?, *J. Hum. Resources* 35 (2000) and MASSEY ET AL., *supra*) and lower grades (citing COLE & BARBER, *supra* and Steele & Aronson, *supra*); increase isolation and stigma (citing MASSEY ET AL., *supra*); and mismatch students and institutions (citing COLE & BARBER, *supra*). Gryphon, *supra* note 66, at 6–10.

68. For instance, there is considerable controversy over whether bilingual education helps or hurts limited-English-proficient children. See, e.g., Keith A. Baker & Adriana A. de Kanter, *The Effectiveness of Bilingual Education*, in BILINGUAL EDUCATION 33–86 (Keith A. Baker & Adriana A. de Kanter eds., 1983); THE FAILURE OF BILINGUAL EDUCATION (Jorge Amselle ed., 1996). All kinds of factors are said to correlate with improved educational performance. See, e.g., Eugenia Costa-Giomi, *The Effects of Three Years of Piano Instruction on Children's Cognitive Development*, 47 J. RES. MUSIC EDUC. 198 (1999); U.S. DEP'T OF EDUC., THE CLASS-SIZE REDUCTION PROGRAM: BOOSTING STUDENT ACHIEVEMENT IN SCHOOLS ACROSS THE NATION (2000); Sheila G. Terry & Kimberly Kerry, *Classroom Breakfast: Helping Maryland Students Make the Grade*, MD. STATE DEP'T OF EDUC. (2000); Julia Ellis et al., *Mentor-Supported Literacy Development in Elementary Schools*, 44 ALBERTA J. EDUC. RES. 149 (1998); Laverne Warner, *Classroom Basics: How Environments Affect Young Children*, 25 TEX. CHILD CARE 2 (2001) (highlighting the importance of classroom design and organization).

69. Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, CENTER FOR EQUAL OPPORTUNITY 1, available at <http://www.ceousa.org/pdfs/Gurin1.pdf> (last visited Mar. 12, 2005).

70. Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, NAT'L ASS'N OF SCHOLARS 79, available at <http://www.nas.org/rhe.pdf> (May 2001).

report, *Does Enrollment Diversity Improve University Education?* by Stanley Rothman, S.M. Lipset, and Neil Nevitte, was published in the peer reviewed *International Journal of Public Opinion Research*.⁷¹

It is worth bearing in mind that, when racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social science experts on behalf of the *proponents* of segregation. In *Davis v. County School Board*,⁷² a companion case to *Brown v. Board of Education*,⁷³ the Supreme Court brief by the State of Virginia attacked the social science evidence presented by the plaintiffs, arguing that their witnesses “bas[ed] their opinion on a lack of knowledge of Virginia.”⁷⁴ And besides, “they were by no means the only experts who testified before the Court below.”⁷⁵ To the contrary, the state “presented 4 educators, a psychiatrist and 2 psychologists,”⁷⁶ all “eminent men”⁷⁷ whose work was supported by “other outstanding scholars”⁷⁸ and who testified that “segregated education at the high school level is best for the individual students of both races.”⁷⁹

One college president concluded that, without segregation, “the general welfare will be definitely harmed” and “the progress of Negro education . . . would be set back at least half a century.”⁸⁰ A child psychiatrist testified, “When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops.”⁸¹ And the *chairman of the department of psychology at Columbia University* also had no doubt that separate-but-equal education was superior:

If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect

71. 15 INT. J. PUB. OPIN. RSCH. 8 (2003).

72. 347 U.S. 483 (1954).

73. 349 U.S. 294 (1955). The shakiness—from both a jurisprudential and an empirical perspective—of the reliance on social science data in *Brown* is discussed in ANDREW KULL, THE COLOR BLIND CONSTITUTION 112, 154–55 (1992). Kull concludes, “But if the legality of racial segregation properly depends on the current state of psychological opinion, expert or homespun, then it is probably a mistake to regard it as a constitutional question at all.” *Id.* at 155.

74. Brief for Appellees at 24, *Davis* (No. 3).

75. *Id.*

76. *Id.*

77. *Id.* at 27.

78. *Id.* at 28.

79. *Id.* at 29.

80. *Id.* at 25.

81. *Id.* at 26.

the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school.⁸²

In *Brown's* predecessor, *Sweatt v. Painter*,⁸³ the State of Texas defended its segregated law schools, arguing that “there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools.”⁸⁴ Texas continued:

After much study for the United States Government, [Dr. Ambrose Caliver] found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more “secure” at a college of his own people.⁸⁵

Texas also cited Dr. Charles William Eliot, “President of Harvard for forty years,” who concluded after a tour of the South that “if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children.”⁸⁶

It is by no means inconceivable that social scientists and educators can still be produced who will testify that a *lack* of diversity will facilitate education. They would testify that there are fewer distractions and more mutual support—indeed, single sex education has its advocates for these reasons, as do historically black colleges.⁸⁷

Furthermore, the diversity rationale could equally be used to justify discrimination *against* formerly disadvantaged groups as well as in their favor. The discrimination undertaken by colleges and universities in the name of diversity typically hurts not only whites but also Asian Americans. Indeed, there is evidence that it hurts Asian Americans more than whites.⁸⁸ Frequently other racial

82. *Id.* at 27.

83. 339 U.S. 629 (1950).

84. Brief for Respondents at 96, *Sweatt* (No. 44).

85. *Id.*

86. *Id.* at 97.

87. See Dale Baker & Kathy Jacobs, *Winners and Losers in Single-Sex Science and Mathematics Classrooms*, Nat'l Ass'n of Research in Sci. Teaching Annual Meeting (1999) (on file with the Library of Congress). Sexual discrimination has frequently been supposedly justified by evidence similar to that used to justify racial discrimination here. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

88. See George Bornstein, *How Affirmative Action Affects Minorities: Experience Shows Racial Preferences Take Seats From Asian-Americans, Echoing Past Discrimination Against Jewish Students*, DETROIT NEWS, Mar. 27, 2003, available at <http://www.detroitnews.com/2003/editorial/0303/27/a13-120129.htm>; Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Anthony K. Lee, *No More Chinese Need Apply*, LEGAL TIMES, Mar. 31, 2003, at 68; Denis Binder, *Affirmative Action Lunacy: College Quotas Limit Asian-Americans in the Name of Atoning for White Racism*, ORANGE COUNTY REGISTER, Mar. 16, 2003; Eugene Volokh, *Making Hay with*

and ethnic minorities—such as Arab Americans and Latinos—are also discriminated against (the University of Michigan law school discriminated against some Latino groups but in favor of others⁸⁹). If a state has an interest in having a university's student body approximate the demographic mix of the state, then logically the number of students from *any* group ought to be capped. For example, in *Johnson v. Board of Regents of the University of Georgia*,⁹⁰ women were discriminated against relative to men, apparently because women were thought to be “overrepresented.”⁹¹ And indeed the federal government has already acknowledged that an improved-education argument based on diversity can be used to justify discrimination against African Americans.⁹²

In the final analysis, it ought to be possible to persuade the Court—especially in light of the most recent empirical studies—that the diversity rationale is simply too thin to justify as constitutional an action as abhorrent as governmental discrimination based on a person's skin color or country of ancestry.

2. Line up some ex-military officers, some businessmen—and some universities.

The Court also seemed to be impressed by the briefs filed by some ex-military officers and some corporations.⁹³ Next time around, there ought to be at least one brief filed on behalf of ex-military officers who do not think that racial preferences or racial bean-counting are desirable, and there should likewise be at least one brief filed by businesses that reject the need for a predetermined racial and ethnic mix in the schoolroom or the workplace. Such people do exist: Bruce Fleming, who was recently a member of the admissions board at the U.S. Naval Academy in Annapolis, has criticized the use of racial preferences,⁹⁴ as has T.J. Rodgers, CEO of Cypress Semiconductor.⁹⁵

Of course, the Court was no doubt also impressed by the apparently solid phalanx of college and university support for preferences. But recent freedom of information requests by the National Association of Scholars (“NAS”) has revealed that many perfectly fine undergraduate institutions do not use racial and

Shifty Labels, L.A. TIMES, Apr. 9, 1998, at B9.

89. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001). Likewise, the University of California at Berkeley for years granted preferences to Mexican-Americans (but not other Latinos) and to Filipinos (but not other Asians). See BOB LAIRD, *THE CASE FOR AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS* (forthcoming 2005) (uncorrected bound proofs at 59–60, 113, on file with author).

90. 263 F.3d 1234 (11th Cir. 2001).

91. See *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375–76 (S.D. Ga. 2000) (discussing the validity of the University of Georgia's gender preference in admissions).

92. See TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION* 112–15 (1996) (discussing brief filed by the United States in a racial preference case involving the layoff of a public school teacher and statements by President Clinton regarding that brief).

93. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). See Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 516–24 (2004).

94. Bruce Fleming, *Not Affirmative, Sir*, WASH. POST, Feb. 16, 2003, at B2.

95. Edward Iwata, *Race Issues Shake Tech World*, USA TODAY, July 24, 2000, at 1B.

ethnic preferences (nineteen of the sixty-six schools NAS has so far contacted, or 29%).⁹⁶ The responses to NAS's document requests indicate that among the schools eschewing preferences are the University of Iowa, the University of Northern Iowa, and Iowa State University; the University of Arizona and the University of Northern Arizona; the University of North Carolina, Greensboro; Central Connecticut State University, Southern Connecticut State University, Eastern Connecticut State University, and Western Connecticut State University; Eastern Kentucky University; and the University of Tennessee, Martin.⁹⁷ Added to this list are the public colleges and universities in California (by Proposition 209, a 1996 ballot initiative amending the state constitution),⁹⁸ Washington (by Proposition I-200, a 1998 ballot initiative amending the state constitution),⁹⁹ and Florida (the One Florida Initiative, announced by Florida Governor Jeb Bush on November 9, 1999),¹⁰⁰ whereby law preferences have been ended statewide. And we must also add the public and private schools in the federal Fifth Circuit—Texas, Louisiana, and Mississippi—and the University of Georgia, since they had for years used, and in some cases are still using, no preferences in light of judicial decisions there.¹⁰¹ Clearly, schools can prosper without preferences.

Perhaps some of these schools would be willing to join a brief saying that racial preferences are not necessary for being a good school; the state of Florida said as much in an amicus brief in the *Gratz* case.¹⁰² But even if they are unwilling to say so, the fact that such schools exist makes it harder to assert the necessity of preferences.

3. Expose the incoherence of the supposed link between diversity and outlooks or experiences.

In addition to its citation of the experts' claim of "educational benefits" discussed above, in the concluding paragraph of its compelling interest discussion, the *Grutter* Court relied on this rather convoluted reasoning:

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having a particular professional experience is likely to affect

96. NAS President Steve Balch, Speech to the Virginia Association of Scholars (Nov. 13, 2004) (on file with author).

97. *Id.* (letters on file with author).

98. See CAL. CONST. art. I, §31(a) (approved Nov. 5, 1996) (codifying Proposition 209).

99. See WASH. REV. CODE §§ 49.60.010–020 (West 2002).

100. See ONE FLORIDA INITIATIVE, available at <http://www.oneflorida.org/> (last visited Mar. 12, 2005).

101. See *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir.), *cert denied*, 518 U.S. 1033 (1996); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

102. Brief of Amici Curiae State of Florida, at 5–15, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.¹⁰³

As this paragraph shows, there are superficially a number of benefits that might be claimed for a diverse student body. On any analysis, however, none can justify racial or ethnic discrimination. For instance, greater diversity might teach toleration, acceptance, and open-mindedness about other racial groups—but this lesson is undermined when there is a pronounced gap in the academic ability of the members of the different groups on campus, as there is when admission preferences are used.

Greater diversity might lead to exposure to people with different ideas or backgrounds, but it is very dubious to use race as a proxy for anticipating individuals' thoughts and experiences. There are few ideas or experiences that only members of a particular racial group can have, and fewer still that all members of that group will share. The most commonly cited such experience—of systematic discrimination—becomes less convincing with every tick of the clock (today's college applicants were born in the latter part of the 1980s), and can hardly justify preferring Hispanics over Asians (and, of course, the white plaintiffs in the Michigan cases were themselves discriminated against). In sum, racial diversity cannot be equated with actual viewpoint diversity¹⁰⁴ (and, indeed, universities show little interest in viewpoint diversity relative to melanin diversity¹⁰⁵).

It might be argued, rather contradictorily, that greater diversity is needed to teach the specific lesson that not all African Americans, for instance, think alike, and indeed the Court says as much. But this is a rather obvious and narrow lesson, and it is hard to understand why it can be taught only by using racial and ethnic

103. *Gutter v. Bollinger*, 539 U.S. 306, 333 (2003) (internal citations omitted).

104. The errors in this approach were convincingly explained by Justice O'Connor in her dissent in *Metro Broadcasting, Inc. v. F.C.C.*: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). It makes more sense to select for the desired qualities rather than rely on increasingly dubious generalizations and stereotypes. *See id.* at 622 ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."). In sum, the government should not use race and ethnicity as "a proxy for other, more germane bases of classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)). *See also Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing "the stereotypical assumption that the race of [station] owners is linked to broadcast content"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that "supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

105. *See, e.g., AM. ENTERPRISE INST., The Shame of America's One-Party Campuses*, AM. ENTERPRISE, Sept. 2002, at 18–25; Karl Zinsmeister, *Diversity on Campus? There Is None*, AM. ENTERPRISE, Jan./Feb. 2005, at 42.

preferences. Teaching the five-word truth, “Blacks don’t all think alike,” can hardly justify institutionalized racial discrimination. A law school might, instead, simply assign to its students selected opinions from Justice Thurgood Marshall, on the one hand, and Justice Clarence Thomas, on the other.

The diversity rationale posits that the broadening effects of random interracial conversations and comments can be obtained only by face-to-face exposure at a university; they cannot be gained in any other way (for example, by studying Martin Luther King, Jr.’s “Letter from a Birmingham Jail” or Ralph Ellison’s *Invisible Man*) or any other place (such as the interracial workplace for which the student is being prepared, or the popular culture—where the message of equality and tolerance is ubiquitous—or the student’s neighborhood or house of worship, or the student’s home). None of this is plausible, let alone compelling.

4. Explain why preferences retard educational progress for African Americans.

Justice O’Connor in *Grutter* seemed to take some solace in the fact that this whole messy, ugly business of racial preferences could be ended in twenty-five years: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁰⁶

Next time, then, the point needs to be made that the system of preferences actually makes it harder to close the academic skills gap that drives the use of preferences in the first place. That is, the use of racial preferences blessed by Justice O’Connor will make it harder to close the academic gap she identifies. It is ironic but likely that preferences are themselves a critical element in keeping the gap wide. They enable politicians to sweep the real problems under the rug by, to mix a metaphor, using preferences to paper over them; and preferences also remove the incentive for academic excellence at the same time that they stigmatize and encourage a defeatist and victim mentality among their supposed beneficiaries. These points have always been commonsensical, and they have increasing empirical support as well, as discussed above.

In addition to the above four suggestions, there are two other points that ought to be made to the Court when the student-body diversity argument is reconsidered, although they are in indirect rather than direct response to the opinion in *Grutter*.

5. Whatever the benchmark for “compelling” is, this does not make it.

Prior to *Grutter*, the only justification that the Supreme Court had consistently found sufficiently compelling to justify racial and ethnic discrimination was discrete remediation of prior discrimination.¹⁰⁷ There are, perhaps, other

106. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

107. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (race classifications must be “strictly reserved for remedial settings”); *Id.* at 524–25 (Scalia, J., concurring). See also *Metro Broadcasting*, 497 U.S. at 612 (O’Connor, J., dissenting) (“Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination.”); *Id.* at 632 (Kennedy, J., dissenting) (criticizing “the use of racial classifications . . . untied to any goal of addressing the effects of past race discrimination”); *United States v. Paradise*, 480 U.S. 149 (1987) (upholding remedial use of

governmental interests that might be hypothesized as compelling enough to justify temporary racial and ethnic classifications by the government—such as national security,¹⁰⁸ or preventing bloodshed in a prison¹⁰⁹—and it is probably impossible to adduce them all or to state a formula by which they can be derived and limited. But, except in situations literally involving life and death, the Court has been rightly reluctant to accept non-remedial justifications as compelling,¹¹⁰ and it should be especially reluctant to accept a justification that is both amorphously grounded and threatens a permanent institutionalization of racial and ethnic discrimination.¹¹¹ As the petition in the *Grutter* case pointed out, the diversity rationale, if accepted for higher education, could also justify pervasive discrimination in other areas of public life, including primary and secondary education, employment, service on different public boards, jury selection, housing, and so forth.¹¹² Less than three months after *Grutter*, the diversity rationale was extended to the employment context by the U.S. Court of Appeals for the Seventh Circuit.¹¹³

If education were impossible without racial classifications, then it might be fair to argue that states have a compelling reason to discriminate. But the University of Michigan's claim was merely that education is improved, to some uncertain and unquantifiable degree, by interracial conversations and comments that occur randomly, sometimes in classrooms and sometimes outside them. Whatever the meaning of "compelling" may be, this falls short.¹¹⁴

6. Deciding whether diversity is "compelling" requires consideration of costs as well as benefits.

For an educational interest to be sufficiently compelling to justify race discrimination, it is also logical to require that the purported educational benefits significantly outweigh the various costs to the institution and to the wider society. The value of anything must consider its liabilities. As Wood notes:

racial preference).

108. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100–02 (1943).

109. See *Johnson v. California*, 543 U.S. ____, 125 S.Ct. 1141 (2005); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (concurring opinion of Black, Harlan, and Stewart, JJ., concurring).

110. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–77 (1986) (plurality opinion).

111. See *Wygant*, 476 U.S. at 276 ("ageless in [its] reach into the past, and timeless in [its] ability to affect the future"); *Metro Broadcasting*, 497 U.S. at 612, 614 (O'Connor, J., dissenting) (noting that the diversity rationale is "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications," and "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture").

112. See Petitioner's Brief at 28, *Grutter v. Bolinger*, 539 U.S. 306 (2003) (No. 02-241).

113. *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

114. Note that, if "diversity" is compelling for Equal Protection Clause purposes, then it ought to be compelling for First Amendment purposes as well. Thus, a state could force newspapers to print viewpoints with which they did not agree, citing the need for "diversity." But this is flatly at odds with the Court's precedent. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

“[R]ace” is *not* a “plus factor” in performing surgery, practicing law, or any other form of advanced study; it is an irrelevancy. And the kind of *diversity* achieved by racially preferential admissions is not educationally invigorating; it is intellectually threadbare and ethically contemptible.

Far from being a painless solution to the nation’s racial divisions, Powell’s exaggeration of the importance of *diversity* only deepened our racial problems . . .¹¹⁵

Wood is right. As we have seen, and as the empirical data increasingly show, the liabilities attendant upon the use of racial and ethnic preferences are substantial: They are personally unfair, and they set a disturbing legal, political, and moral precedent to allow state racial discrimination; they create resentment;¹¹⁶ they stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves;¹¹⁷ they foster a victim mindset, remove the incentive for academic excellence, and encourage separatism;¹¹⁸ they compromise the academic mission of the college or university and lower the academic quality of the student body; they create pressure to discriminate in grading and graduation; they breed hypocrisy within the school; they encourage a scofflaw attitude among college and university officials; they mismatch students and institutions, guaranteeing failure for many of the former;¹¹⁹ they obscure the real social problem of why so many African-Americans and Hispanics are academically uncompetitive; and they get state actors involved in unsavory¹²⁰ activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to

115. WOOD, *supra* note 1, at 145. See also KULL, *supra* note 73, at 118 (noting that the Court’s scrutiny of racial classifications “necessarily incorporates a weighing of costs and benefits”).

116. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 8–9, 97–104, 109, 130, 133–34, 146–50, 176–77 (1993); PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 15–58 (1997).

117. The principle of nondiscrimination serves all Americans, and the use of preferences harms not only those immediately discriminated against but also the supposed beneficiaries. The use of a double standard communicates, in this context, that some racial and ethnic groups are incapable of competing at the same intellectual level as others. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Classifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility.”); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting). On self-stigmatization, see SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 111–25 (1990).

118. See JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 235–38 (2000).

119. See *supra* Part III.1; STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 405–11 (1997); Abigail Thernstrom & Stephen Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preference, and Higher Education*, 21 *CONST. COMMENTARY* 251, 273 (2004).

120. See *Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (“[T]he very attempt to define with precision a beneficiary’s qualifying racial characteristics is repugnant to our constitutional ideals.”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534–35 n.5 (1980) (Stevens, J., dissenting)).

establish authentic group membership.

CONCLUSION

One last thing: We need a slogan with which to counter the word “diversity.” One is tempted to go with, “Diversity sucks,” except that the problem, of course, is not diversity per se—as stated at the outset of this review, no one is opposed to that—but the discrimination that is undertaken in its behalf. So, how about “No preferences,” or “No discrimination,” or simply “Quality”? The key words on one side are “fairness,” “unity,” “everyone,” and “equality”; on the other, “preferences,” “discrimination,” and “favoritism.” At a discussion of Peter Wood’s book, Professor Stephan Thernstrom suggested that we should be putting “uni” back in “university.”¹²¹ Or perhaps the counter-slogan is not necessary: The word “diversity” has become a joke.¹²²

In any event, Peter Wood has done a superb job in *Diversity: The Invention of a Concept* of describing the origins of evolution of the “diversity” mantra—and demonstrating how it is at once nonsensical and pernicious. In particular, he has done fine work in exposing its dubious legal roots in the *Bakke* case. Wood’s work will inspire those of us working for the overturning of *Grutter*—a decision of manifest weaknesses of its own—in the not-too-distant future.

121. Stephan Thernstrom, Remarks at The Heritage Foundation Event, *Diversity: The Invention of a Concept* (March 26, 2003), available at www.heritage.org/press/events/ev032603.cfm.

122. See, e.g., Dave Barry, *An Off-Color Rift*, WASH. POST MAGAZINE, Dec. 19, 2004, at 32 (“This is called ‘diversity,’ and it is why we are such a great nation—a nation that has given the world both nuclear weapons and SpongeBob SquarePants.”). In addition, in his 2004 book *I Am Charlotte Simmons*, Tom Wolfe has characters refer to his fictional campus’s “diversoids,” meaning those students admitted for diversity’s sake. TOM WOLFE, *I AM CHARLOTTE SIMMONS* 12, 97 (2004).

REVIEW OF DAVID E. BERNSTEIN'S
*YOU CAN'T SAY THAT!—THE GROWING
THREAT TO CIVIL LIBERTIES FROM
ANTIDISCRIMINATION LAWS*

IVAN E. BODENSTEINER*

The tension between the First Amendment to the U.S. Constitution and federal, state, and local antidiscrimination laws frequently is overlooked because discriminatory conduct is not viewed as falling within the protection of the First Amendment. Because the First Amendment protects association, as well as speech and the free exercise of religion, and because antidiscrimination laws can limit speech, particularly those laws that reach harassment, and mandate association, the tension is quite common. Professor Bernstein's point is that the tension is widespread and, unfortunately, the antidiscrimination or civil rights laws are trumping the civil liberties guaranteed by the First Amendment. In other words, in his view there is a significant tension and civil rights laws are winning the battle all too frequently.

Intolerant activists are determined to impose their moralistic views on all Americans, regardless of the consequences for civil liberties. These zealots are politically well-organized and are a dominant force in one of the two major political parties. They have already achieved many legislative victories, especially at the local level, where they often wield disproportionate power. Courts have often acquiesced to their agenda, even when it conflicts directly with constitutional provisions protecting civil liberties. Until the power of these militants is checked, the First Amendment's protection of freedom of speech and freedom of religion will be in constant danger.

The clash of civil liberties and antidiscrimination laws has emerged due to the gradual expansion of such laws to the point at which they regulate just about all aspects of American life. This expansion of antidiscrimination laws, in turn, reflects a shift in the primary justification for such laws from the practical, relatively limited goal of redressing harms visited upon previously oppressed groups, especially African Americans, to a moralistic agenda aimed at eliminating all forms of invidious discrimination. Such an extraordinarily ambitious goal cannot possibly be achieved—or even vigorously pursued—without grave consequences for civil liberties.¹

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1. See DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!—THE GROWING THREAT TO CIVIL*

When courts actually confront the tension between the First Amendment and antidiscrimination laws, frequently the key issue is whether the government has a compelling interest in the antidiscrimination provision that trumps the First Amendment.² Professor Bernstein is critical of the fact that courts, including the Supreme Court, have agreed that there is a compelling interest in eradicating discrimination.³ He believes the courts are too willing to find that the government's interest in eradicating discrimination is compelling.⁴ To be compelling, he says the "interest should be so vital that it would be virtually suicidal for society *not* to limit civil liberties in order to pursue it."⁵ Government interests that are merely important are not sufficient to trump speech and association rights protected by the First Amendment.⁶ Professor Bernstein is particularly critical of liberal law professors and the American Civil Liberties Union ("ACLU"), "with otherwise impeccable civil liberties credentials," for abandoning civil liberties in favor of civil rights based, in part, on a perceived constitutional value of equality reflected in the Fourteenth Amendment.⁷ Even if the Constitution protects such an abstract value, Professor Bernstein says there is no conflict between the First Amendment and the Fourteenth Amendment because the latter prohibits only the states from denying equal protection of the laws and does not address individuals who engage in racist speech.⁸

Professor Bernstein's real concern is with laws that prohibit private discrimination against members of groups which were never viewed as needing the help of the Equal Protection Clause to achieve equality and which, in fact, have done quite well in improving their status in society because of the First Amendment's guarantee of freedom of expression.⁹ Ironically, he says, some are willing to erode the protection of the First Amendment, a vital factor in the drive for equality, for the short-term gain of antidiscrimination laws that can be changed

LIBERTIES FROM ANTIDISCRIMINATION LAWS 1, 4 (2003).

2. As a general matter, restrictions on speech that are content-based are subjected to strict scrutiny when challenged on First Amendment grounds. *See, e.g.,* *Boos v. Barry*, 485 U.S. 312 (1988). This means government can justify the restriction only if it has a compelling interest and the restriction is narrowly tailored to serve that interest.

3. BERNSTEIN, *supra* note 1, at 11.

4. *Id.*

5. *Id.* This is not the current Court's definition of a compelling governmental interest.

6. The difference between a compelling and important governmental interest is less than clear and in many situations reasonable people could differ in their assessment of the government's interest. For example, in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), the Court held that Minnesota had a "compelling interest in eradicating discrimination against its female citizens." However, in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000), the Court held that New Jersey's interests in its "public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," apparently concluding that New Jersey's interest in banning discrimination by the Boy Scouts based on sexual orientation is not compelling. In another context, an equal protection challenge to the University of Michigan Law School admissions program, the Court held that an educational institution has "a compelling interest in attaining a diverse student body." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

7. BERNSTEIN, *supra* note 1, at 12.

8. *Id.* at 12-13.

9. *Id.* at 14-22.

easily and quickly.¹⁰ While Professor Bernstein overstates the problem, in light of the Court's narrowing interpretation of most civil rights statutes and its approval of many governmental restrictions on speech, his concern is legitimate. Whether or not one agrees with his view of the extent of the problem, his book serves an important function in pointing out a tension that is overlooked or ignored too frequently.

To place the tension between civil liberties and civil rights in perspective, it is important to remember that despite the language of the First Amendment that "[the government] shall make no law . . ." ¹¹ its protection is not absolute.¹² The Free Exercise Clause is not only not absolute, it has been rendered relatively meaningless as a source of religious freedom by the Court's decision in *Employment Division, Department of Human Resources v. Smith*.¹³ While not absolute, the First Amendment guarantee of freedom of speech, including expressive association,¹⁴ generally trumps government regulation of speech unless government survives heightened scrutiny, i.e., government has a compelling interest in regulating speech and utilizes the least restrictive means of serving its interest.¹⁵ Of course, reasonable people can differ on what is "compelling" and what is "least restrictive." Despite this broad constitutional protection for speech, there are several circumstances where the Supreme Court has upheld a restriction on speech.

One example of such restrictions is found in the so-called unprotected categories of speech, such as obscenity,¹⁶ fighting words,¹⁷ libel and slander,¹⁸ child pornography,¹⁹ and advocacy of illegal activity.²⁰ While it is easy to list the categories, it is often difficult to determine whether speech fits within one of the unprotected categories, such as obscenity.²¹ It is not clear whether making these

10. *Id.*

11. U.S. CONST. amend. I.

12. *See* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

13. 494 U.S. 872, 882 (1990) (holding that religion neutral laws of general applicability do not trigger heightened scrutiny when challenged on free exercise grounds). *But see* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (holding that a law targeting religious beliefs must satisfy strict scrutiny when challenged on free exercise grounds).

14. *See* *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). However, the "right to associate for expressive purposes is not . . . absolute." *Id.* at 623.

15. *Id.*

16. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

17. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

18. *See, e.g.*, *Gertz v. Welch*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

19. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *New York v. Ferber*, 458 U.S. 747 (1992).

20. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

21. *Miller*, 413 U.S. at 24. The Court set the following guidelines for determining whether material is obscene:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether

categories of speech unprotected is justified by a compelling government interest or the low value of the speech, or a combination of the two. While the Court has been reluctant to admit that there is a hierarchy of speech value, it seems quite apparent that political speech ranks higher than pornography or sexually explicit speech.²² If the protection of speech is not absolute, maybe it makes sense to assign constitutional value to speech. As Justice Stevens put it, “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”²³ The problem, of course, is that assigning value is difficult. Until 1975, commercial speech was considered unprotected,²⁴ but in recent years it has enjoyed great protection.²⁵ Content-neutral regulations of speech, such as time, place or manner restrictions, are generally easier for government to justify, with the Court applying a level of scrutiny less than strict.²⁶ This seems acceptable because the speaker is not silenced and, if the regulation is truly content-neutral, there is less chance that the government is suppressing a particular message. Similarly, symbolic speech is more susceptible to regulation if the goal is to regulate the conduct, not the message.²⁷ In addition, government regulation of speech on government-owned property that is treated as a nonpublic forum is subjected to only rational basis review as long as the regulation is not viewpoint-based.²⁸

the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

22. See, e.g., *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976).

23. *Id.* at 70.

24. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that speech is not stripped of its First Amendment protection merely because it is commercial speech).

25. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1976). The intermediate scrutiny standard for commercial speech was articulated by the Court in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

26. See, e.g., *Hefron v. Int’l Soc’y of Krishna Consciousness*, 452 U.S. 640, 648 (1981) (holding reasonable time, place and manner restrictions are approved “provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information,” (quoting *Virginia Pharm. Bd. v. Virginia Citizen Consumer Council*, 425 U.S. 748, 771 (1971))). See also *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000) (noting that the principle inquiry in determining content neutrality is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys”) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

27. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The Court noted:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

28. See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). See also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107–08 (2001) (holding that government can establish a limited public forum and reserve the forum for certain groups or the

Aside from the forum analysis, the context and location in which one chooses to speak may determine whether the speech is protected. Government employees' speech frequently leads to discipline or discharge and their First Amendment claims fail if a court determines that they were not speaking on a matter of public concern or, even if the speech concerns such a matter, a court determines the government's interest, as an employer, in avoiding disruption in the workplace trumps the First Amendment interest.²⁹ In fact, the Court has determined that the government as an employer has a compelling interest in "labor peace."³⁰ Similarly, while students do not leave their First Amendment protection behind when they enter a public school, their right to speak is discounted because of the school's interest in avoiding substantial disruption that interferes with the purpose of the school—education.³¹

The point is simply that the tension between civil liberties and civil rights must be analyzed in light of a rather complex, and maybe not always consistent, body of First Amendment jurisprudence that recognizes many circumstances where restrictions on speech are justified. This does not mean that we should accept more restrictions on speech, or use existing restrictions as a justification for more. Rather, in a world where First Amendment jurisprudence already allows a wide variety of restrictions on speech, including some restrictions resulting from antidiscrimination laws, it may be that most of the restrictions imposed by antidiscrimination laws should be tolerated.

Many discriminatory acts have nothing to do with speech, association, or religion, and this probably explains why the First Amendment is not raised as a defense in most litigation based on the antidiscrimination laws. But, in some circumstances application of an antidiscrimination law clearly implicates the First Amendment. Examples are the laws that treat harassment, including verbal harassment, as a form of discrimination. Assume a private employer hires African American applicants to avoid liability under laws such as Title VII of the Civil Rights Act of 1964³² and 42 U.S.C. § 1981,³³ but tolerates or encourages severe or pervasive verbal racial harassment of these employees by both supervisors and co-workers, knowing that the harassment makes it impossible for the African American employees to perform satisfactorily. Further assume that the verbal harassment consists of the ugliest derogatory comments conveying the message that these minority workers are not wanted in the workplace. Giving the targeted employees a claim based on either of these federal statutes penalizes speech. A separate question is whether application of the federal statutes violates the First Amendment.

If we conclude that application of these federal statutes to this situation violates

discussion of certain topics, as long as it does not discriminate on the basis of viewpoint and the restriction is reasonable in light of the purpose served by the forum).

29. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

30. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 217–32 (1977).

31. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

32. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

33. 42 U.S.C. § 1981 (2000).

the First Amendment, then we are saying that government cannot assure equal opportunity in employment because the First Amendment protects those who decide to drive some employees out of the workplace because of their race. Similar racial harassment may be designed to deny equal opportunity in housing, in violation the Fair Housing Act of 1968 (“FHA”),³⁴ or in education, in violation of Title VI of the Civil Rights Act of 1964 (“Title VI”).³⁵ Here too, if we conclude that the First Amendment trumps the FHA and Title VI, we are saying government cannot assure equal opportunity in housing and education. Current First Amendment jurisprudence suggests a First Amendment challenge to the application of the civil rights statutes to the three situations described would trigger strict scrutiny because while the statutes are viewpoint neutral, i.e., they protect anyone who is subjected to harassment because of race,³⁶ the statutes are content-based because they address speech that makes the target too uncomfortable to continue to work, live in a house, or attend school.³⁷ However, the Court’s decision in *Roberts v. United States Jaycees* suggests application of the three statutes would be upheld because government has a compelling interest in addressing race discrimination in employment, housing, and education.³⁸

Upholding application of the civil rights statutes in these three situations represents a restriction on speech. Is such a restriction justified? In addition to the compelling government interest argument, one could argue that the speech, intended to harass for the purpose of denying equal opportunity in employment, housing, and education, has a low value and is therefore subject to more restrictions.³⁹ Also, application of the civil rights statutes simply changes the location of the speech because the speakers remain free to express their views on equality outside the workplace, away from the targeted home, and away from the school. They are restricted only insofar as their speech interferes with an individual’s access to employment, housing, or an education. The restricted speech is the rough equivalent of a punch in the nose as a means of telling someone she is not welcome because of her race. While we generally accept the principle that the expressive punch in the nose is not protected by the First

34. Pub. L. No. 90-284, §§ 801–819, 901, 82 Stat. 73, 81–90 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)). A common form of “speech” designed to drive African American families out of their homes is a cross burning. In *Virginia v. Black*, 538 U.S. 343, 347–48 (2003), the Court held “that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.”

35. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

36. Professor Bernstein says “[h]ostile environment law clearly discriminates based on viewpoint.” BERNSTEIN, *supra* note 1, at 31. But see *Boos v. Barry*, 485 U.S. 312, 319 (1988) (holding that a District of Columbia statute prohibiting display of certain signs within five hundred feet of a foreign embassy was a content based restriction but that the provision was not viewpoint based).

37. See *Boos*, 485 U.S. at 321.

38. 468 U.S. 609, 623–25 (1984) (holding that Minnesota has a compelling interest in eradicating sex discrimination in places of public accommodation).

39. Further, if the speaker’s intent is not to communicate ideas, but only to harass and intimidate, the “speech” may be more like conduct not protected by the First Amendment.

Amendment because of the government's interest in protecting individuals from bodily injury and maintaining the peace, it is not clear that the harm caused by the punch in the nose is greater than the harm caused by the verbal harassment.⁴⁰ Of course, we can justify regulation of the conduct by pointing out that the regulation is not aimed at the message, only the means utilized.⁴¹ Similarly, we can argue that the restriction on verbal harassment is not aimed at the message, only the location.⁴²

If the First Amendment precludes application of the civil rights statutes in the situations discussed above, then the government is powerless to address an obvious denial of equal opportunity based on race. Professor Bernstein suggests the free economic market will correct the situation,⁴³ but there is no evidence that this will work. Prejudice is rarely the product of rational behavior and neither the market nor the antidiscrimination laws have eliminated racial discrimination.

Even if one concludes that civil rights statutes aimed at race discrimination in employment, housing, and education trump civil liberties, such a conclusion does not mandate that all antidiscrimination laws trump civil liberties. Professor Bernstein makes the point that antidiscrimination laws have been extended far beyond race.⁴⁴

Once the racial caste system was largely dismantled, and newly organized groups—such as older Americans, gays, and the disabled—began to use civil rights terminology in expressing their demands for government intervention on their behalf, antidiscrimination activists shifted their rhetorical emphasis.⁴⁵ They no longer focused on historical and economic arguments regarding the need to end racial discrimination in employment and places of public accommodation. Rather, they argued that discrimination—as expansively defined by organized interest groups—should be banned as a moral evil.⁴⁶ Once private-sector discrimination was portrayed primarily as a secular sin, rather than as an economic issue, the rhetorical goal of civil rights advocates became the *elimination* of invidious discrimination.⁴⁷

Bernstein argues that the shift in the primary justification for antidiscrimination laws, “from aiding previously oppressed groups to an austere moralism,” led to a

40. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1205–06 (7th Cir. 1978) (holding that a city ordinance, designed to prohibit a Nazi demonstration was unconstitutional. The court recognized the “psychic trauma” caused by such speech, but concluded the city’s concern with this injury did not justify the ordinances).

41. See *United States v. O’Brien*, 391 U.S. 367, 381–82 (1968).

42. Even as a restriction on location, it does not fit within the time, place and manner analysis because it is not really content-neutral. *But see City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49 (1986) (treating an adult entertainment ordinance as content-neutral because it was aimed at the secondary effects rather than the content of the films); *Grayned v. Rockford*, 408 U.S. 104, 108 (1972) (upholding an ordinance prohibiting “noise or diversion” near a school that would disturb the “peace or good order of such school”).

43. BERNSTEIN, *supra* note 1, at 15–16.

44. See *id.* at 7 (“Antidiscrimination laws came to protect more and more groups against more and more types of discrimination.”).

45. *Id.* at 7.

46. *Id.* at 8.

47. *Id.* at 7.

broad expansion at all levels of government with antidiscrimination laws “protect[ing] more and more groups against more and more types of discrimination.”⁴⁸ It is this expansion of civil rights laws that most concerns Professor Bernstein. He discusses how these antidiscrimination laws have resulted in growing restrictions on speech, including workplace speech,⁴⁹ artistic expression,⁵⁰ political speech,⁵¹ and campus speech.⁵² In some situations, discussed in Chapter Six, he sees the antidiscrimination laws resulting in compelled speech.⁵³ Professor Bernstein is particularly critical of laws, often state or local, banning discrimination in broadly defined public accommodations⁵⁴ and, as a result, threatening the autonomy of private institutions and discouraging the formation of organizations for expressive purposes.⁵⁵ He also sees the effect of antidiscrimination laws on the religious freedom of, for example, religious schools⁵⁶ and landlords,⁵⁷ since they subject themselves to lawsuits when they act based on their beliefs about sexual morality. Another chapter argues that the right of privacy or intimate association is being compromised by the antidiscrimination laws, using attacks on female-only health clubs as an example.⁵⁸ Finally, Professor Bernstein is critical of the ACLU for abandoning its staunch defense of civil liberties when they conflict with civil rights laws.⁵⁹

While the ACLU does not need me to defend it, as a long-time member I struggle with, but am not disappointed by, its decision to avoid an uncompromising position that would automatically result in civil liberties trumping civil rights laws. In First Amendment cases, the Court has sometimes mentioned inequality in access to avenues of expression as a result of the great disparity in resources, but has not attempted to correct the inequality.⁶⁰ If there is such a thing as a marketplace of ideas,⁶¹ those with extensive resources have a better chance of selling their ideas. Downtown street corners have been replaced, to a great extent, by privately owned shopping malls that can restrict speech,⁶² and politicians rely heavily on high-priced television ads to communicate their ideas. While the internet might be an equalizer, at least to some extent, low-income families are less likely to have access to it. The point is simply this—if you are without a job, a home, or an

48. *Id.*

49. *Id.* at 23–34 (Chapter 2).

50. *Id.* at 35–46 (Chapter 3).

51. *Id.* at 47–57 (Chapter 4).

52. *Id.* at 59–72 (Chapter 5).

53. *Id.* at 73–83 (Chapter 6).

54. *Id.* at 85–96 (Chapter 7).

55. *Id.* at 97–110 (Chapter 8).

56. *Id.* at 111–19 (Chapter 9).

57. *Id.* at 121–30 (Chapter 10).

58. *Id.* at 131–44 (Chapter 11).

59. *Id.* at 145–53 (Chapter 12).

60. *See, e.g.,* *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1944); *Martin v. Struthers*, 319 U.S. 141, 146 (1943).

61. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

62. *See* *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (holding that action of a privately-owned shopping mall did not constitute government action, subject to the First Amendment).

education because of your race, age, disability, national origin, gender, religion, or sexual orientation, it is unlikely that you see the First Amendment as your savior. If given a choice, you might vote for laws addressing discrimination even at the expense of the freedom of speech that you have no ability to exercise because you have no resources. Freedom of speech and expressive association will be more meaningful when there is greater equality in our society; the marketplace of ideas will be much better when everyone has access. Of course, not all groups seeking the protection of antidiscrimination laws are without resources. Nevertheless, I can understand the reluctance to conclude that civil liberties should always trump civil rights laws aimed at equality, particularly when the enjoyment of civil liberties is extremely difficult for those who do not have “access” to them.

Even if we accept this explanation, it does not answer some of Professor Bernstein’s legitimate concerns. Most people would agree that equal access to some things, maybe employment, housing, health care, and education, is more important than equal access to other things, such as certain “public accommodations” and private religious schools. Similarly, people might agree that not all discrimination is equally offensive; implicit in the Court’s equal protection jurisprudence, with the standard of review ranging from rational basis to strict scrutiny, is the notion that some types of discrimination, such as racial discrimination, are more offensive than other types, like age.⁶³ Also, civil rights laws reflect the fact that some classifications are more likely to be legitimate than others by providing a “bona fide occupational qualification” defense. If this is true, does the denial of equal access to something of less importance to our well-being in society based on a less offensive classification justify an antidiscrimination law that conflicts with civil liberties?⁶⁴

In chapters two through eleven of his book, Professor Bernstein gives examples of laws and their application to specific situations in which he believes civil liberties are being compromised without sufficient justification. These examples include:

- A Caucasian Department of Energy employee in Texas who “unwittingly spawned a harassment suit when he followed up a southwest Texas training session with a bit of self-deprecating humor,” i.e., presenting colleagues who attended the training session with a gag certificate making each recipient an honorary “Coon Ass,” a “mildly derogatory slang term for a Cajun,” which was prompted by the fact that the area of the training session has a large Cajun population, including the author of the certificate; this led to a hostile environment action by an African American recipient of the certificate;⁶⁵
- the removal of pieces of art from a classroom at Penn State University

63. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

64. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557 (1995). While a classification based on sexual orientation is offensive and usually without even a rational basis, access to a parade and the Boy Scouts may not be particularly important.

65. BERNSTEIN, *supra* note 1, at 27–28. The plaintiff prevailed in the trial court and the case was settled while on appeal. *Id.* at 28. In most circuits, it would be difficult for the plaintiff to satisfy the “severe or pervasive” requirement based on the facts given.

- and city hall in Murfreesboro, Tennessee in response to complaints from a professor who taught in the classroom and a citizen who passed the art on the way to a meeting in city hall, who found the art offensive, because of a concern about sexual harassment litigation;⁶⁶
- an attempt by a housing rights group “to punish opponents of a proposed public housing project in Berkeley” by filing a complaint with the Department of Housing and Urban Development (“HUD”) alleging discrimination based on disability;⁶⁷
 - discipline of university professors for what they say in the classroom, because of the university’s fear of harassment litigation;⁶⁸
 - government agencies dictating what appears in advertisements⁶⁹ and compelling violators of antidiscrimination laws to speak against their beliefs as part of a settlement or remedy;⁷⁰
 - treating “private clubs” as “public accommodations” and then compelling them to accept as members persons with whom they would prefer not to associate, i.e., “legally compelled association,”⁷¹ even where such compelled association interferes with the message of an expressive association;⁷²
 - requiring a Jesuit university, based on a local law banning discrimination against gays, to extend “university recognition” to two gay student groups;⁷³
 - attempting, by application of a Massachusetts fair housing law prohibiting discrimination based on marital status, to force a “devout Roman Catholic” couple to rent an apartment to an unmarried couple, contrary to their religious doctrine because it would facilitate fornication;⁷⁴ and
 - application of Madison, Wisconsin’s fair housing ordinance to a tenant who sublet three bedrooms to female housemates, but would not sublet a room to a lesbian applicant.⁷⁵

There are many other examples in chapters two through eleven, but this is a representative sample and I believe it is fair to say that, in Professor Bernstein’s view, the outcome of each of these cases is less important than the existence of antidiscrimination laws that encourage claims and cause defendants to devote resources to defending such claims.⁷⁶ No doubt, the existence of such laws,

66. *Id.* at 39.

67. *Id.* at 47–49.

68. *Id.* at 66–71.

69. *Id.* at 76–81.

70. *Id.* at 73–76.

71. *Id.* at 85–86.

72. *Id.* at 103–04.

73. *Id.* at 114–15.

74. *Id.* at 121–22.

75. *Id.* at 131–32.

76. If a civil rights claim, based on a federal statute, is frivolous, a prevailing defendant is usually entitled to costs, including attorney fees.

combined with a broad interpretation and aggressive administrative enforcement, can have a chilling effect on potential defendants and their civil liberties because they are concerned about the costs of defending a claim. While overbreadth is a common basis for a First Amendment challenge to restrictions on speech,⁷⁷ it is measured by the language of the law and the courts' interpretation,⁷⁸ not how a particular "timid" person chooses to modify his or her conduct in an effort to steer clear of costly administrative or judicial proceedings.

The first example above involves racial discrimination in the form of harassment in the workplace and, as Professor Bernstein suggests, it probably does not meet the "severe and pervasive" standard, at least not in most circuits.⁷⁹ Nevertheless, he reports that the victim was successful in the trial court and the matter was settled before the appeal was heard.⁸⁰ Whether that result is good or bad, correct or incorrect, does not answer the broader question, i.e., whether laws that prohibit race discrimination, including racial harassment, in employment interfere with constitutionally protected civil liberties. As suggested earlier, because employment is important and the speech of the Department of Energy employee, the gag certificate, is of relatively low value, and because the restriction is limited to the location of the speech, one could reasonably conclude the antidiscrimination law, if it even applies here, should trump freedom of speech.

The situations presented in the second example may represent an unfounded prophylactic reaction by two institutions. While a Penn State professor complained about the *Naked Maja* hanging in a classroom and it was removed, it is not clear that either the professor or students had a viable sexual harassment claim against the university. The real question might be why a university would place in a classroom anything that may cause a distraction. In the other situation, it was the city's decision to remove a painting from city hall that triggered a First Amendment claim by the artist. While the city attorney expressed his concern about a Title VII sexual harassment claim, it is not apparent that Title VII is in play since the complaining party, the one offended by the art, did not work in city hall but was there for a meeting.⁸¹

77. See, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

78. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 113–14 (1990).

79. BERNSTEIN, *supra* note 1, at 28.

80. *Id.*

81. There are circumstances under which an employer can be held liable for the acts of non-employees. See *Guidelines on Discrimination Because of Sex: Sexual Harassment*, 29 C.F.R. § 1604.11(e) (2004). See also *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968–69 (9th Cir. 2002) (noting that in the Ninth Circuit "employers are liable for harassing conduct by non-employees 'where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct'" (quoting *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997))); *Rodriguez-Hernandez v. Miranda-Belez*, 132 F.3d 848, 854 (1st Cir. 1998) ("Under Puerto Rico law, an employer is held responsible for 'the acts of sexual harassment towards his employees in the work place by persons not employed by him if the employer or his agents or supervisors knew or should have known of such conduct and did not take immediate and adequate action to correct the situation.'" (internal citation omitted)). Even if Title VII applies, it is unlikely that the painting in city hall would be considered actionable sexual harassment.

HUD's pursuit of several individuals who spoke out against a zoning variance for a facility, in response to a complaint alleging a violation of the FHA because the opposition was based on the possibility that the facility might house persons with a disability, is the subject of the third example. While HUD ultimately dropped that investigation because the individuals acted within their First Amendment rights, Professor Bernstein says HUD's vigorous pursuit of the matter, including its referral to the Justice Department for prosecution, demonstrates the agency's disregard of the First Amendment in enforcing the FHA.⁸² A provision in the FHA makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [other provisions of the Act]."⁸³ The difficulty with this case is that there are lawful reasons for denying a variance and there are unlawful reasons, such as the prospect that persons with a disability will occupy the housing. If in fact the opponents were trying to persuade government officials to deny the variance because of the disability—or race, national origin, sex, or marital status—of the tenants, they would be advocating illegal activity. Advocacy of illegal activity generally is not protected by the First Amendment. In contrast, advocating a change in a section of the FHA clearly would be protected speech.

Disciplining professors, or other employees, for engaging in what might be considered harassment in violation of Title VI⁸⁴ or Title VII⁸⁵ of the Civil Rights Act of 1964, or Title IX of the Education Amendments of 1972,⁸⁶ raises First Amendment issues when the alleged harassment consists of speech. If students at a public college or university claim they are being denied an equal educational opportunity as a result of a professor's in-class attack on them because of their race, gender, or national origin, which may violate one of the civil rights statutes or the Equal Protection Clause, would university-imposed disciplinary action violate the professor's right to freedom of speech? First, assume the harassment is so severe or pervasive that it would in fact give the student a claim. Thus, the issue is whether the First Amendment trumps the right to an equal educational opportunity. Given the fact that the First Amendment is already discounted when applied to employee speech in the workplace, based on the *Pickering-Connick* line of cases,⁸⁷ one could conclude that the government has an interest sufficient to trump the location-based restriction on speech. The government's interest may be considered compelling and therefore sufficient to trump even a full-fledged First Amendment interest. Second, assume the harassment is not so severe or pervasive that it would give the students a claim, but the university disciplines the professor because it wants to enhance its position if there is litigation, i.e., it does not want to be painted as an institution that tolerates harassment by professors. Here the problem is not the civil rights laws; rather, the problem is a university that is overly concerned about litigation by the students and this concern may trigger a

82. BERNSTEIN, *supra* note 1, at 49.

83. 42 U.S.C. § 3617 (2000).

84. *See* 42 U.S.C. § 2000d (2000).

85. *See* 42 U.S.C. § 2000e-2 (2000).

86. Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 42 U.S.C. §§ 1681 to 1688 (2000)).

87. *See supra* note 29 and accompanying text.

meritorious First Amendment claim by the professor against a public university.⁸⁸ As Professor Bernstein suggests, part of the problem is the fact that colleges and universities may adopt vague guidelines prohibiting harassment, thus chilling professors' speech in the classroom.⁸⁹ The remedy for this is better guidelines, not abandonment of the restrictions that attempt to assure equal educational opportunity.

While the compelled speech examples raise First Amendment concerns, at least when the speech is compelled by a court or an administrative agency rather than by a voluntary settlement, there may be a strong governmental interest in compelling speech as a remedy for a violation of a civil rights law.⁹⁰ Where the compelled speech is commercial, it is less protected under the *Central Hudson Gas & Electric v. Public Service Commission of New York* standard.⁹¹

Professor Bernstein sees laws that prohibit discrimination in public accommodations as a serious threat to the autonomy of private organizations, particularly expressive associations, because some states interpret the term "public accommodation" broadly to include, for example, the Boy Scouts of America,⁹² the Rotary Club,⁹³ and the Jaycees,⁹⁴ and to prohibit discrimination on bases not included in Title II of the Civil Rights Act of 1964,⁹⁵ such as gender or sexual orientation. Further, he says state and local laws often have no, or a very limited, exemption for private clubs. Cases based on public accommodations laws raise questions about whether the group really is expressive and, if so, whether forced admission really changes the message.⁹⁶ While Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act,⁹⁷ ("ADA") include a "private club" exemption to protect intimate association,⁹⁸ most private clubs do not fit within the exemption because they are not truly private, i.e., they openly solicit members, and anyone who does not fit within the excluded category (African Americans or females) is welcome. If an association is expressive, and

88. A professor would not have a First Amendment claim against a private university because its restriction on speech is voluntary, i.e., not compelled by law, and, therefore, there is no government action.

89. BERNSTEIN, *supra* note 1, at 67.

90. For example, the Court has recognized a compelling interest in government taking race into account in remedying a past violation of a federal statute or the Constitution. *See, e.g., Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

91. 447 U.S. 557 (1980). Under this standard, the Court asks whether the speech is advertising illegal activities or whether it is false or deceptive (unprotected speech), whether the restriction is justified by a substantial governmental interest, whether the law directly advances the government's interest, and whether the regulation is no more extensive than necessary to achieve the government's interest. *Id.* at 566.

92. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

93. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

94. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

95. Pub. L. No. 88-352, §§ 201–207, 78 Stat. 241, 243–46 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (2000)).

96. *See, e.g., Dale*, 530 U.S. at 640; *Roberts*, 468 U.S. at 609.

97. Pub. L. No. 101-336, §§ 301–310, 104 Stat. 327, 353–65 (codified as amended at 42 U.S.C. §§ 12181 to 12189 (2000)).

98. The "private club" exemption is found in 42 U.S.C. § 2000a(e) (2000) (Title II), and 42 U.S.C. § 12187 (2000) (Title III of ADA).

admission of the “unwanted” group would change its expression or message, then the question is whether the government has a compelling justification. In *Roberts* and *Rotary Club*, the Court upheld the application of public accommodations laws to clubs that excluded females,⁹⁹ however, in *Dale* and *Hurley* the Court held that application of such a state law to discrimination based on sexual orientation violated the First Amendment.¹⁰⁰ Maybe the different results are justified by the nature of the organizations, “business” organizations versus a parade and a social organization for young males, as well as government’s more consistent effort (at least recently) to eliminate sex discrimination versus its checkered history relating to discrimination based on sexual orientation.

When an antidiscrimination law is applied to religious organizations or individuals claiming that compliance with the law would interfere with their religious beliefs, there is unlikely to be a violation of the Free Exercise Clause, as interpreted in *Employment Division, Department of Human Resources v. Smith*,¹⁰¹ since such laws normally are neutral laws of general applicability and not aimed at a particular religion. Absent a showing that marital status discrimination actually causes a shortage of housing available to unmarried couples, one could conclude that there is no real justification for such laws, or at least no justification for such laws without a religious belief exemption, and municipalities should not adopt such ordinances and thereby avoid the problem. Why burden some landlords’ religion if there is not really a problem? Similarly, one might ask why Madison, Wisconsin would include “housemates” in its fair housing ordinance; why impose intimate association absent a strong showing of a problem?

While I believe Professor Bernstein may overstate the tension between civil liberties and civil rights laws, his book is very valuable in that it makes us aware of the tension or at least the potential for a tension. Such awareness may cause legislative and administrative bodies that make such laws and regulations, as well as the courts that interpret them, to more carefully weigh the competing interests in considering civil rights provisions. Even where a particular antidiscrimination law would not violate the Constitution under current interpretation, unless there is a showing of a denial of equal access or opportunity, the better course is to avoid passing laws that accomplish little while restricting or chilling civil liberties. Because educational institutions are in the business of promoting the exchange of ideas, they have a special duty to be sensitive to the potential for a tension between civil liberties and civil rights and to be particularly careful in drafting rules aimed at protecting civil rights.

99. *Roberts*, 468 U.S. at 623; *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 547 (1987).

100. *Dale*, 530 U.S. at 655; *Hurley v. Irish-Am. Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557, 573 (1995).

101. 494 U.S. 872 (1990).

REVIEW OF JAMES J. DUDERSTADT'S
AND FARRIS W. WOMACK'S
*THE FUTURE OF THE PUBLIC UNIVERSITY IN
AMERICA: BEYOND THE CROSSROADS*

KEVIN R. DAVIS*

New books about the state of academe by former major college presidents deserve our attention. We hope to learn from them what works and what does not, what was achieved and at what cost, and what lies ahead for the academy. *The Future of the Public University in America: Beyond the Crossroads* by James J. Duderstadt and Farris W. Womack stands out for its focus on public universities.¹ The subject is important—public colleges and universities serve 80% of college students today²—even if the authors overstate its significance.³ Duderstadt was president of the University of Michigan from 1988–96, and during that time Womack was his chief financial officer.⁴ The two label their book a “treatise on lessons learned” and they intend it as a guide for current college and university leaders.⁵ The reader, however, finds more challenges than solutions described in the book, and strong grounds to be skeptical about the future of public universities. One gets the distinct feeling that the public university is “Beyond the Crossroads,” and that a wrong turn was taken long ago.

The authors recognize that public higher education includes a variety of institutions, including community colleges, small and large four-year institutions, and research universities, including some with large medical centers.⁶ To focus, Duderstadt and Womack limit their concerns to those of public research institutions, in particular “the great state universities.”⁷ Since only four state universities are mentioned by name in the book, one is given to understand that

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1. JAMES J. DUDERSTADT & FARRIS W. WOMACK, *THE FUTURE OF THE PUBLIC UNIVERSITY IN AMERICA: BEYOND THE CROSSROADS* (2003).

2. *Id.* at 161.

3. *See id.* at 195 (“Throughout much of the history of higher education in the United States, public research universities . . . have provided the faculty, the pedagogy, the textbooks and scholarly materials, and the standards for *all* of higher education.”) (emphasis added).

4. *Id.* at viii.

5. *Id.*

6. *Id.* at 14.

7. *Id.* at ix.

they have focused narrowly, indeed.⁸

If there is a consistent theme to this book it is that public universities need to become more like private institutions in order to survive. To a large extent, the issues faced by public universities are shared by independent colleges and universities, but Duderstadt and Womack go to some length to draw distinctions between the two groups which, in fact, are not easily distinguished.⁹ Public universities are usually, though not necessarily, larger than private institutions. The revenue sources of each may differ, though on average public universities receive less than 30% of their operating funds from direct appropriations;¹⁰ both public and private institutions must, therefore, rely primarily on other sources of funding, including non-public sources. Legal control is the best distinguishing criterion, in that most public universities lack self-appointing boards.¹¹

Both public and private institutions may have public service missions. But public universities now increasingly lack the resources to accomplish their mission. Historically, the authors argue, public universities have been charged with the mission of promoting freedom, democracy, and social justice by providing educational access and opportunity for the public.¹² The authors posit the source of this mission in a fictional social contract between public universities and the states they serve.¹³ In return for the benefit of direct appropriations of tax dollars, the public university, they suggest, agrees to provide low cost educational access and opportunity to all segments of the public. "The historical rationale for public higher education . . . is that, since education benefits all of society, it deserves to be supported by public tax dollars."¹⁴ The service orientation of the public university supported its research and teaching missions by sustaining public confidence and giving legislators a reason to continue appropriating funds.¹⁵

This bargain has been broken, they argue, by both sides, resulting in one of the chief sources of risk for the public university.¹⁶ For the university's part, it has strayed from its commitment to public education and has taken on peripheral tasks, including promoting regional economic development, research for hire, health care, and providing mass entertainment through intercollegiate sporting events.¹⁷ The adoption of many divergent missions has caused the university's resources to be reallocated and has diluted the focus and effectiveness.¹⁸ These new missions

8. In addition to the University of Michigan, the Universities of Wisconsin, Virginia, and California are also mentioned.

9. See DUDERSTADT & WOMACK, *supra* note 1, at 12–25. Though the institutions they refer to as "private" normally designate themselves as "independent," as in the National Association of Independent Colleges and Universities, I will here use the term "private" to follow the book's usage.

10. *Id.* at 16.

11. *Id.* at 13.

12. *Id.* at 45.

13. *Id.* at 6–8, 126.

14. *Id.* at 7.

15. *Id.* at 23.

16. *Id.* at 8.

17. *Id.* at 25.

18. *Id.* at 24, 105.

have been adopted in response to perceived demands, if not needs, of the public. This departure from the traditional mission has resulted, the authors argue, in the loss of public confidence and support for the university.¹⁹ They suggest public sympathy for universities, ironically, was greater in the past when fewer individuals had an opportunity for higher education.²⁰

The public has also failed to keep its part of the bargain, gradually withdrawing and changing the nature of its financial support over the last forty years, jeopardizing the ability of the public universities to continue the original bargain.²¹ Hewing to its traditional mission is increasingly difficult for the public research university when the public demands low cost education, i.e., affordable tuition, but is unwilling to support the true costs of the institution through sufficient appropriations or other aid.

The factors challenging the mission of public universities are many and great. In the valuable core of the book the authors consider three crisis areas necessitating change: market forces,²² finances,²³ and governance.²⁴

The very fact that education is now viewed as a market highlights one of the significant changes for colleges and universities over the last forty years. Where formerly education was viewed as a public investment, provided by the public for the consumption of all, today it is viewed as a consumer good benefiting the individual.²⁵ The authors see a shift in public policy with respect to education generally as responsible for our current perception of learning. The authors note that we now talk of “accountability” and “outcomes” for education rather than “access” and “opportunity.”²⁶

Private capital has taken notice that education is a market, as well. The private sector has awakened to the fact that education is a \$665 billion industry, with higher education accounting for \$225 billion.²⁷ When the “knowledge and learning” industry is considered as a whole, education contributes \$2.2 trillion to the American economy.²⁸ The authors see for-profit companies forming in the education sector to take advantage of new opportunities and eventually overwhelming traditional education with a “tsunami” like impact.²⁹

Traditional public universities have been too slow to take account of the changing nature of education consumers. The authors point out that only 16% of today’s undergraduates are eighteen to twenty-two year-olds living on campus as full-time students.³⁰ An increasing number of college students are adults who work. The authors foresee either radical change or the creation of new institutions

19. *Id.* at 23.

20. *Id.* at 8.

21. *Id.* at ix, 78–79, 123.

22. *Id.* at 75–99.

23. *Id.* at 100–29.

24. *Id.* at 150–80.

25. *Id.* at 88.

26. *Id.* at 75–76.

27. *Id.* at 89.

28. *Id.*

29. *Id.* at 88.

30. *Id.* at 32.

meeting the new demand for this sector.³¹ They forecast that the market for executive, post-graduate, or non-degree education may soon exceed the demand for undergraduate education, and they urge universities to focus on efforts to capture this market.³² The authors fear that for-profits will transform higher education in the “dark, market-driven future.”³³ Universities have been too slow to respond to these changes and they urge universities to make changes to compete with for-profits.³⁴

Consistent with the new market perspective on higher education is the fundamental change in how public universities are financed. The authors point out that financial support for public universities has changed from direct appropriations, to a tuition/student aid model.³⁵ Distribution of student aid is left to the market, i.e., the choices made by students. The authors rue this new confidence in market forces that has replaced public policy as the guiding principle in higher education. Public universities, which cannot as readily adjust their tuition upwards because of political resistance, cannot capture as great a share of federal dollars. Public universities are thus caught between state politicians trying to control costs with limited tax revenues to spend, and the federal government which has given universities an incentive to raise tuition.³⁶

The shift in financial aid policy represents a change in thinking about who should pay for the costs of a college education.³⁷ Between 1978 and 1998, state appropriations as a percent of public university revenue declined by 25%; over the same period, however, enrollments increased.³⁸ The authors see no hope for change on this front.³⁹ At the University of Michigan, for instance, direct appropriations now account for less than 10% of the university’s operating budget.⁴⁰ Public universities must now compete for students receiving need-based aid, or more odious to the authors, merit-based aid.⁴¹ This change in the nature of federal aid has put debilitating financial pressure on public institutions.

The authors especially dislike the shift at the state level from need-based aid to merit scholarships, a change they deem a “tragedy” because it benefits primarily middle to upper income families.⁴² The change is all the more grievous because such aid tends to benefit private institutions.⁴³ The authors explain this shift as a calculated effort on the part of states to “buy votes.”⁴⁴

31. *Id.*

32. *Id.*

33. *Id.* at 96.

34. *Id.* at 187.

35. *Id.* at 78–79, 109.

36. *Id.* at 40.

37. *Id.* at 36.

38. *Id.* at 103.

39. *See id.* at 127 (“It simply may not be possible to justify the level of tax support necessary to sustain the quality of these institutions in the face of other public priorities . . .”).

40. *Id.* at 125.

41. *See id.* at 41.

42. *Id.*

43. *Id.* at 38–40.

44. *Id.* at 41. Why states would need to buy more votes is not made clear.

The university system model of administration poses yet another financial obstacle for flagship campuses which, we are led to believe, should not have to compete for their resources.⁴⁵ Upstart regional public universities trying to develop a reputation for research compete with traditional research institutions for federal research funds and state appropriations.⁴⁶ The competition has made for less collegiality and a “confused” public, resulting in less tolerance and support for the research enterprise.⁴⁷

In the face of such financial crises, public universities have few options. The authors wisely counsel a strategy involving diversifying the university revenue base,⁴⁸ building adequate financial reserves,⁴⁹ and decentralizing budgetary decisions in the interest of cost containment.⁵⁰ They caution, though, that new financing models that make public universities more like private institutions will bring new challenges for preserving the public character of these institutions.⁵¹

Exacerbating the fiscal crises of public universities is the fact that state governments continue to deny public universities the ability to govern themselves. Control by the state, and the leadership model adopted by most institutions, insure that universities, especially large public ones, are not suited to maneuver quickly to adapt to change or challenges. Some of the book’s harshest words are aimed at the leadership and governance of public universities.

Trustees, typically named through a political process, are likely to have more allegiance to political interests than to the institution. Perhaps most importantly, they have reason to resist raising tuition rates to levels adequate to compensate for diminished appropriations. Further, trustees are insulated from the effects of poor governance, have accountability to no one, and they require no accountability of the executive leadership.⁵² The authors thus see the culture of the public university as a conundrum: the university needs strong leaders to direct change rapidly, but the culture of public universities, in both their boards and faculty, do not welcome strong leaders. It is no wonder then that we are seeing public universities’ professional schools, when they are able, effectively seceding from control of universities’ boards of trust.⁵³

In concluding that governance shared among politically selected trustees, tenured faculty, and amateur executives is inappropriate for the contemporary university, Duderstadt and Womack spare no one.⁵⁴ The executive leadership is

45. See *id.* at 171 (“By forcing flagship institutions to become a part of a general standardized system of college and universities . . . the quality of many of the nation’s leading public universities has been threatened.”).

46. *Id.* at 55.

47. *Id.*

48. *Id.* at 106–13.

49. *Id.* at 101, 113–15.

50. *Id.* at 172.

51. *Id.* at 127–29.

52. *Id.* at 165 (“There is ample evidence to suggest that, for all practical purposes, board members are effectively isolated from accountability for even the most blatant incompetence.”).

53. See David L. Kip & Patrick S. Roberts, *Mr. Jefferson’s University Breaks Up*, 148 PUB. INT. L. REP. 70–85 (2002).

54. See DUDERSTADT & WOMACK, *supra* note 1, at 151.

scolded along with trustees. Public universities have suffered under an “amateurish academic leadership model” that has elevated faculty members with little management experience and poor skills.⁵⁵ Without the skills to guide institutions through change, university leaders are neutralized by the “bribery culture” among tenured faculty and their deans who resist meaningful change unless their cooperation is “purchased.”⁵⁶ Typically, administrators lack both the authority and the will to dislodge faculty from the bunker-like structures of traditional departments. The structure of the public university from top to bottom makes it thoroughly unable to adapt to a changing environment.

In light of these challenges, Duderstadt and Womack make a number of bold proposals, but they fail to say whether any of them have yet been tried or have succeeded. They suggest several ways for universities to enter the adult education market including introducing a new advanced liberal learning degree, and establishing new alliances with community colleges to divide the research and teaching missions.⁵⁷ They propose new alliances with private business to supply new groups of adult learners, and suggest using new digital technologies to enable wider distribution of their courses.⁵⁸ They also suggest universities capture ownership of intellectual property created by faculty members for classroom use and exploit it as a new revenue source.⁵⁹ Finally, they make several suggestions for new administrative experiments to facilitate change, including rotating senior administrators,⁶⁰ diminishing the faculty’s role in executive leadership,⁶¹ and enabling presidents of public universities to help select board members just as private college leaders do.⁶²

One would like, in a book such as this, to read more about how the authors’ insights have been earned from first-hand experience. In only a few instances do we read that something worked, or did not, at the University of Michigan. The Michigan Mandate, about which the authors are justifiably proud, involved achieving consensus to diversify student enrollments.⁶³ Faced with declining appropriations, the authors managed to raise their university’s bond rating to lower the cost of debt financing.⁶⁴ But they cite scant evidence that they, or anyone else, have attempted the radical changes they suggest.

Another disappointment is that the book is marred by the authors’ premise that for public universities to succeed, private institutions must suffer. They perceive a rivalry between the two sectors and believe private institutions unfairly share some of the privileges of public universities without having the burdens of state control. The authors are angry, for instance, with the tax-exempt status of private institutions’ endowment income that allows the accumulation of enough wealth to

55. *Id.* at 122.

56. *Id.* at 174.

57. *Id.* at 94, 196.

58. *See id.* at 64, 94.

59. *Id.* at 85.

60. *Id.* at 189.

61. *Id.* at 165.

62. *Id.* at 176–77.

63. *Id.* at 50.

64. *Id.* at 113–14.

lure faculty away from public universities.⁶⁵ Elite private institutions, we learn, are “carnivores” and “predators” that steal faculty members away from public institutions.⁶⁶ They warn that if private institutions do not stop their “irresponsible” behavior, the public universities will be “compelled to unleash the T Word, *tax policy*,”⁶⁷ and use their political clout to remove the deductibility of charitable contributions to private institutions as well as tax exemption for their endowment income. The authors also suggest that the amount of federal student aid available for use at elite private institutions should be limited.⁶⁸

They further attack the elitism resulting from selective private admissions on the grounds that it has skewed the public’s notion of quality in education.⁶⁹ Private institutions are too selective, they argue. Their selectivity in admissions has been pushed to “extreme limits” and the authors conclude, “It is time to ‘de-Harvardize’ higher education in America.”⁷⁰ The private institutions have effectively misled the public into thinking a selective private college is more desirable than a public university.

But the authors have an almost schizophrenic view of private institutions. In an ironic compliment to private higher education, they foresee that the best course for public universities is to become more like private colleges. They want public universities to gain the ability to set their own tuition rates, select their own leaders outside of public scrutiny, and limit their mission to a more manageable set of goals. In both their forecast and recommendations, the authors see a convergence of the public and private models of funding, governance, and mission.⁷¹

All said, the authors are not sanguine about the prospects of public universities. The best hope they offer is that public universities will become more like the best private institutions in their governance and financing while retaining a mission of public service. They have given us, by the end, strong reason to conclude that state governments are ill suited to run colleges and universities. The challenges the authors enumerate for the public university are in truth a list of the reasons they have failed, and will continue to fail, at their core missions. This is clearly frustrating for someone like Duderstadt who has been outspoken for responsible change in the academy. He has advocated reform of intercollegiate athletics and sought to change the selection process of the University of Michigan’s trustees.⁷²

If the public university is not yet a failed project, Duderstadt and Womack leave little doubt that it is at risk.⁷³ The authors’ fear is that unless radical changes are made, public research universities, if they do not first unravel, are destined to sink into mediocrity. To this reviewer’s mind, the reality is that most public universities are already comfortably settled there, even if the “great” state

65. *Id.* at 214–15.

66. *Id.* at 28.

67. *Id.*

68. *Id.* at 215.

69. *Id.* at 42–44.

70. *Id.* at 44.

71. *See id.* at 184–89.

72. *Id.* at 199.

73. *Id.* at 105.

campuses are still fighting against gravity.

REVIEW OF BRIAN L. PORTO'S *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS*

BRIAN A. SNOW*

*A New Season*¹ echoes the theme of several recent books that call for reformation of intercollegiate athletics programs, particularly in football, to eradicate infections of exploitation, greed, and scholarly malaise in America's post-secondary institutions. Its subtitle, however, "Using Title IX to Reform College Sports," invokes a surprising and novel area of exploration.

The author advocates a "participation" model in intercollegiate athletics that permits students to engage in sports in a manner similar to the non-scholarship, non-professional, postulates of the Ivy League, the Patriot League, and the National Collegiate Athletic Association ("NCAA") Division III.² Thus, although schools might still sponsor football, their teams would not retain million dollar coaches, aspire to be the national champion, or maintain multiple platoons of starters and reserves. More emphasis would be given to establishment and development of intramural and club sports, and schools would highlight their "student scholars" instead of "student athletes." Reviving memories of Spartan values, students would play for enjoyment and physical development and concentrate on the value of learning instead of touchdowns and three-point plays.

Paradoxically, in spite of this emphasis on academics, this is not a scholarly book. It is, however, an interesting and informative narrative for mainstream readers, highly dependent on popular sports narratives and news articles for its research. It includes many illustrations of the destructive nature of commercialization of college sports coupled with occasional sidebar discussions of the avaricious seekers and the "villains" and miscreants who sometimes inhabit this arena. *A New Season* challenges and assaults the underpinnings of the muscular showboats of the academic world, firing at four primary targets.

I. PORTO'S FOUR TARGETS

The first broadside shatters a common public perception that athletic programs derive considerable profits from men's football and basketball—enough to

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1. BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* (2003).

2. *Id.* at 174.

maintain the so-called “non-revenue sports” like swimming, golf, and tennis, which do not generally realize sufficient earnings to be self-supporting. Actually, most institutions lose money on intercollegiate athletics.³ Not only do they not earn enough to support less profitable programs, they do not generate amounts sufficient to nourish their alleged “cash cow” in men’s programs.⁴ In fact, 74 of the 114 institutions in Division I-A lost an average of \$3.8 million during the 2001–02 year and only forty made a profit.⁵ If the presidents and athletic directors of the “losers” were guests on Donald Trump’s television show, “The Apprentice,” after disclosing their financial failures, they would face his words of occupational doom. Yet, they continue to reign. Some coaches in the higher echelons are paid more than a million dollars each year. After a championship season in 2004, Nick Saban, the head coach of Louisiana State University’s (“LSU”) football team was given a new contract calling for an annual payment of \$2.3 million a year—with incentives that could boost his total to \$3.4 million by 2010—the final year of the contract.⁶ Although Saban has been credited with improving the academic performance of the football team, LSU has struggled with its treatment of women athletes.⁷

The second strike blasts athletic programs as chronic wasters of money, particularly in the bloated staffs they retain, their separate academic support areas, and the perquisites they lavish on their employees and “friends.”⁸ One illustrative example involves an appearance by the University of Wisconsin in the 1999 Rose Bowl. The narrative reveals that Wisconsin earned a payout of \$1.8 million, but expended about \$2.1 million.⁹ A breakdown of these expenses showed that \$831,400 went for airfare, housing, and meals for 832 people, including coaches and their families, six baby-sitters, the marching band, the cheerleaders, and three “Bucky Badger” mascots.¹⁰ Thus, the lush payout was transmogrified into a debt of almost \$300,000.¹¹

3. *Id.* at 52.

4. *Id.* at 68–69.

5. *Id.* at 52.

6. See Melinda Deslatte, *LSU Makes Saban College Football’s Richest Coach*, USATODAY.COM, available at http://www.usatoday.com/sports/college/football/sec/2004-02-19-saban-contract_x.htm (Feb. 19, 2004). Saban moved to even greener gridiron at the end of 2004 by becoming the head coach of the Miami Dolphins with a reported salary of at least \$4.5 million. Steve Wine, *Saban Leaving LSU to Accept Dolphins Head-Coaching Job*, USATODAY.COM, available at http://www.usatoday.com/sports/football/nfl/dolphins/2004-12-25-saban-accepts_x.htm (Dec. 25, 2004). LSU agreed to pay his successor, Les Miles, formerly head football coach at Oklahoma State University, annual compensation aggregating \$1.25 million, plus conditional incentives. ASSOCIATED PRESS, *New Coach’s Start-up Deal Rivals Saban’s*, ESPN.COM, at <http://sports.espn.go.com/nfl/news/story?id=1965507> (Jan. 21, 2005).

7. See *Pederson v. La. State Univ.*, 201 F.3d 388 (5th Cir. 2000) (involving female students’ class action against the university to force LSU to field women’s soccer and softball teams).

8. PORTO, *supra* note 1, at 60–62.

9. *Id.* at 61.

10. *Id.*

11. *Id.* Those responsible for spending in athletics could have used the U.S. government as a model. In 1975, Senator William Proxmire of Wisconsin instituted the “Golden Fleece” award to recognize the government programs that involved wasteful, idiotic, or ridiculous uses of

The third volley hammers athletics as the subordinator and corroder of the academic mantelpiece of institutions of higher education.¹² The reader finds that the term “student-athlete” is an oxymoron. Tales are told about cheating, plagiarism, falsification of transcripts, grade inflation, and intrusion by athletic personnel into course selection, designed to keep the players eligible as opposed to leading them towards a degree.¹³ The reader is reminded of the tragic flushing of star athletes like Dexter Manley and Kevin Ross who were apparently neither exposed to “pedagogy,” nor taught the meaning or spelling of such words.¹⁴ More ammunition for undermining the early intellectual development of athletes is provided by the disclosure that the average member of a “top 25” football or men’s basketball team is ill-prepared for college, having departed from high school in the bottom 25% of his class.¹⁵ The book notes that, unfortunately, many athletes disregard their course work, believing that they will earn their livelihood as part of the multi-million-dollar explosion in signing bonuses and long-term pay in the professional world.¹⁶ Such views, which are widespread among athletes at all ages and levels, are myopic. According to information released by the NCAA, only three in ten thousand (approximately 0.03%) of high school senior boys playing basketball will be drafted by a National Basketball Association (“NBA”) team and only nine in ten thousand (0.09%) will be drafted by a National Football League (“NFL”) team.¹⁷ The book also states that African-American athletes, significant contributors to most college basketball and football teams, may face frustration and severe disappointment after they leave college.¹⁸ The author quotes John Hoberman of the University of Texas as referring to sports as a “ritual of survival that reenacts a visceral African-American determination to persevere.”¹⁹ The book then illustrates why the fire fueling hopes and expectations of post-college athletes is so often doused as they confront the reality of the improbability of never playing in the major leagues.²⁰ They would be more likely to be hit by an asteroid than to

taxpayers’ money. Winners included a study of social relationships in a Peruvian brothel and a project for building a low-slung backward steering motorcycle that no one could ride. TAXPAYERS FOR COMMON SENSE, *The Golden Fleece Award* (1975–1988), at <http://www.taxpayer.net/awards/goldenfleece/1975-1980.htm> (last visited Mar. 14, 2005).

12. PORTO, *supra* note 1, at 81–104.

13. The nation’s academic community must have shuddered after reviewing the text of the final exam in assistant basketball coach Jim Harrick Jr.’s course, “Coaching Principles and Strategies of Basketball” at the University of Georgia in 2001. The brain-twisting questions included, “How many halves are in a college basketball game?” and “How many points does a 3-point field goal account for in a basketball game?” ASSOCIATED PRESS, *Cake Walk, Final Exam In Harrick Jr.’s Class at Georgia Was Absurdly Easy*, ESPN.COM, at <http://sportsillustrated.cnn.com/2004/basketball/ncaa/03/03/bc.bkc.georgia.easyclas.ap/?cnn=yes> (Mar. 3, 2004).

14. PORTO, *supra* note 1, at 6.

15. *Id.* at 87.

16. *Id.* at 81–104.

17. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, available at http://www.ncaa.org/research/prob_of_competing/probability_of_competing2.html (last visited Mar. 14, 2005).

18. PORTO, *supra* note 1, at 115–24.

19. *Id.* at 116.

20. *Id.*

realize this dream.²¹ The author submits convincing evidence by emphasizing:

There are fewer than 3,400 male professional athletes in team sports, and there are approximately 50.2 million American males who are between the ages of fifteen and thirty-nine, of whom approximately 6.2 million are black. This means that the odds of an African-American male becoming a professional athlete are one in five thousand, which is why there are twelve times as many black lawyers and fifteen times as many black doctors in America as there are black professional athletes. Even in basketball, where African Americans dominate top college teams and professional teams, only 1 in 250 Division I college players will win a job in the NBA.²²

These are heady and instructive messages for young aspirants in professional sports. If they have subordinated and disdained their academic work in favor of the court or playing field, they face the demeaning and helpless prospect of needing jobs after college, but lacking the requisite skills and talents to perform meaningful work.

The fourth blow attacks shameful and painful criminal behavior by players involving violence, such as rape and physical assault, and scandals resulting from gambling and bribery.²³ Coaches also receive their share of scorn, particularly as to stunts that should embarrass a ten-year-old. For example, Bobby Knight, known for throwing chairs, is scolded for his mistreatment of players and colleagues.²⁴ The author states, "Bob Knight is an extraordinary teacher of basketball, but he is wholly unqualified to teach anybody manners and civility."²⁵ The book was published prior to Knight's most recent foray into a bizarre angry exchange at a salad bar with the chancellor of the university where he is now coaching.²⁶ Tom Osborne, the former coach at the University of Nebraska, is also rebuked as an example of a coach who supported the mystique of entitlement often afforded players by excusing their bad behavior, minimizing its seriousness, and prolonging disciplinary actions so they can continue playing.²⁷ The cases of Larry Eustachy and Mike Price apparently had not materialized when the book was written. Eustachy, while head men's basketball coach at Iowa State, was accused of "partying" with young sorority women,²⁸ and Price, who had been employed, but

21. *Id.*

22. *Id.*

23. *Id.* at 124–29.

24. *Id.* at 130–31.

25. *Id.* at 131.

26. Larry Beil, *Notes From the Future of Entertainment*, YAHOO!SPORTS.COM, at <http://sports.yahoo.com/top/news?slug=lb-halftime&prov=yahoo&type=lgns> (Feb. 7, 2004). After a game, Knight's son, who is also one of his assistants at Texas Tech, reportedly said with reference to hunting with his father, "Imagine how I feel. I'm around him when he's got a gun in his hands." Mark Haslet, *Tech's Knight Exonerated Following Most Recent Meltdown*, DESERT-MOUNTAIN TIMES, available at http://www.dmtimes.net/blog/Sports/_archives/2004/2/5/18271.html (Feb. 5, 2004). At a later game that season, some Tech fans wore shirts proclaiming "Lettuce Support Coach Knight." *Id.*

27. PORTO, *supra* note 1, at 129–30.

28. Tom Witosky, *Eustachy Hearing May Take Weeks*, DES MOINES REGISTER, available

had not signed a contract as Alabama's head football coach, was sanctioned for alleged missteps at a topless bar.²⁹ Both coaches have since been hired to coach by sly and sanctimonious institutions of higher learning that “dare to be great.”³⁰

II. THE PROFESSIONAL DEVELOPMENT LEAGUE OPTION

The author does recommend a possible option for easing the pain³¹ of such disappointment for those who are unwilling or unable to attend college, but have strong athletic skills: participation in professional development leagues. Although the NFL primarily relies on colleges to serve as its “farm system,” it does have a distant and shaky attachment to scrums of hopeful grassgrabbers in an alliance known as NFL Europe.³² The teams in this league, with ironic names like the Rein Fire and Berlin Thunder, are primarily comprised of American players with at least eight non-American nationals.³³ They perform in a soccer-crazed environment among fans who are newcomers to the vagaries and follies of American football. Attendance for the league has steadily declined from an average 25,361 per game in 1991 (when football was a novelty overseas) to 15,925 in 2004.³⁴ Many NFL owners object to its survival, pointing to the drain from financial losses and limited success in player development.³⁵

Another alliance, the Arena Football League (“AFL”) provides some professional opportunities, especially for those who are not capable of playing in the NFL. Although Kurt Warner, an NFL star quarterback, once played in this league, the name of Daffy Duck is probably more recognizable in the United States than those of the AFL's stars. In the midst of the 2004 season, the league passing leaders were Mark Frieb, Tony Graziani, and Clint Dolezel, and the three top

at http://www.enquirer.com/editions/2003/05/05/spt_wwwsptcol1e5.html (May 5, 2003).

29. ASSOCIATED PRESS, *Witt: Price Warned Before Trip about His Behavior*, ESPN.COM, at <http://www.espn.go.com/ncf/news/2003/0503/1548767.html> (May 3, 2003).

30. See ASSOCIATED PRESS, *Eustachy to Return to Coaching Ranks*, ROCKY MOUNTAIN NEWS, available at http://www.rockymountainnews.com/drnm/college/article/0,1299,DRMN_40_2756235,00.html (Mar. 25, 2004); ASSOCIATED PRESS, *Second Chance in El Paso: UTEP Hires ex-Wazzu, Alabama Coach Price to Rebuild Struggling Program*, CNN.COM, at <http://sportsillustrated.cnn.com/2003/football/ncaa/12/21/utep.price.ap/> (Dec. 21, 2003).

The term “dare to be great” has been used in many contexts to exemplify motivation and a quest for success. It may have achieved its greatest prominence in the early 1970s when it was the theme used by renowned pitcher, Glenn Turner, in connection with a pyramid scheme. See *Dare to be Great, Inc. v. Commonwealth*, 511 S.W.2d. 224 (Ky. 1974).

31. “Ease his pain” was also a philosophical chord for evoking alienation and seclusion in W.P. KINSELLA, *SHOELESS JOE* (Mariner Books 1999), and the movie *FIELD OF DREAMS* (Universal Studios 1989).

32. CANADIAN PRESS—ASSOCIATED PRESS, *NFL Europe Starting 10th Season*, available at http://slam.canoe.ca/Slam020410/nfle_10-ap.html (Apr. 21, 2004); NFL EUROPE, *Turning the Dream Into Reality*, at http://www.nfleurope.com/news/archive/15082000_histintro (Aug. 15, 2000).

33. SPORTSLINKSCENTRAL.COM, *NFL Europe*, at http://www.sportslinkscentral.com/Leagues_Teams/nfl_europe.htm (last revised Feb. 2, 2004).

34. Kenn Tomasch, *NFL Europe Attendance*, at <http://kenn.com/sports/football/nfle/> (last updated Feb. 1, 2005).

35. Les Pasquerelli, *NFL Europe Almost Voted Into Extinction*, ESPN.COM, at <http://sports.espn.go.com/espn/print?id=1618267&type=story> (Sept. 17, 2003).

rushers were Dan Curran, Marlon Moya-Moore, and Adrian McPherson.³⁶ All are obscure except to the most devoted AFL fans. Football purists disdain the AFL, which has nineteen teams in large cities that play indoor on diminutive surfaces (fifty yards long compared to one hundred yards in the NFL) and feature sky-high scores.³⁷

Surprisingly, the AFL has not served as a significant source of new players for the NFL. Few advance to a higher level. Its players tend to be older than those joining the NFL and many have previous minor league football experience. By scheduling games after the end of the NFL season, the AFL satisfies the needs of many fans who want to watch football beyond the regular professional season. Accordingly, it has achieved significant profitability. In 2002, one sports journalist observed that the value of AFL franchises had increased by 250% during the prior three years and 45% in the prior three months, resulting in a going rate for acquisition of an AFL franchise of \$7–10 million.³⁸ This was only a fraction of the amount required to buy a franchise when the league was formed. The AFL, which recently formed its own development league in smaller cities, Arena Football 2, reaped \$1 million dollars for each new franchise.³⁹ Owners of NFL teams flocked to AFL franchises as investors in its teams and several more are in line to buy League interests.⁴⁰ As these owners become dominant in the AFL, it will be interesting to see whether they are content with the profits and escalation of the value of their franchises, including the newly formed Arena Football 2, or whether this is an emerging plan to use both leagues for development of players. Certainly, this could be valuable insurance if there is significant reform in college football and cease their role as the “minor league” for the NFL.

The NBA has been more willing than the NFL to develop alternatives to colleges for training future prospects. It has fewer players and drafts them at an earlier age than its football counterpart. The NBA sponsors and supports a productive prospect development program. Although none of the six participants in this venture, aptly named the National Basketball Development League (“NBDL”), is affiliated with any specific NBA team, the league is a source of player talent and serves as a proving ground for potential front-office employees in areas such as public and media relations, operations, and marketing.⁴¹ Teams in

36. David Williams, *Arena League: Some Relief for Football Withdrawal*, at <http://www.outsports.com/columns/arenafootball20030304.htm> (Mar. 4, 2003); ARENA FAN ONLINE, *2004 League Leaders*, at <http://www.arenafan.com/history/?page=yearly&fpage=leaders&year=2004> (last visited Mar. 14, 2005).

37. Richard Weiner, *Arena Football League Becomes a Major Success*, USA TODAY, July 11, 2001, at 3C; ARENA FAN ONLINE, *2005 League Leaders*, available at <http://www.arenafan.com/statistics/?page=leaders> (last visited Mar. 14, 2005).

38. Weiner, *supra* note 37, at 3C; Arlen Boardman, *Arena Football Team Owner Takes Philosophy to Gridiron*, POSTCRESCENT.COM, available at http://wisinfo.com/postcrescent/news/archive/biz_12960509.shtml (Nov. 16, 2003).

39. Weiner, *supra* note 37, at 3C.

40. *Id.*

41. Larry Bills, *National Basketball Development League*, at http://www.hoovers.com/nbdl/--ID_111469--/free-co-factsheet.xhtml (last visited Mar. 14, 2005); NBA, *Welcome to the NBA Team Jobs Website!*, at <http://nbateamjobs.teamworkonline.com/teamwork/jobs/default.cfm> (last visited Mar. 14, 2005).

the NBDL include such colorful combatants as the Columbus Riverdragons in Georgia and the Charleston Lowgators in South Carolina. Players must be at least twenty years of age before the start of the NBDL season or have signed a contract with an NBA team and been subsequently released.⁴²

The book suggests that both the NBA and the NFL (with a newly created development program) should allow individuals to “pursue [their] dreams” through two separate “minor leagues” in football and basketball, each organized by age and comprised of a “rookie league” for athletes between the ages of eighteen and nineteen without professional sports experience, and a more advanced league for players between the ages of nineteen and twenty who have played professional sports for at least a year.⁴³ As compensation for their athletic services, participants in the leagues would be paid a salary.⁴⁴ Those who do not advance to the major leagues would also be credited with a right to draw upon a “Future Fund,” for future educational or vocational expenses.⁴⁵ The author seems unduly optimistic about significant earnings that might be derived even from creative and well-managed operation of these leagues.⁴⁶ No analyses of potential revenues or salary projections are provided to support these conclusions. However, the proposal has merit and should be examined more carefully with consideration of subsidies that might be provided by the NFL, other professional teams, and colleges and universities that might enroll some of the players during their playing careers or in the future.

The NFL is not likely to institute a player development system so long as it can continue relying on free services provided by college athletic programs. Of course, college football players and coaches, supported by rabid fans who possess wealth and political influence, are often willing participants in this arrangement. Most players lack a strong reason for favoring change, finding that programs whose players “graduate” to the NFL offer a more luxuriant environment than all other alternatives.

The lifestyles of outstanding players in strong football programs closely resemble those in the NFL. Such college players are taught and directed by a bevy of individual tutors called coaches; conditioned in facilities that feature high-tech benders, lifters, and squatters in music-laden environments with hot tubs and trainers; treated by the best physicians who love game passes and special attention; fed through services of cooks and nutritionists who are especially adept at transforming an average-sized man into a 380-pound human rhino; and given applause and boosts of self-esteem by a legion of “whim-satisfiers” among fans and boosters. Thus, elite players are indirectly groomed for the NFL while playing as “amateurs” in the college systems.

As should be expected, the NFL has rules that keep this connection secure. It bars all players from being employed by a team in the league until at least three years have passed from the date of the player’s graduation from high school. Thus,

42. PORTO, *supra* note 1, at 186.

43. *Id.* at 214.

44. *Id.*

45. *Id.*

46. *Id.*

a high school graduate who is an NFL prospect can do nothing, work, or go to college (any college or university often will do, irrespective of its academic quality). The player simply cannot get a job performing in the NFL until the requisite period has passed.

Recently, a star running back for Ohio State University, Maurice Clarett, decided to challenge this rule by suing the NFL in federal district court, claiming that its three-year rule violated the Sherman Antitrust Act and the Clayton Act.⁴⁷ He had performed spectacularly during his freshman year in college, but was suspended from playing by the university for disciplinary reasons involving NCAA violations during his second year.⁴⁸ As he approached his third year, he decided that he was ready to play in the NFL. The NFL, however, refused to accept him because three years had not passed since his high school graduation; so Clarett sued. Clarett prevailed at the district court level, but lost on appeal when the Second Circuit held that the NFL's three-year rule is a permissible condition of employment under both federal antitrust law and federal labor law.⁴⁹

III. THE RELEVANCE OF TITLE IX

The reader who is attracted by the inclusion of "Title IX" as part of the title of this book may be disappointed that it does not provide a more balanced analysis and comprehensive discussion of the application of this law, which was originally enacted by Congress in 1972 to prohibit gender discrimination by recipients of federal funds in all sectors of education, including admissions and curriculum.⁵⁰ Since educational providers, such as elementary and secondary schools and post-secondary institutions, commonly receive some federal assistance, their athletic programs are almost universally subject to Title IX. The book focuses on application of this law to athletics at the collegiate level where males have clearly dominated and women have often been demeaned and subordinated. Title IX has provided a magnificent vehicle for women to compel institutions to accord them fairness and equality in their right to play, to receive scholarships, and to be treated with respect and dignity.⁵¹ Women have vigorously pursued litigation to attain and preserve these rights and have almost uniformly been successful in these efforts. At least eight federal circuit courts of appeal have upheld their claims of discrimination in athletics under Title IX and particularly underscored their right to equality of participation.⁵² However, when men have asserted similar rights under

47. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 390 (S.D.N.Y. 2004), *rev'd and vacated by*, 369 F.3d 124 (2d Cir. 2004).

48. See NBC4I.COM, *Geiger Announces Clarett's One-Year Suspension, Sophomore Allegedly Violated Two NCAA Bylaws*, at <http://www.nbc4i.com/sports/2468541/detail.html> (Sept. 10, 2003).

49. *Clarett v. Nat'l Football League*, 369 F.3d 124, 143 (2d Cir. 2004).

50. Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)).

51. See Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003); NAT'L WOMEN'S LAW CENTER, *THE BATTLE FOR GENDER EQUITY IN ATHLETICS: TITLE IX AT THIRTY* (2002).

52. *Nat'l Wrestling Coaches Ass'n v. United States Dept. of Educ.*, 263 F. Supp. 2d 82, 94-95 (D.D.C. 2003) (noting that Title IX has "survived constitutional challenges in no fewer than

Title IX, often as a result of their teams being downsized in numbers or eliminated, the courts have been disinclined to rule in their favor, emphasizing the historic lack of opportunities for women and observing that men's sports must sometimes give way to avoid continuation of the pattern of subordination of women in athletics.⁵³

The author suggests that Title IX could serve as a meaningful catalyst for introducing the "participation" model it advocates and borrows one of its regulatory benchmarks, the "substantial proportionality" test, to advance this position.⁵⁴ Under a key prong of this three-part test, intercollegiate athletic opportunities for male and female athletes must be provided in numbers that are substantially proportionate to their respective enrollment ratios.⁵⁵ Thus, if women represent 52% of enrolled students and men represent 48%, women would be entitled to 52% of the playing slots on athletic teams and men would have only a 48% share. Since football teams include huge numbers of male players, and women's sports generally have relatively small squads, institutions often encounter difficulties in meeting the required proportionality test unless they are financially capable of sponsoring a massive number of women's sports.

Even though the book contains a trenchant analysis of the inner workings of Title IX, including a carefully constructed examination of the proportionality standard, the manner in which this gender-based statute is to be the linchpin for achieving reformation of college sports is fuzzy and tenuous. Although women's sports have received significant opportunities from the application of Title IX, the book does not give a clear and well-constructed description of how use of the proportionality test will provide a structure for redressing many of the concerns raised in the excellent discussion of the history and the problems currently associated with "big-time" college sports. The reference to Title IX as the foundation for reform seems akin to being given some but not all the pieces of a puzzle to complete. The use of a gender-equity law to justify reforming of the entire college sports "industry" without specific regard to the sex of individuals is puzzling and seemingly unrealistic. Certainly, women's sports, which have been historically subordinated, would profit mightily from strict application of Title IX, including the proportionality standards, but one is hard-pressed to visualize how the academic and behavioral issues addressed in the earlier parts of the book would be addressed.

It must be recognized, however, that this book is clearly visionary and, to some extent revolutionary. Thus, this calls for avoidance of hasty and reckless judgments of the book's limitations. In recent years, institutions have repeatedly attempted to comply with the numerical ratios inherent in the proportionality standard by reducing or eliminating men's sports such as wrestling, gymnastics, and baseball. Others have chosen to enlarge the numbers for women's participation by embracing new offerings of particular sports, such as rowing, that

eight Federal circuits").

53. *Id.* at 85.

54. PORTO, *supra* note 1, at 186.

55. See Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, United States Dept. of Educ., *Further Clarification of the Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (June 11, 2003).

permit expansion of athletic opportunities for women. For example, Kansas State University increased its female participation levels through the addition of an equestrian team (sixty-two women) and a rowing squad (seventy-four women).⁵⁶ Its Athletic Director candidly acknowledged, "Both of those sports were added to offset our football numbers."⁵⁷

The existence of large football rosters, almost exclusively involving men, without comparably populated sports for women, has contributed to institutional difficulties in meeting the proportionality standards under Title IX. The book suggests that instead of emasculating several smaller-sized male squads, as many institutions have done in the last few years to comply with the numerical requirements of the proportionality standard, football should be the target.⁵⁸ Indeed, it is the prime candidate for reduction in participants because of its mammoth rosters, with each program containing at least eighty-five participants and sometimes more than a hundred. Application of the proportionality test might prompt colleges to decrease the number of football participants to no more than fifty players, as suggested in the book, thereby freeing up enrollment for athletes in other sports.⁵⁹ If this were coupled with strengthening many of the non-revenue sports through the participation model by converting them into intramural and club sports, overall athletic opportunities for both men and women would be enhanced. It must be noted that only about 5% of the total number of college students participate in varsity athletics. That leaves colleges with a dilemma that has never been fully addressed. How are they to accommodate the athletic interests of both men and women who constitute the remaining 95%? Both women and men who are not willing or able to participate in varsity football or basketball have long been shortchanged.⁶⁰

In fact, those sports identified as "non-revenue" and those not given varsity status may be the most neglected group in college athletics. If these programs were configured so that not only women, but also those men who are not part of the favored few, were encouraged and offered greater opportunities in more institutionally-supported intramural and club sports, the sports profile of colleges and universities would be more reasonable and equitable for all students. Such action would promote the spirit and value of Title IX by providing opportunities for those who have effectively been "under represented."

56. Tom Farrey, *Football Grabs Stronger Hold on Purse Strings*, ESPN.COM, at <http://sports.espn.go.com/gen/s/2003/0025/1514457.html> (Feb. 26, 2003).

57. *Id.*

58. PORTO, *supra* note 1, at 159.

59. *Id.*

60. See Jeffrey Owings et al., *Who Reports Participation in Varsity Intercollegiate Sports at 4-Year Colleges?*, NAT'L CTR. FOR EDUC. STATISTICS, available at <http://nces.ed.gov/pubs/97911.pdf> (Dec. 1996); Melanie Noto, *True Sportsmanship—Intramural and Recreational University Sports*, INSIGHT ON THE NEWS, available at http://www.findarticles.com/p/articles/mi_m1571/is_48_16/ai_72274921 (Dec. 25, 2000).

CONCLUSION

Fans of “big time” college sports, particularly football, are likely to wonder if they have entered a game of virtual dodgeball as they feel pounded by the negative findings and conclusions in this book. Some readers may be provoked and aggravated, silently questioning the accuracy and validity of the assertions made as they reflect on the litany of adverse observations about their vicarious icons. They should recognize, however, that the factual assertions are well supported by research and that this is exactly the book they *need to read* to be prepared for the debates and dialogues that will inevitably flare in the future. The Association of Governing Boards of Universities and Colleges,⁶¹ the Knight Commission,⁶² and the NCAA recently have raised significant concerns similar to those in the book about the problems now reflected in college sports.⁶³ Vanderbilt University has even integrated its athletic department into the operational mainframe of the institution under the *actual* jurisdiction and supervision of its president.⁶⁴ Other institutions that have experienced problems in their athletic programs are reviewing this model as a potential alternative.⁶⁵

This book is not only for the sports enthusiast or the skeptic. It is a valuable resource for anyone who cares about the future of higher education in this country.

61. See ASS'N OF GOVERNING BODS. OF UNIVS. AND COLLS., *Statement on Board Responsibilities for Intercollegiate Athletics*, available at <http://www.agb.org/content/explore/AthleticStatement.pdf> (Mar. 28, 2004).

62. KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Calling Big-Time College Sports to Reform*, available at http://www.knightfdn.org/default.asp?story=annual/2001/knight_commission.htm (2001); KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Knight Commission Study Finds Two-Thirds of Men's Teams Would be Ineligible for NCAA Basketball Tournament*, available at <http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F03%5F18%5Fkcia.html> (Mar. 18, 2004); KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Trustees' National Group Advances College Sports Reform Effort* (March 18, 2004), at <http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F03%5F29%5Fagb.html> (Mar. 18, 2004).

63. See Bill Pennington, *Unusual Alliance Forming to Reign in College Sports*, N.Y. TIMES, Jan. 17, 2003, at D2; Welch Suggs, *NCAA Weighs New Penalties for Academic Laggards*, CHRON. HIGHER EDUC., Apr. 23, 2004, at A42.

64. See Welch Suggs, *A Course Correction for Vanderbilt Sports*, CHRON. HIGHER EDUC., Oct. 17, 2003, at A43; *Vanderbilt U. Keeps Sports But Drops Its Athletics Dept.*, CHRON. OF HIGHER EDUC., Sep. 19, 2003, at A35.

65. *In Need of an Overhaul: Liaison Recommends Vanderbilt-style Dismantling of CU Athletic Program*, CNNSI.COM, at <http://sportsillustrated.cnn.com/2004/football/ncaa/04/16/bc.fbc.universityassaul.ap/index.html> (Apr. 16, 2004).

REVIEW OF PETER H. SCHUCK'S *DIVERSITY IN AMERICA: KEEPING THE GOVERNMENT AT A SAFE DISTANCE*

VINCENT D. ROUGEAU*

As part of a 1983 consent decree settling a lawsuit alleging racial segregation in the San Francisco public schools, the San Francisco Unified School District created a “diversity index.”¹ The diversity index assigns students among the city’s public schools so that all schools have racial, ethnic, and socioeconomic balance.² Six factors are considered in the placing of a child including: socioeconomic status, academic achievement, the mother’s educational background, standardized test scores, and the language spoken in the home.³ Until 1999, no school could have a student population in which one racial or ethnic group exceeded 45%, and no school could have fewer than four racial groups represented.⁴ In 1999, however, another federal court settlement barred the use of race in school assignments and these provisions were dropped from the index.⁵ Although the San Francisco student population is so ethnically and racially diverse that no one group dominates, residential segregation is still a problem. A report in 2003 found a pattern of resegregation developing in many of the district’s schools.⁶ In particular, San Francisco’s Chinese-American community, which tends to be concentrated in certain neighborhoods, is finding that many of their neighborhood schools are closed to their children, who must be bussed to other areas of the city in order to keep those schools “diverse.”⁷

The quest for diversity in the San Francisco schools is but one example of what Peter Schuck describes in *Diversity in America: Keeping Government at a Safe Distance*⁸ as an American society in which:

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1. See Tiffany Maleshefski, *Diversity Index Could Be Kaput: Chin’s Resolution Quietly Submitted*, at http://sfindependent.com/article/index.cfm/i/103003n_index (last visited Mar. 14, 2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *Profile: Attempt to Integrate Schools in San Francisco Being Called Discriminatory* (National Public Radio Broadcast, Apr. 5, 2004).

8. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING THE GOVERNMENT AT A SAFE DISTANCE* (2003).

diversity is so pervasive, so deeply embedded in everyday life, that we tend to ignore it until our attention is called to it We overlook how diversity shapes our primary relationships, affecting the kinds of people with whom we work, converse, compete, do business, shop, attend school, reside, and worship. We also forget how recently we came to value it and how fragile our commitment to it might prove to be.⁹

Of particular interest to Schuck is the role of law in American diversity discourse and how the law “manages” diversity. As one might be able to guess from his title, Schuck is skeptical about the ability of government to promote or manage diversity through blunt instruments like the law:

The harder the law tries to create or promote diversity, the more law magnifies and highlights its own weaknesses, and the more law reveals as inauthentic, illegitimate, and disvalued the diversity that it fashions.

. . . .

In truth, government and law are natural enemies of diversity, especially when they are most eager to create it. . . . Public law’s hope is to use simplistic categories to facilitate legislators’ control of regulators and regulators’ control of the rest of us. . . .

Even at the most formal level, then, it is more problematic for public law to define, certify, and promote diversity than it is to protect (and, in some cases, exploit) a diversity that has already been defined, authenticated, and valorized by civil society. Genuine diversity value is a product of an opaque, complex, dynamic, mysterious realm of human meaning and identity that we call culture. Where the goal of generating diversity value is concerned, law is seriously disabled. This disability, moreover, cannot be overcome or accommodated. We can only hope to understand its sources and minimize its worst effects.¹⁰

The complex issues surrounding the desegregation of the San Francisco schools lends some credence to Schuck’s view that governmental attempts to create meaningful diversity are doomed to failure, if only because the law has trouble keeping up with the changing social dynamics that are a fundamental part of defining what we mean when we talk about diversity. Yet, despite his lack of confidence in the ability of law and government to manage and sustain diversity, Schuck exhibits a strong respect for the diversity ideal, primarily due to the high regard in which he holds the values of individual choice and personal autonomy. For Schuck, a respect for diversity, rightly understood, allows individuals to flourish in ways that they find most personally authentic, and in a society with strong respect for individual rights, this type of diversity will thrive without government involvement. What, then, does Schuck believe we are talking about in the United States when we discuss diversity?

Schuck defines diversity as “those differences in values, attributes or activities among individuals or groups that a particular society deems salient to the social

9. *Id.* at 10–11.

10. *Id.* at 322–24.

status or behavior of those individuals or groups.”¹¹ Ultimately, what is particularly significant for Schuck is the ongoing, albeit recent, development of diversity as a positive social and political ideal in the United States. Historically, ethnic and religious diversity have been a key source of social conflict and political instability around the world. Why are Americans so certain that diversity will not cause such problems here? Schuck is not convinced that most Americans are at all certain. Indeed, he believes that many are hostile to diversity. Nevertheless, a certain “liberal guilt,” particularly among the nation’s elites, has allowed diversity to entrench itself through “immigration and other preferential policies as a way to acknowledge and rectify past wrongs perpetrated by the U.S. and its allies.”¹² It is from this background that Schuck frames a position in which he argues that attempts to impose and manage the diversity ideal through public laws are misguided.¹³

Schuck traces the current American understanding of diversity to the African-American civil rights struggle, most particularly to the ideological influence of the black nationalist movements during the 1960s.¹⁴ The identity-building strategies initiated by black Americans in an effort to combat negative and destructive racial stereotypes were soon used as a model for the struggles of numerous other groups. Ultimately, this developed into identity politics which, combined with the Supreme Court’s approval of the concept of affirmative action, set a new tone for discussions of American identity:

The new politics of black identity in the 1960s, as well as the adoption of affirmative action programs favoring nonwhite minorities, cast the pursuit of the diversity ideal in a more assertive, even belligerent light. This helped to energize in white ethnic groups their own identity politics, which celebrated their continuing “unmeltability,” underwrote their opposition to affirmative action, and weaned many of them away from the Democratic party. Three decades later the tremors from this political convulsion are still being felt.¹⁵

The American diversity ideal also meshes well with the versions of liberalism that tend to glorify individual freedom and personal autonomy, and which are so prevalent in American political and social life. Central to any comprehensive understanding of Schuck’s opinion of diversity is recognizing that he takes a sympathetic view of the American bias toward a highly autonomous understanding of the human person. This becomes important in his assessment of the effectiveness of law and government in promoting the diversity ideal through, for

11. *Id.* at 7.

12. *Id.* at 49.

13. *See id.* at 14. Schuck notes:

The belief in the diversity ideal, then, appears to be a distinctively, if not uniquely, American (at least North American) theme. Even in the United States . . . this ideal is a very recent invention; many Americans still oppose it, as many always have. Many others, moreover, support it only because they assume that it will be a merely temporary condition.

Id.

14. *See id.* at 51–52.

15. *Id.* at 53.

instance, affirmative action:

[A] threshold question is whether these [claims] are best understood as liberal claims on behalf of persons who seek to exercise their freedom as autonomous individuals, or instead as group claims that are not really intelligible on a liberal, individualistic account of value. I take the former, liberal view, at least insofar as a democratic society like the United States is concerned. In the most individualistic and market-friendly societies like the United States, people intensively crave—and must fashion for themselves—the affective and solidaristic ties to others that individualism inhibits and that people in more communitarian societies simply inherit and take for granted.¹⁶

The history of the United States as an immigrant society is another essential underpinning to any coherent understanding of why the concept of diversity finds so much resonance in American culture. Immigration continues to be a key source of American ethnic, racial, and religious diversity. But the idea that the diversity produced by immigration is a good thing is primarily a product of the social, political, and cultural changes that began in the 1960s. As Schuck points out, prior to a major reform of immigration law in 1965, American immigration policy was blatantly racist and filled with restrictions based on ethnic origin and gender.¹⁷ The animating cultural ideal prior to 1965 was not diversity but assimilation, and certain groups, primarily those of northern European origin, were viewed as more suitable than others. The 1965 reforms ended discrimination based on country of origin, although Schuck provides compelling evidence to suggest that the liberalization of immigration quotas passed the Congress based on assumptions that the reform would favor “white” immigrants from southern and eastern Europe.¹⁸ There was little thought of opening the country up to people from Asia, Africa, and Latin America, but it is the immigrants from these areas that have transformed the ethnic make-up of American society over the last forty years. This has created a “demographic diversity” that few anticipated in the 1960s:

[I]mmigration and citizenship policies combine with illegal migration to produce high levels of demographic diversity. By itself, this diversity-in-fact is merely that, a fact; it is simply a matter . . . of counting and classifying. But it is a fact whose greatest significance is normative, not empirical. What matters most are the social values diversity serves, not the bare facts denoted by ethnic statistics. We want to know how diversity does and should affect how Americans think of themselves as a political community, the political values they share, the rights they demand and the duties they accept, what they expect of new members, and how they design their institutions, including law, to serve those expectations.¹⁹

16. *Id.* at 61–62.

17. *Id.* at 75, 83.

18. *See id.* at 87–88. Schuck also notes that it was not until the 1990s that American immigration law completely shed its Eurocentric bias. For instance, the Irish had enjoyed preferential treatment throughout the late 1980s and early 1990s. *Id.* at 124–27.

19. *Id.* at 98.

Schuck's preference for liberalism strongly protective of personal autonomy helps him answer these questions:

[T]he law should, insofar as possible, leave minority cultures to their own devices, consistent with the overriding need to maintain public order and uphold constitutional values. This position means, among other things, that government should not promote or even preserve cultural diversity beyond what is necessary to vindicate individuals' constitutionally guaranteed autonomy, freedom of speech, and equal protection of the laws.²⁰

But this approach does not get to the heart of the problem that diversity creates for American society. Are these abstract ideals sufficient for creating the kind of unity that will sustain a society over the long-term? Schuck himself notes that being American seems less central to citizens' identities than it has ever been.²¹ The culture to which most immigrants are expected to assimilate is "fueled by market incentives, the need and desire to learn English, the allure of sports, and a powerful, mass-media-shaped national culture."²² More and more immigrants seem to be maintaining ties with the "old country" in order to shield themselves and their children from the destructive and dysfunctional aspects of the self-centered and materialistic values that are so central to American identity.²³

Schuck believes the immigration laws, at least as currently structured, are a poor tool for encouraging diversity because their classifications are too simplistic, and they are too easily manipulated for political purposes and by groups seeking competitive advantage.²⁴ The latter case is best exemplified by the battle over bilingual education, which Schuck believes has for the most part failed large numbers of students.²⁵ Nevertheless, these programs have been kept alive by certain political interests that have manipulated diversity rhetoric to entrench bilingual education programs and the patronage jobs, funding, and authority they provide.²⁶

Schuck also looks at affirmative action, residential neighborhood integration, and religion to provide examples of other areas where public law has attempted to promote and manage diversity with, at best, mixed results.²⁷ He gives his most detailed attention to affirmative action and residential neighborhood desegregation, and he draws some interesting lessons from legal activism in those areas to support his generally unfavorable disposition toward government action designed to promote diversity.

At first blush, the controversy surrounding affirmative action in the United States seems to support Schuck's contention that imposed diversity through legal

20. *Id.*

21. *See id.* at 100.

22. *Id.* at 101.

23. *See e.g.*, Lynette Clementson, *For Schooling, A Reverse Emigration to Africa*, N.Y. TIMES, Sept. 4, 2003, at A21.

24. SCHUCK, *supra* note 8, at 132.

25. *Id.*

26. *Id.* at 133.

27. *See id.* at 203–308.

and government mandates creates more problems than it solves.²⁸ He notes, “[t]he diversity rationale has transformed a temporary, limited tactic into an almost theological orthodoxy that skin color per se confers diversity value, an orthodoxy confirmed by many elites who should, and do, know better.”²⁹ Even Schuck admits that African-Americans may have a unique moral claim in the context of American society for some sort of acknowledgment of past wrongs.³⁰ But Schuck is no fan of affirmative action. He argues quite persuasively that the social construction of race is in major flux in the United States today, due in large part to waves of immigration from the Third World. But what really seems to bother him is the way that affirmative action distorts the allocation of benefits in a society that places a high value on individual achievement as defined by a principle of merit:

[A]ffirmative action, although well intended, is hard to square with liberal ideals in general, and with the diversity ideal (properly understood) in particular. The social benefits are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify.³¹

Schuck places a great deal of emphasis on the concept of merit, and he believes that affirmative action is largely responsible for giving spots in elite institutions of higher education to large numbers of African-Americans for which, under a principle of merit as it is generally understood in American society, they are not really qualified and do not otherwise deserve. He points to studies that demonstrate that black applicants to highly selective institutions of higher education have a huge advantage over similarly situated white applicants.³² One

28. *Id.* at 134. Schuck states:

Affirmative action policy is even more divisive and unsettled today than at its inception forty years ago. This is a remarkable sociopolitical fact. I know of no other public policy since the rise of the administrative state during the New Deal that has remained so intensely unpopular among whites and among many minority individuals, yet has survived so long.

Id.

29. *Id.* at 202.

30. *See id.* at 201. Schuck argues:

My point, emphatically, is not to deny that appalling inequalities of opportunity persist; no informed person could possibly do so with a straight face. Rather, it is to insist that race today is a poor proxy for the conditions affirmative action is supposed to remedy and that it is steadily becoming an ever cruder and more misleading proxy as the number of multiracial Americans increases and as intragroup differentiations proliferate.

Id.

31. *Id.* at 135.

32. *Id.* at 147–48 (“There is little disagreement about the actual magnitude of the preferences enjoyed by black applicants . . . [B]y any objective standard, the preference is very large—one might say *immense*—although its precise magnitude probably cannot be determined.”)

perceives a barely concealed sense of outrage here, and Schuck seems to be particularly concerned with the unfairness to other applicants to elite universities who are denied admission due to the preferential treatment black applicants receive. But Schuck runs into some trouble on this issue. He admits that black graduates of these schools tend to perform well as professionals and members of the broader community, and that affirmative action, particularly in higher education, has been a significant factor in black social and economic progress.³³ He also admits that the potential for harm to an individual white applicant because of affirmative action preferences is quite small.³⁴ Indeed, one need only look at the small number of blacks in elite higher education to see why this is so.³⁵

Are current white applicants to elite institutions any more burdened by affirmative action today than their predecessors were by the presumptions favoring certain private preparatory schools and legacies forty years ago? It is probably easier for middle or working class white students from public high schools to get into Yale or Harvard now than it was when George W. Bush and John Kerry were applying to college.³⁶ One explanation is that the same values and social changes that helped support affirmative action for African-Americans have also broken down social class barriers that inhibited upward mobility for lower-status whites in

It is interesting to note, however, that new research shows the benefit minorities receive in admissions to elite colleges and universities is about the same as the one accorded to athletes:

Among students with comparable SAT scores, recruited athletes were about 30 percentage points more likely to be admitted to one of the colleges studied [in an analysis of admissions data by William Bowen, president of the Mellon Foundation]. Underrepresented minority students were about 28 percentage points more likely to be admitted.

Peter Schmidt, *Noted Higher-Education Researcher Urges Admissions Preferences for the Poor*, CHRON. OF HIGHER EDUC., Apr. 16, 2004, at A26.

33. See SCHUCK, *supra* note 8, at 149–50; 158–59; 174–75.

34. *Id.* at 172.

35. For instance, in 2000, blacks made up about 11% of all students in American degree-granting institutions. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2003-067, *The Condition of Education 2003* at 246 (2003). Black students were about 9% of all students enrolled in professional degree programs. *Id.* at 24. Schuck cites the highly regarded Bowen-Bok study on affirmative action in higher education and notes the authors' finding that affirmative action really matters little once admissions to highly selective schools are excluded from analysis—most institutions of higher learning accept all of their applicants. See SCHUCK, *supra* note 8, at 147 (citing WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

36. New evidence now suggests, however, that more and more of the spots at elite institutions of higher learning are going to students from the nation's wealthiest households:

In 2000, about 55 percent of freshman at the nation's 250 most selective colleges, public and private, were from the highest earning fourth of households, compared with 46 percent in 1985. . . . The number from the bottom fourth slipped slightly over that period, while those from the middle 50 percent fell sharply.

David Leonhardt, *As Wealthy Fill Top Colleges, New Efforts to Level the Field*, N.Y. TIMES, Apr. 22, 2004, at A1. Data like this suggest significant growth in income inequality in this country and a decline in social mobility for significant numbers of Americans, yet it is affirmative action and the benefits it confers on a relatively small number of black students that seems to be the major focus of concerns about distributive justice in higher education.

American society. Schuck's main concern seems to be that the existence of affirmative action impedes the development of a "pure" meritocracy in American elite higher education. Although he believes that private institutions should be free to use preferences, he does not think that these policies are appropriate for the state.³⁷ Thus, affirmative action should be forbidden at elite state schools such as California–Berkeley, Texas, Michigan, and Virginia. These are, however, the types of "elite" schools that are most accessible to minority students from traditionally disadvantaged groups.

Schuck next takes on residential diversity. He argues that attempts to promote diversity within neighborhoods through legal mandates forbidding housing discrimination have met with limited success. Of particular interest here is his view that attempts to diversify residential neighborhoods run up against a general acceptance among Americans of an economic or class discrimination in the nation's housing markets.

This "classism," to use Schuck's term,³⁸ basically boils down to the view that inability to pay the market rate for housing in a particular neighborhood is a reasonable, one might even say morally permissible, barrier to entry in the housing market. In other words, Schuck believes that racism and ethnic prejudice may not necessarily be major causes of ongoing residential segregation in the United States, economic class bias may be. Of course, in many instances it is difficult to separate race and class prejudice. Given the nation's history, high concentrations of African-Americans and Latinos have never been associated with "better" neighborhoods for most whites. Anti-discrimination laws were an attempt to break through this prejudice and the negative stereotypes it tends to nurture. Schuck, however, would prefer to see "personal predilection" drive residential diversity.³⁹ Yet, housing segregation, particularly the ongoing isolation of large numbers of African-Americans, is a huge social problem in the United States, and there is convincing research that shows that minorities fare better when they live in integrated settings.⁴⁰

37. SCHUCK, *supra* note 8, at 135–36. The author notes:

For sound *policy* reasons, then, I would bar government from sponsoring affirmative action, as distinguished from non-discrimination In contrast the law should allow private institutions that are associational in nature . . . to use affirmative action for diversity, exclusivity, or other associational purposes so long as the association meets the larger community's most fundamental normative commitments, including non-discrimination against minorities.

Id.

38. *Id.* 206–7; 213–14.

39. *Id.* at 218.

40. Sheryll Cashin has demonstrated how the solidly middle-class heavily African-American suburbs suffer from discrimination and economic underinvestment, and argues that African Americans fare better in terms of access to government services and economic and education opportunities when they live in integrated settings. See Sheryll D. Cashin, *Middle Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001). She notes:

[A]ffluent, largely white suburban communities tend to garner the majority, sometimes an overwhelming majority, of a region's economic growth. Suburban communities with large black populations—communities that attract less economic growth and more social service burdens—tend to have higher tax rates, higher public debt, and

Schuck looks at three attempts by the courts to force the integration of lower income minorities into middle-class residential communities.⁴¹ This aspect of housing desegregation relates directly to his contention that most Americans accept economic discrimination as an appropriate form of sorting in American life, and he is particularly interested in the case of *Yonkers*, New York.⁴² In *Yonkers*, the court mandated a scattered site low-income housing plan primarily directed at the more affluent areas of the city. It was never well received by the community, and it provoked lasting animosity on all sides. On the other hand, Schuck notes with approval the results of the *Gautreaux* litigation in the Chicago metropolitan area, where there had long been strong resistance to the racial integration of residential neighborhoods:

Gautreaux has improved housing options for thousands of low-income minority families who now enjoy some of the hoped-for social, economic, and educational benefits of integration. In contrast, endless litigation in *Mount Laurel* and *Yonkers* has yielded little housing improvement and even less genuine integration. What accounts for the different outcomes?⁴³

Schuck believes the role of the market in housing is a powerful constraint on the government's ability to shape housing choices, and that the tools available to the government impose diversity on neighborhoods are crude at best.⁴⁴ Furthermore, American approval of economic class discrimination means that the culture rejects the notion of a right to live in any neighborhood one chooses, and many communities will mobilize against a governmentally mandated idea of diversity that is counter-cultural in this regard.⁴⁵ Schuck may, however, be trying to prove too much with his reliance on the negative experience of *Yonkers*:

Seldom, if ever, has so much judicial power been exerted for so long against so many officials and produced so little progress as in *Yonkers*. The culprit, of course, has always been the city government itself, not the judge who sought tirelessly, if often fecklessly, to uphold the law But neither this fact nor the fact that *Yonkers* is an unusually pathological case should blind us to the deeper, more structural problems that arise when the law defines, promotes, and mandates diversity in certain ways.⁴⁶

If *Yonkers* is an "unusually pathological" case, why does it serve as a compelling example for Schuck's point? Indeed, *Gautreaux* proves government

substantially different patterns of expenditures for local services than do other suburbs. Empirical studies also suggest that blacks receive better government services from consolidated metropolitan government than from segregated, majority-black government.

Id. at 758.

41. SCHUCK, *supra* note 8, at 218–57.

42. *Id.* at 231–57.

43. *Id.* at 258.

44. *Id.*

45. *Id.*

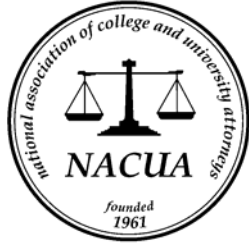
46. *Id.* at 259.

and court involvement in residential neighborhood diversity can be quite successful. Does the fact that large numbers of Americans have accepted a morally dubious equation of wealth with privilege mean that the government should support them in this belief? Is the market the fairest arbiter of how resources like decent schools and public services should be distributed within our society? This is not to say that neighborhoods should be bludgeoned into accepting diversity as defined by others, but when the market enhances destructive cultural norms like racism or isolation of the poor, why is it inappropriate to fashion public remedies to counter the market's effects? There are many examples of relatively successful government intervention to diversify residential neighborhoods which, had the market been left to its own devices, were destined to become racially or economically segregated.⁴⁷

CONCLUSION

Peter Schuck has written an extremely well-documented book on a topic of immense importance, not only to the future of American society but also to the stability of liberal democracies around the world. Although his distrust of government and his admiration for the highly autonomous notion of individual freedom in American liberalism is consistent with the views of many people in this country, one is tempted to ask whether this position ultimately limits the potential of the book as a scholarly resource. Many Americans have embraced diversity because they recognize that a logical result of American understandings of individualism and liberal autonomy is that a shared notion of the collective identity of the American population, such as it exists, provides a weak platform for social cohesion. The United States has no choice but to embrace diversity because, notwithstanding attempts to pretend otherwise, diversity has been the nation's reality from its inception. In our democracy, it is the federal government and the legal system that provide a common point of civic reference, engendering a degree of broad-based respect that few other institutions in American life can claim. Given these realities, relying on the collective wisdom of individuals to produce diversity from the ground up seems a bit risky, although it may work from time to time to produce a grass-roots diversity that achieves wide popular support. Nevertheless, American history is rife with examples of fear of and disdain for those who were different, fears typically nurtured by deeply held "personal predilections." These tendencies have been a much greater threat to the dignity of human beings in this country than any attempts by the government to use its authority to create a civic culture that respects human difference.

47. The Moderately Priced Dwelling Unit Program (MPDU) in Montgomery County, Maryland, near Washington, DC, is one example. Since the 1970s, Montgomery County has maintained a mandatory inclusionary zoning law that requires 12–15% of the total number of units in every subdivision or high-rise building of thirty-five or more units to include "moderately priced" units as defined by the county government. See MONTGOMERY COUNTY PARK & PLANNING, MD., *Overview of Moderately Priced Dwelling Program*, available at www.mcnccppc.org/research/analysis/housing/affordable/mpdu.shtml (last visited Mar. 7, 2005).



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