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## WHAT PRICE *GRUTTER*?

# WE MAY HAVE WON THE BATTLE, BUT ARE WE LOSING THE WAR?

EBONI S. NELSON\*

### INTRODUCTION

Since the implementation of the first race-based affirmative action program, many battles regarding the constitutionality, fairness, and necessity of such programs have been fought between those who favor and oppose their use. While proponents of affirmative action have employed theoretical weapons such as the present effects of past discrimination<sup>1</sup> and the importance of racial diversity<sup>2</sup> to justify the use of race-based affirmative action, opponents of affirmative action have armed themselves with the Equal Protection Clause of the Fourteenth Amendment in their efforts to eliminate such programs.<sup>3</sup>

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1. See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001) (defending affirmative action as a means to remedy past and ongoing discrimination); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2112 (2004) (“Affirmative action supporters consider the conditions resulting from discriminatory practices from the perspective of those who have been injured by an elaborate system of racial exclusion. They believe that affirmative action promotes equality and advances the unfinished process of desegregation.”); Abraham L. Wickelgren, *Affirmative Action: More Efficient Than Color Blindness*, 10 TEX. J. C.L. & C.R. 165 (2005) (defending past discrimination as a justification for affirmative action).

2. See Kenneth L. Karst, *The Revival of Forward-looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004) (discussing affirmative action as a forward-looking means to integrate and diversify American institutions); Mexican Am. Legal Def. and Educ. Fund et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 HARV. LATINO L. REV. 33 (2005) (relying on diversity rationale to advocate for the reintroduction of race-based affirmative action at Texas institutions of higher education).

3. See *Grutter v. Bollinger*, 539 U.S. 306, 348–49 (2003) (Scalia, J., concurring in part and dissenting in part) (arguing that “racial preferences in state educational institutions are impermissible” on the ground that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception”). See also *id.* at 378 (Thomas, J.,

The grounds on which these battles are being fought have taken many different forms. Ballot initiatives such as Proposition 209 in California<sup>4</sup> and Initiative 200 in Washington<sup>5</sup> have been used to eliminate the use of racial preferences in government contracts, employment, and public education. Executive orders like the one issued by Governor Jeb Bush in Florida have also been employed to prohibit racial preferences, racial set-asides, and the consideration of race and ethnicity in college and university admissions.<sup>6</sup> Perhaps the most frequent battles between opponents and proponents of race-based affirmative action have taken place within the judicial system, including many cases concerning the use of race-conscious admissions policies in public education.<sup>7</sup>

As consistently recognized by the Supreme Court, public education is one of the most important institutions in our society.<sup>8</sup>

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concurring in part and dissenting in part) (characterizing race-based affirmative action as “a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause”).

4. Cal. Const. art I, § 31(a) (formerly Proposition 209, enacted in 1996).

5. Wash. Rev. Code § 49.60.400(1) (formerly Initiative 200, enacted in 1998).

6. See Press Release, Governor Bush Announces His One Florida Initiative (Nov. 9, 1999), available at [http://www.oneflorida.org/myflorida/government/governorinitiatives/one\\_florida/articles/gov\\_announces\\_one\\_fl\\_a\\_init.html](http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/gov_announces_one_fl_a_init.html).

7. See generally *Grutter*, 539 U.S. 306 (rejecting challenge to the University of Michigan Law School’s race-conscious admissions procedures); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (upholding challenge to the race-conscious admissions procedures used by the University of Michigan undergraduate program); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (upholding challenge made against a set-aside program that required prime contractors who had been awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more minority businesses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (upholding challenge made against a collective bargaining agreement that stated that regardless of seniority, minority teachers would be retained over non-minority teachers in layoff decisions in an effort to provide minority role models for minority students); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (upholding challenge made against the University of California at Davis Medical School admissions program, which employed a quota system and a separate admissions track for minority applicants); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (upholding challenge made to the University of Maryland merit scholarship program for which only African-American students were eligible); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (upholding challenge made against the University of Georgia race-based admissions policies); *Farmer v. Ramsay*, 43 F. App’x 547 (4th Cir. 2002) (rejecting challenge made against the University of Maryland School of Medicine race-conscious admissions program); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (upholding challenge made against the Boston School Committee admissions policy of setting aside 35% of the seats available at three Boston public schools for African-American and Latino students); *Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730 (Nev. 1997) (rejecting a challenge to the state university system affirmative action plan).

8. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”) (citations omitted); *Grutter*, 539 U.S. at 331 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our

[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>9</sup>

Although these words were written by Chief Justice Earl Warren more than fifty years ago, their applicability today is undeniable. Most people in our society view education as the gateway to career, financial, and life opportunities.<sup>10</sup> In light of this view, it is no surprise that providing racial and ethnic minority students access to educational opportunities serves as a fundamental goal underlying the use of race-based affirmative action in higher education.<sup>11</sup> Many proponents of race-based affirmative action believe that “[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.”<sup>12</sup> Fueled by this belief, proponents of race-based affirmative action are engaged in the war to effectively provide minority students access to educational opportunities.

In the case of many wars, numerous battles must be fought before a victor is ultimately determined; the war over affirmative action is no different. Opponents of race-based admissions procedures declared victory after the Fifth Circuit’s decision in *Hopwood v. Texas*<sup>13</sup> effectively eliminated the use of race-based programs in Louisiana, Mississippi, and Texas higher education admissions procedures.<sup>14</sup> In finding that racial and ethnic diversity was not a compelling state interest to justify the use of race in admissions decisions,<sup>15</sup> the Fifth Circuit

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political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” (quoting *Plyler*, 457 U.S. at 221)).

9. *Brown*, 347 U.S. at 493.

10. See Brief for the United States as Amici Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 176635 [hereinafter Brief for the United States] (“A university degree opens the doors to the finest jobs and top professional schools, and a professional degree, in turn, makes it possible to practice law, medicine, and other professions.”); Karst, *supra* note 2, at 60 (stating that “universities are gateways to leadership in American institutions”).

11. See *Grutter*, 539 U.S. at 331–32 (acknowledging that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective” (quoting Brief for the United States, *supra* note 10, at 13)) (emphasis added). See also *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting) (acknowledging “the networks and opportunities . . . opened to minority graduates” of “colleges and universities [that] seek to maintain their minority enrollment” following the Court’s decisions in *Grutter* and *Gratz*).

12. Brief for the U.S., *supra* note 10, at 13.

13. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

14. See The Center for Individual Rights, *Hopwood* Ends Affirmative Action in 5th Circuit, <http://www.cir-usa.org/cases/hopwood.html> (last visited Nov. 19, 2005) (declaring *Hopwood* to be a landmark victory for the Center for Individual Rights against affirmative action and noting that the Court’s denial of certiorari effectively banned affirmative action in admissions in Texas, Louisiana, and Mississippi).

15. *Hopwood*, 78 F.3d at 944–48.

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departed from the Supreme Court's apparent holding to the contrary in *Regents of the University of California v. Bakke*.<sup>16</sup> Twenty-five years passed before the question of whether "student body diversity is a compelling state interest that can justify the use of race in university admissions" was unequivocally answered in the affirmative.<sup>17</sup>

At first glance, the *Grutter* Court's sanctioning of race-based affirmative action in higher education may be viewed as a victory in the effort to provide minority students access to higher education opportunities. Indeed, the decision does provide an immediate benefit for those seeking to provide opportunities to minority students. Permitting colleges and universities to consider an applicant's race or ethnicity in their admissions decisions affords them the opportunity to enroll a "critical mass" of minority students,<sup>18</sup> an opportunity that, in all likelihood, would be severely hindered were they not permitted to do so.<sup>19</sup>

Notwithstanding the apparent advantages derived from the *Grutter* decision, one must also consider the potential costs it imposes. Ultimately, the Court's decision may prove to be a detriment rather than a benefit for those attempting to provide minority students with meaningful access to higher education opportunities. By reaffirming race-based affirmative action, the Court sanctions admissions policies that focus on the narrow goal of granting preferences to minority students to increase minority enrollment rather than broader goals of providing guidance, resources, and assistance to such students. In taking that step, the Court's decision may serve not as a gateway to educational opportunities but rather as a barrier to such access.

By sanctioning the use of race-based preferences, the Court reaffirms the status quo as it relates to college and university methods for achieving racially and ethnically diverse student bodies—a status quo that arguably has neither produced optimal levels of diversity in higher education,<sup>20</sup> nor successfully addressed the

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16. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311–12, 320 (1978).

17. *Grutter*, 539 U.S. at 325.

18. *Id.* at 316–20. Although the Court does not define the term "critical mass," it can be inferred from the opinion that the term relates to the enrollment of a meaningful or significant number of minority students such that their presence contributes to a diverse learning environment.

19. See *infra* Part II.B–C (discussing the impact termination of race-based affirmative action has had on racial and ethnic diversity levels at colleges and universities in California and Texas).

20. For example, in 1996, prior to the Fifth Circuit's decision in *Hopwood*, the University of Texas at Austin (UT), one of the state's flagship universities, maintained an African-American and Hispanic freshman enrollment of 4% and 14%, respectively. GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN, DEMOGRAPHIC ANALYSIS FALL 2003, ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS ACADEMIC YEARS 1996–2002 4 (2003), available at <http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf>. One could argue that such diversity levels are low considering UT is located in a state that maintained an African-American population of 12% from 1990–2000 and a Hispanic population of 26%–32% during the same years. See Proportion of the Population in Each Race/Ethnicity Group in 1980, 1990, and 2000, Numerical Change 1980 to 1990 and 1990 to 2000 by Race/Ethnicity, and Proportion of Net Change from 1980 to 1990 and 1990 to 2000 by

potentially defeating challenges confronting disadvantaged minority students, including a lack of guidance and encouragement regarding educational goals.<sup>21</sup> Since the Court's decision in *Bakke*, institutions of higher education have utilized race-based admissions procedures as primary methods for achieving diverse student bodies. As recognized by the Court in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."<sup>22</sup> In fact, after the *Bakke* decision, "most universities adopted programs taking race into account in all undergraduate, graduate school, and professional school admissions, and today racial diversity has become a hallmark of the university scene."<sup>23</sup>

Unfortunately, in their reliance on *Bakke* and utilization of race-based affirmative action, colleges and universities have traditionally neglected to afford serious consideration to race-neutral measures that do not consider applicants' race or ethnicity in admissions decisions. As admitted by Gerald Torres when discussing race-neutral diversity efforts at the University of Texas at Austin (UT) following *Hopwood*, "Sadly, I think we would not have rolled up our sleeves and made the effort of doing the math and trudging into the neglected high schools and neglected districts had it not been for *Hopwood*."<sup>24</sup> This neglect has greatly hindered the development of effective race-neutral alternatives.

[B]ecause everyone has taken *Bakke* as his guide, these [race-neutral] experiments are not nearly as far along as they would have been had the Court foreclosed race consciousness in 1978. Thus, society today is not as far along the road to finding effective race-neutral means of accomplishing racial diversity as it would have been . . . .<sup>25</sup>

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Race/Ethnicity in the State of Texas, available at [http://txsdc.utsa.edu/data/census/2000/redistrict/pl94-171/desctab/re\\_tab2.txt](http://txsdc.utsa.edu/data/census/2000/redistrict/pl94-171/desctab/re_tab2.txt) (last visited Nov. 19, 2005). See also Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1, 9 (2005) (arguing that "decades of affirmative action have not significantly diminished the problem of African-American underrepresentation in universities").

21. See *Grutter*, 539 U.S. at 372 & n.11 (Thomas, J., concurring in part and dissenting in part) (criticizing the University of Michigan Law School's affirmative action policies for not "address[ing] the real problems facing 'underrepresented minorities,'" such as the underperformance and underrepresentation of African-American men at the Law School).

22. *Grutter*, 539 U.S. at 323 (citing Brief for Amici Curiae Judith Areen et al. in Support of Respondents at 12-13, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 554398 (stating that law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke*"); Brief of Amherst College et al., Amici Curiae, Supporting Respondents at 27, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399075 ("After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion . . . and set sail accordingly.")).

23. Robert A. Sedler, *Affirmative Action, Race and the Constitution: From Bakke to Grutter*, 92 KY. L.J. 219, 226 (2003).

24. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1608 (2003).

25. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 549 (2003).

Reliance on race-based programs has led many institutions and proponents of such programs to argue that they will not be able to achieve the educational benefits that are derived from having a diverse student body without the use of race-based affirmative action.<sup>26</sup> The Court appears to accept this argument, as indicated by its decision to permit educational institutions to continue using such preferences in their admissions decisions. As a result, the Court allows colleges and universities to continue employing measures that traditionally exclude the serious consideration and development of race-neutral alternatives, many of which extend beyond mere admissions decisions to providing necessary resources and assistance to disadvantaged students.<sup>27</sup> Without such race-neutral efforts, the ability of many colleges and universities to provide minority students with meaningful access to educational opportunities will be severely hindered.

Now that race-based affirmative action has been sanctioned by the Court, what incentives do educational institutions have to explore, develop, and implement effective race-neutral measures? This article attempts to answer that question.

Part I begins with a discussion regarding the meaning of the term “race-neutral alternatives.” Contrary to some theories, race-neutral measures do not necessitate a color-blind approach to achieving the goal of providing meaningful educational opportunities to minority students.<sup>28</sup> Effective race-neutral programs can and do consider race and ethnicity to increase and diversify the pool of applicants; such programs, however, do not consider an applicant’s race or ethnicity when selecting from that pool.

Part II analyzes the *Grutter* opinion to extract reasons why colleges and universities should immediately begin to develop and implement race-neutral admissions procedures. Realities set forth in the opinion regarding the constitutional standard—a standard that requires narrowly-tailored practices and places durational limits on race-based programs—should encourage institutions of

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26. See Transcript of Oral Argument at 41–43, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 1728613 (discussing the necessity of the Law School taking race into account to achieve its educational goals); Brief for the NAACP Legal Defense & Educational Fund, Inc. & the American Civil Liberties Union as Amici Curiae in Support of Respondents at 4–5, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398820 (discussing race-based affirmative action as “one of the sole avenues” for achieving “social and educational benefits” resulting from “racial interaction in our nation’s schools and interaction between individuals from diverse backgrounds”).

27. For evidence of the reluctance of colleges and universities to consider race-neutral alternatives following the *Grutter* opinion, see Barbara Lauriat, Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. Rev. 1171, 1191–92 (2003) (“Several weeks after the [*Grutter/Gratz*] decisions, the leaders of forty-eight colleges, including the University of Michigan, met at Harvard to discuss the opinions. Apparently, the academic leaders had little interest in pursuing race-neutral alternatives to affirmative action, and [s]everal of those present said they planned to focus on finding ways to shield race-conscious admissions policies against future legal challenges, rather than experimenting with . . . alternatives to affirmative action . . . .” (quoting Peter Schmidt, *College Leaders Discuss Ways of Preserving Affirmative Action*, CHRON. HIGHER EDUC., July 17, 2003, available at <http://chronicle.com/daily/2003/07/2003071702n.htm> (last visited Oct. 28, 2003))).

28. See, e.g., Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 846 (Feb. 2004) (implying that because race-neutral measures do not consider race, they “cannot identify applicants who have the relevant life experience” for which race serves as a marker).

higher education to begin or continue their development and implementation of race-neutral programs. Part II also considers the aftermath of *Grutter* to further demonstrate the immediate need for consideration and utilization of race-neutral alternatives.

Part III proposes a redefinition of “affirmative action” that would expand contemporary understanding to include the provision of resources and assistance to disadvantaged minority students both before and after an admissions decision has been made. Such expansion is critical to accomplish the broader goal of providing meaningful educational access and opportunities to minority students. Because traditional race-based preferences narrowly focus on the number of minority students admitted to an institution, such methods fail to most effectively accomplish this goal.

Part IV examines currently employed race-neutral measures such as percentage plans, class-based affirmative action, and outreach programs to identify the advantages and weaknesses of those measures. Although programs like percentage plans and class-based affirmative action are race-neutral measures, they suffer from the same shortcoming as race-based affirmative action: the failure to broaden the scope of assistance provided to disadvantaged minority students beyond the admissions decision itself. When employed in conjunction with other race-neutral measures—like outreach and financial aid—such programs most effectively achieve the ultimate goal of providing meaningful educational opportunities and access to racial and ethnic minority students. Therefore, colleges and universities that are truly committed to the provision of higher education opportunities and access to racial and ethnic minority students should not rest on the race-based laurels of *Grutter*. Rather, they should undertake the important and necessary task of developing and implementing effective race-neutral affirmative action programs.

Part V concludes with suggestions and recommendations regarding race-neutral programs that are ripe for immediate use and development in college and university efforts to provide meaningful educational access and opportunities for racial and ethnic minority students.

#### I. THE MEANING OF “RACE-NEUTRAL ALTERNATIVES”

A common criticism launched against race-neutral admissions measures is that they are not race-neutral at all. Rather, the charge is that they are “just as race conscious”<sup>29</sup> as traditional race-based affirmative action because their goal is “to maintain and hopefully increase racial diversity in the various public institutions.”<sup>30</sup> Therefore, “they present no comparative advantage in terms of

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29. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

30. Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. in Support of Respondents at 22, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 554393 [hereinafter Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates].

their race neutrality” over traditional race-based procedures.<sup>31</sup> Such comments fail to recognize the potential benefits derived from the use of race-neutral rather than race-based programs. Those arguments also fail to reflect the heart of the race-neutral versus race-based debate, which primarily concerns the *methods* by which the stated goals are accomplished rather than the goals themselves.

It can be inferred from the aforementioned comments that “true” race-neutral programs are “color-blind” and do not consider race in any respect. This is not the case. Race-neutral measures are programs that seek to provide educational opportunities to a diverse group of students without the use of racial or ethnic classifications. These programs do not classify or designate applicants based on their race or ethnicity. Under race-neutral affirmative action, an applicant’s racial or ethnic classification is not a factor in the actual admissions decision; it *is* a factor under a race-based affirmative action scheme.<sup>32</sup> It is not necessary, however, for such programs to neglect or ignore race and the influence of race on certain students in order to be considered race-neutral. It is only necessary that they do not allow applicants to be classified and/or selected based on their race or ethnicity.<sup>33</sup>

Race continues to be a critical aspect of American society. As the Court recognized in *Grutter*, “in a society, like our own . . . race unfortunately still matters.”<sup>34</sup> Many continue to experience the past and present effects of racial discrimination, which have led to stark disparities between racial groups.<sup>35</sup> As

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31. *Id.*

32. See David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-based Decision-making by Individualized Discretion*, 56 FLA. L. REV. 483, 530 (2004) (noting that alternatives to traditional race-based affirmative action “do not . . . require categorizing individuals by race for the purpose of granting them more or less of the State’s benefits on a person-by-person basis”); Memorandum from Walter Dellinger, Assistant Attorney Gen., U.S. Dep’t of Justice to Gen. Counsels (June 28, 1995), available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/adarand3.html> (last visited Nov. 19, 2005) (noting that in the government contracting context, acceptable race-neutral measures do not consider race or ethnicity in the actual decision to award a contract).

33. See Dellinger, *supra* note 32, at 7 (“In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision.”).

34. *Grutter*, 539 U.S. at 333.

35. See R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1046 (2001) (“American society permits gross disparities among groups in the opportunities and resources that promote achievement.”); Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U. L. REV. 1507, 1510 (2003) (quoting Justice Marshall as urging Americans to “[f]ace the simple fact that there are groups in every community which are daily paying the cost of the history of American injustice” (citing Annual Judicial Conference Second Judicial Circuit of the United States, 115 F.R.D. 349, 352–53 (1987))); Curt A. Levey, *Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 502 (2003) (discussing “racial disparity in standardized test scores and grades”); Glenn C. Loury, *Affirmed . . . For Now*, BOSTON GLOBE, June 29, 2003, at D1 (recognizing “the dramatic underrepresentation of blacks and Hispanics among top academic performers”); Keith R. Walsh, *Color-blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD

detailed by Justice Ginsburg in her dissenting opinion in *Gratz v. Bollinger*:

In the wake “of a system of racial caste only recently ended,” large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”<sup>36</sup>

Race-neutral measures, such as consideration of an applicant’s socioeconomic status, acknowledge these disparities and attempt to remedy them by providing educational opportunities and preferences to those students who have been adversely affected by such circumstances.<sup>37</sup> Although “motivated by race-conscious concerns,” such measures are “race-neutral in their operative provisions” because they do not classify or provide preferences based on race or ethnicity.<sup>38</sup>

Neither the Constitution nor modern equal protection jurisprudence requires admissions programs to be color-blind.<sup>39</sup> As recognized by Justice Ginsburg, “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”<sup>40</sup> Such effects are evident in the many

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L.J. 443, 449–51 (2004) (discussing disparities between Blacks and Whites regarding levels of education and performance on standardized tests).

36. *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting) (footnotes and citations omitted).

37. See, e.g., Daria Roithmayr, *Direct Measures: An Alternate Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 14–15 (2001) (arguing that an admissions program that grants preferences to applicants based on their experiences of discrimination is race-neutral because “it does not at all focus on racial identity or require that the applicant belong to a particular racial group”).

38. Karst, *supra* note 2, at 73.

39. See *Gratz*, 539 U.S. at 305 n.11 (Ginsburg, J., dissenting) (“In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race.”); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (discussing efforts such as strengthening recruitment of African-Americans and actively encouraging them to apply for jobs as permissible race-neutral measures); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1557–58 (11th Cir. 1994) (describing high school and college recruiting programs, solicitation of firefighter applications from minorities, and outreach programs spearheaded by minority firefighters as permissible race-neutral measures); *Shuford v. Ala. State Bd. of Educ.*, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995) (stating that “affirmative recruitment is a neutral measure”). For a discussion of constitutional implications related to race-neutral alternatives see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) and Roithmayr, *supra* note 37, at 14–30.

40. *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (citing *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

disparities that continue to exist between racial groups. Many race-neutral efforts, such as recruiting and outreach, target those students who have experienced and overcome discrimination and disadvantage. Institutions that employ race-neutral measures distribute resources and grant preferences based on applicants' "historical experience of discrimination"<sup>41</sup> and their ability to contribute underrepresented viewpoints to classroom discussions.<sup>42</sup>

By relying on an applicant's experiences rather than on his or her racial classification, race-neutral measures overcome a criticism often made against traditional race-based affirmative action. Many opponents of race-based affirmative action argue that such programs fail to help those individuals who truly need assistance because they grant preferences on the basis of race, without regard to whether an individual has actually experienced discrimination or has an underrepresented viewpoint to contribute.<sup>43</sup> As discussed by Daria Roithmayr, a race-neutral program that affords preferences based on "an applicant's experiences, viewpoints and commitments without regard to racial identity" will "prefe[r] the White applicant who fulfill [sic] the relevant criteria to the Black applicant who does not."<sup>44</sup>

Because of this advantage, many opponents of traditional race-based affirmative action have embraced and encouraged the use of race-neutral alternatives to provide minority students educational opportunities. Curt Levey, the former Director of Legal and Public Affairs at the Center for Individual Rights, the law firm that represented the plaintiffs in *Gratz* and *Grutter*, has supported colleges and universities that grant preferences based "on something other than race, such as socioeconomic class, or coming from an under-performing high school, or writing an essay about how you are disadvantaged."<sup>45</sup> Similarly, President George W. Bush, who opposes preferences based on racial or ethnic classifications, has said that he supports institutions that "affirmatively tak[e] action to get more minorities in their schools."<sup>46</sup>

Race-neutral measures should not be dismissed as insufficient alternatives to race-based affirmative action simply because they do not completely ignore the importance of race in our society. Rather, institutions of higher education should develop and implement programs that do not classify or select applicants based on

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41. Roithmayr, *supra* note 37, at 19.

42. *Id.* at 6–8.

43. See Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 35 (1992) (questioning how "blacks living today who are not the descendants of the victims of past racial discrimination [can] be 'owed' the compensation of affirmative action") (footnote omitted). See also Forde-Mazrui, *supra* note 39, at 2372 (noting that many opponents of race-based affirmative action resent the way in which it "appears to give preferential treatment to some privileged racial minorities who do not deserve it").

44. Roithmayr, *supra* note 37, at 2, 26. See also Forde-Mazrui, *supra* note 39, at 2371–72 (noting that race-neutral measures that are based on disadvantage "award a preference to individuals who have been identified as suffering from a tangible disadvantage and deny such a preference to those not suffering from that disadvantage").

45. Levey, *supra* note 35, at 499.

46. Kristen Mack, *Bush: Colleges Should End 'Legacy' Admissions*, HOUSTON CHRON., Aug. 7, 2004, at A3.

their race or ethnicity in their efforts to achieve diverse student bodies and to provide minority students access to educational opportunities.

## II. DEVELOPMENT AND IMPLEMENTATION OF RACE-NEUTRAL ADMISSIONS PROGRAMS IN HIGHER EDUCATION: WHY ACT NOW?

Given that the Court has sanctioned the use of race-based affirmative action in higher education, one may question the need for educational institutions to immediately develop and employ race-neutral programs. Why not wait to consider race-neutral alternatives until such time in the future if and when race-based programs are required to be terminated? This section explores three reasons why the immediate development and implementation of race-neutral programs are necessary endeavors.

First, although the *Grutter* opinion sanctions the use of race-based affirmative action in higher education, it also requires educational institutions that employ such measures to engage in “serious, good faith consideration” of race-neutral alternatives to satisfy constitutional scrutiny.<sup>47</sup> Specifically, colleges and universities that wish to utilize racial preferences in their admissions decisions must also consider race-neutral approaches to maintain admissions programs that are narrowly tailored to achieve their diversity and educational goals.

Second, as required by *Grutter*, race-based affirmative action must have a “termination point.”<sup>48</sup> In light of this reality, institutions of higher education should immediately begin to develop and employ race-neutral approaches in their efforts to avoid severe declines in minority enrollment similar to those experienced by schools in California and Texas following their state-wide elimination of race-based programs.

Finally, the development and use of race-neutral measures will assist diversity efforts at institutions that decide not to employ race-based admissions programs post-*Grutter*. Race-neutral advancements will also benefit colleges and universities in states such as California and Washington where *Grutter* has no influence due to state laws prohibiting racial preferences. The greater the number of institutions that experiment with race-neutral measures, the more effective such measures will be in helping all institutions provide educational opportunities to minority students.

### A. *Grutter* and Its Call for Consideration of Race-neutral Alternatives

In 2003, the *Grutter* decision marked the Court’s return to the fragmented and passionate debate surrounding the constitutionality of race-based affirmative action in higher education. In this case, a Caucasian applicant who was denied admission to the University of Michigan Law School (Law School) argued that the Law School’s race-conscious admissions policies violated her rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>49</sup> At issue in the case was the

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47. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

48. *Id.* at 342.

49. *Id.* at 317.

constitutionality of the Law School's admissions program that sought to establish and maintain racial and ethnic diversity in the student body by considering an applicant's race or ethnicity as a factor in its admissions decisions.<sup>50</sup> Reasoning that racial and ethnic classifications are inherently suspect under the Equal Protection Clause and, thus, subject to strict scrutiny, the Court held that the Law School's goal of creating a racially and ethnically diverse student body "is a compelling interest that can justify the narrowly tailored use of race" in admissions decisions.<sup>51</sup> Finally, in holding that the Law School's admissions policies were sufficiently narrowly-tailored to be permitted under the Constitution,<sup>52</sup> the Court provided one reason why colleges and universities should begin to include race-neutral programs in their admissions policies.

The Court set forth several tests and requirements that race-based admissions programs must meet in order to survive the narrowly tailored prong of strict scrutiny. Among these tests is a prohibition against establishing quota systems<sup>53</sup> and a flexible consideration of race or ethnicity as well as other diversity factors to ensure individualized consideration of each applicant.<sup>54</sup> Another factor that the Court considered in its examination of whether the Law School's admissions program was narrowly tailored was whether it considered race-neutral alternatives to race-based programs. While the Court rejected the petitioner's and United States's argument that "the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks,"<sup>55</sup> the Court did hold that "narrowly tailoring does, however, *require* the *serious, good faith* consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>56</sup> Therefore, colleges and universities that wish to consider race and ethnicity in their admissions decisions must also consider race-neutral alternatives to maintain a constitutional program.

Unfortunately, the Court did not engage in a detailed discussion regarding which actions or measures may constitute "serious, good faith consideration" of race-neutral alternatives.<sup>57</sup> The Court rejected the District Court's finding that the

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50. *Id.* at 316.

51. *Id.* at 322, 326–33.

52. *Id.* at 333–41.

53. *Id.* at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 315 (1978))).

54. *Id.* at 336–37 ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."). See *Gratz*, 539 U.S. at 271–72 (holding that the narrow tailoring requirement was not met by a race-based admissions program that awarded twenty predetermined bonus points based on race or ethnicity because it was not flexible and did not afford individual consideration of all aspects of an applicant's application).

55. *Grutter*, 539 U.S. at 339.

56. *Id.* (emphasis added).

57. See generally *Crump*, *supra* note 32, at 520–23 (criticizing the Court's analysis (or lack

Law School's admissions program was not narrowly tailored because it failed to consider race-neutral policies such as a lottery system or lower admissions standards.<sup>58</sup> The opinion, however, failed to discuss the implications of the Law School's failure to consider other race-neutral alternatives such as class-based affirmative action, outreach programs, and partnerships with other institutions.<sup>59</sup>

Although the Court did not indicate whether "serious, good faith consideration requires experimentation with race-neutral methods," a recent case suggests that "it requires, at very least, a formal on-the-record evaluation of such methods."<sup>60</sup> In *Parents Involved in Community Schools v. Seattle School District, No. 1*, the Ninth Circuit held that a school district's practice of using race as a tiebreaker in assigning students to oversubscribed high schools was not narrowly tailored to accomplish the district's diversity goals because the district failed to seriously consider race-neutral alternatives.<sup>61</sup> The court reasoned that, while it was not requiring the district to implement specific race-neutral measures, "there is no question but that the Board should have *earnestly appraised* such . . . [programs'] costs and benefits."<sup>62</sup> The Ninth Circuit found that the school board's refusal to formally evaluate and study<sup>63</sup> how certain race-neutral efforts would impact school diversity did not comply with the narrowly tailored requirement set forth in *Grutter*.<sup>64</sup>

Presently, it is unclear whether an institution's mere discussion and contemplation of race-neutral alternatives will satisfy strict scrutiny or if more formal action is required. If other circuits follow the Ninth Circuit's holdings, institutions of higher education may be required to engage in formal evaluations or studies of race-neutral alternatives before rejecting their usefulness. Such

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thereof) of the "narrowly tailored" requirement); L. Darnell Weeden, *Employing Race-neutral Affirmative Action to Create Educational Diversity While Attacking Socio-economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 330 (2005) (observing that "[t]here is virtually nothing in the *Grutter* opinion to suggest that the University of Michigan had actually implemented in good faith a race-neutral plan that failed to generate the desired intellectual diversity").

58. *Grutter*, 539 U.S. at 340.

59. See Crump, *supra* note 32, at 494 (arguing that "for this reason, Justice O'Connor's apparent conclusion that narrower alternatives were not appropriate is unpersuasive"). See generally *infra* Parts IV and V (discussing currently employed race-neutral programs and recommendations for implementation of such programs).

60. Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 TEX. REV. L. & POL. 63, 67 (2004).

61. 377 F.3d 949, 970–75 (9th Cir. 2004), *reh'g granted*, 395 F.3d 1168 (9th Cir. 2005).

62. *Id.* at 970–71.

63. *Id.* at 972 ("Matters not formally evaluated cannot be 'rejected' in a constitutionally-relevant sense: Such appraisal—whether with regard to the need for race-based action, or to the shape such action is to take—must be conducted 'on the record.'") (citations omitted).

64. *Id.* at 975. More specifically, the court stated:

While it may be the case that educational institutions need not *exhaust* every conceivable alternative to the use of racial classifications to satisfy strict scrutiny, narrow tailoring at least demands that schools *earnestly consider* using race-neutral and race-limited alternatives in order to provide for the kind of diversity that, properly constituted, can further compelling educational and social interests. *Id.*

evaluations may require actual implementation of race-neutral programs to assess their impact on diversity levels. As correctly hypothesized by Justice Scalia, these and other issues related to the “contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs”<sup>65</sup> will most likely be answered in future lawsuits challenging race-based affirmative action.<sup>66</sup>

Despite the uncertainty regarding which actions constitute “serious, good faith consideration” of race-neutral alternatives, one thing is certain: institutions of higher education that wish to employ racial preferences in their admissions decisions must afford significant consideration to workable race-neutral alternatives. Failure to do so will result in the invalidation of race-based programs by the federal courts. To avoid such results, colleges and universities should make a concerted effort to begin or continue researching, developing, and examining race-neutral admissions programs to assess their utility in assisting institutions to reach and maintain their diversity and educational goals.

Faculty, administrative committees, or external consultants could carry out these exercises in development. Regardless of who develops an institution’s race-neutral alternatives, the findings and recommendations should be discussed among and considered by members of the faculty and administration. While it is uncertain whether the Court requires educational institutions to actually employ or implement race-neutral admissions programs to satisfy strict scrutiny, the next section argues why institutions of higher education should engage in such endeavors.

#### B. *Grutter’s* Call for Durational Limits of Race-based Affirmative Action

Although the *Grutter* opinion allows the use of race as a factor in admissions decisions, the opinion also foreshadows the eventual termination of race-based affirmative action in higher education. In light of this impending reality, institutions of higher education that wish to continue providing educational

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65. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

66. *Id.* at 348–49 (Scalia, J., concurring in part and dissenting in part) (discussing how the *Grutter-Gratz* split will produce future lawsuits ranging from whether a particular admissions program affords sufficient individualized consideration to each applicant without establishing separate admissions tracks forbidden by *Bakke* to “whether, in the particular setting at issue, any educational benefits flow from racial diversity”). *See also* *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (discussing whether school district that wished to employ a race-conscious transfer policy considered race-neutral alternatives so as to satisfy strict scrutiny as set forth in *Grutter*); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 861 (W.D. Ky. 2004) (finding that school board’s race-conscious student assignment plan was narrowly tailored as evidenced by the board’s consideration and implementation of race-neutral approaches); *Lauriat*, *supra* note 27, at 1200 (“One can add to this list claims that an institution has not considered race-neutral alternatives in good faith . . .”). *See generally* *Virdi v. DeKalb County Sch. Dist.*, 135 F. App’x 262, 268 (11th Cir. 2005) (finding that school district’s Minority Vendor Involvement Program, which included minority participation percentage goals, was unconstitutional because the district failed to consider race-neutral alternatives for tracking its activities); *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1330–31 (S.D. Fla. 2004) (finding that “County’s failure to at least explore a [race-neutral program] *in practice* indicates that the [Hispanic Business Enterprise] program is not narrowly tailored”) (emphasis added).

opportunities to minority students should immediately begin to implement effective race-neutral admissions programs.

Recognizing that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” the *Grutter* Court held that “race-conscious admissions policies must be limited in time.”<sup>67</sup> Unlike its discussion—or lack thereof—about what action constitutes “serious, good faith consideration” of race-neutral alternatives, the Court did provide guidance regarding its intended meaning of “limited in time.” First, the Court explicitly required race-based admissions programs to “have a logical end point.”<sup>68</sup> The Court imposed durational limits and termination points in an attempt to curb the potentially dangerous consequences that are inherent in all racial classifications.<sup>69</sup> Second, the Court provided recommendations regarding which practices may meet the durational requirement. “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>70</sup> The Court, however, did not appear to state a specific time or date when such sunset provisions should become effective.

Generally, the Court has held that colleges and universities should cease using racial preferences when they have determined that such measures are no longer necessary to achieve diversity and educational goals. At first glance, it appears that the Court defers to the individual schools to make this determination.<sup>71</sup> The Court, however, may have imposed its own determination regarding the continued need for race-based programs when it announced its expectation that, in twenty-five years, institutions of higher education will no longer need to use race-based affirmative action to further their diversity and educational goals.<sup>72</sup>

Whether the Court intended, as Justice Thomas asserted, for this announcement

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67. *Grutter*, 539 U.S. at 341–42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

68. *Id.* at 342.

69. *See id.* at 326 (noting that “a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed” (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995))). *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (stating that “[c]lassifications based on race carry a danger of stigmatic harm”); Forde-Mazrui, *supra* note 39, at 2376 (arguing that because racial classifications “discriminate on racial grounds, these classifications plausibly reflect illegitimate racial beliefs and may cause harms that must be clearly justified”).

70. *Grutter*, 539 U.S. at 342.

71. *See id.* at 328 (stating that the holding in *Grutter* stays within “our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits”). *See also id.* at 343 (“We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”). *But cf.* Lauriat, *supra* note 27 (discussing schools’ reluctance to engage in consideration of race-neutral alternatives following *Grutter*).

72. *See Grutter*, 539 U.S. at 343 (stating that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”); *id.* at 377 (Thomas, J., concurring in part and dissenting in part) (characterizing “the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School’s educational judgments and refusal to change its admissions policies will itself expire”).

to be a “holding that racial discrimination in higher education admissions will be illegal in 25 years” is subject to debate.<sup>73</sup> While some scholars appear to agree with the plausibility of Justice Thomas’s declaration,<sup>74</sup> others contend that the Court was merely expressing its hope that the future state of American society and education will be such that racial preferences in admissions will no longer be necessary.<sup>75</sup>

Without further clarification from the Court, it is impossible to know the intended meaning of its statement. Nor is it possible to know whether twenty-five, thirty, or fifty years from now the Court would uphold or strike down an admissions program that considered an applicant’s race or ethnicity. This lack of knowledge, however, does not diminish the immediate need to explore and implement race-neutral alternatives in higher education.<sup>76</sup> Because the Court has required all race-based admissions measures to have a termination point, the elimination of race-based affirmative action in higher education appears to be inevitable.<sup>77</sup> To ensure the continual provision of educational opportunities for

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73. *Id.* at 351 (Thomas, J., concurring in part and dissenting in part).

74. See Amar & Caminker, *supra* note 25, at 542 (hypothesizing that Justice O’Connor’s comment “may connote some kind of a warning about the evolution of the law—that she (or her counterpart on a future Court) would not vote to uphold the law school’s program on the same facts in the year 2028”); Crump, *supra* note 32, at 494 (characterizing the Justice O’Connor’s comment as “install[ing] an eye-popping durational limit”); Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced Grutter and Gratz*, 92 KY. L.J. 241, 260 (2003–2004) (noting that the Court “basically gave higher education one more generation to use race-conscious admissions before race-neutral admissions would be the command of the Fourteenth Amendment” and “Justice O’Connor’s majority flatly states that it will tire of affirmative action—even at elite law schools—after another twenty-five years”); Walsh, *supra* note 35, at 466–67 (commenting on “Justice O’Connor’s forecast, that affirmative action will end in another twenty-five years”) (emphasis added).

75. See *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) (“[O]ne may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”). See also Mexican Am. Legal Def. & Educ. Fund, *supra* note 2, at 44 (“This sentence [regarding the twenty-five years] should be construed as the Court’s dictum expressing, by reference to the passage of time since the *Bakke* decision, its aspiration—and not its mandate—that there will be enough progress in equal educational opportunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity.”) (citation omitted) (emphasis added); Amar & Caminker, *supra* note 25, at 542 (“[Justice O’Connor] may have been trying to express nothing more than her (and the Court’s) fervent desire that the number of minority law school candidates with top grades and test scores would naturally increase so dramatically over the next quarter century that racial diversity in all competitive law schools would exist even if it were not pursued as a distinct admissions goal, or if it were pursued only in a race-neutral way.”).

76. See Glenn C. Loury, *Affirmed . . . For Now*, BOSTON GLOBE, June 29, 2003, at D1 (“Although the legal significance of such speculation is uncertain, the fact that this statement appears in the opinion at all should serve as a clear warning to supporters of affirmative action. We must not rest on our laurels. This recent victory may well be our last, and the benefits may be short-lived.”).

77. *Grutter*, 539 U.S. at 342 (noting that “[w]e see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point”). See also Adela de la Torre & Rowena Seto, *Can Culture Replace Race? Cultural Skills and Race Neutrality in Professional School Admissions*, 38 U.C. DAVIS L. REV. 993, 996 (Mar. 2005) (stating that “Current . . . Supreme Court case law, reflect[s] the ultimate future goal

minority students following the termination of race-based affirmative action, institutions of higher education must develop and implement effective, race-neutral alternatives.<sup>78</sup>

*Grutter*, in fact, instructed colleges and universities to engage in this endeavor now, while employing race-based programs, and it alluded to race-neutral efforts currently used by institutions in states where state laws have prohibited race-based affirmative action.<sup>79</sup> The Court noted that “[u]niversities in other States can and *should* draw on the most promising aspects of these race-neutral alternatives as they develop.”<sup>80</sup> Moreover, *Grutter* encouraged institutions to “perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”<sup>81</sup> In so doing, educators and administrators ought to go beyond mere consideration of race-neutral programs and further examine their current race-based policies to determine ways in which they can successfully incorporate race-neutral measures. Experimenting with race-neutral alternatives through actual implementation will afford institutions the opportunity to assess the effects of such programs on their educational goals, rather than relying on hypothetical results that may or may not be accurate. Actual implementation will also reveal potential shortcomings that can be modified to maximize a measure’s utility.

Employing both race-based and race-neutral approaches also achieves the important goal of gradually moving away from race-based affirmative action—as necessitated by the eventual termination of such programs—and toward the exclusive use of race-neutral alternatives. This goal is evident in the *Grutter* Court’s instruction for institutions to implement sunset provisions in their race-based policies and to conduct periodic reviews to determine the ongoing necessity of employing racial preferences to achieve their diversity and educational goals.<sup>82</sup> The Court also “take[s] the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”<sup>83</sup> One might speculate that

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of eliminating race and ethnic considerations in admissions criteria. Thus, race is an acceptable admissions criterion only in the short-term”) (footnote omitted); Kerstin Forsythe, Note, *Racial Preference and Affirmative Action in Law School Admissions: Reactions from Minnesota Law Schools and Ramifications for Higher Education in the Wake of Grutter v. Bollinger*, 25 *HAMLIN J. PUB. L. & POL’Y* 157, 187 (Fall 2003) (acknowledging that the Court “indicated that race-conscious decision making must inevitably end”).

78. See Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 *HOUS. L. REV.* 459, 496 (2004) (concluding that the development and implementation of race-neutral admissions programs “may be necessary in the future, for it is possible that the Court will no longer permit the use of racial preferences twenty-five years from the date of the decision in *Grutter*, that is, in the year 2028”).

79. *Grutter*, 539 U.S. at 342. See *infra* Part IV (discussing use of race-neutral admissions programs).

80. *Grutter*, 539 U.S. at 342 (emphasis added).

81. *Id.* at 342 (Kennedy, J., concurring (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995))).

82. *Id.*

83. *Id.* at 343 (quoting Brief for Respondents at 34, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236).

the Court itself would “like nothing better” than to see this occur at all institutions of higher education currently considering race or ethnicity in their admissions decisions. As theorized by Vikram Amar and Evan Caminker, “Justice O’Connor seems to want to structure a constitutional transition period, i.e., she’s using the next quarter century as a planned transition to what she perceives to be a constitutionally preferable state of affairs.”<sup>84</sup> A “gradual weaning”—rather than “an abrupt about-face”—from dependence on race-based affirmative action will help mitigate potentially negative effects on diversity levels following the termination of race-based programs.<sup>85</sup>

In their transition from race-based affirmative action to race-neutral policies, colleges and universities should aggressively implement race-neutral measures to guard against dramatic declines in diversity levels such as those experienced at institutions in California and Texas immediately following the termination of race-based affirmative action. In 1995, the University of California, Berkeley (Berkeley) and the University of California, Los Angeles (UCLA) enrolled 24.3% and 30.1% of “underrepresented minorities,” respectively, using racial preferences.<sup>86</sup> In 1998, following the termination of race-based affirmative action, the percentages decreased to 11.2% and 14.3%, respectively.<sup>87</sup> In 1996, prior to *Hopwood*’s termination of racial preferences, African-American and Hispanic students constituted 3.6% and 11.2%, respectively, of the freshman class at Texas Agricultural and Mechanical University (Texas A&M).<sup>88</sup> In 1998, the percentages declined to 2.7% and 9.1%, respectively.<sup>89</sup> The University of Texas School of Law also experienced similar decreases. Between 1996 and 1999, enrollment of African-American students dropped from 7% to 1%, while Latino enrollment fell from 14% to 9%.<sup>90</sup>

The stark declines were due, in part, to the abrupt termination of race-based affirmative action without the availability of developed, viable race-neutral alternatives to take its place. As previously discussed, reliance on race-based measures has historically resulted in the neglect of race-neutral programs.<sup>91</sup>

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84. Amar & Caminker, *supra* note 25, at 550–51.

85. *Id.* at 549–50 (noting that “a cold-turkey disestablishment of race-conscious programs would lead to a stark and highly visible resegregation of higher education, with a likely delayed effect being the resegregation of public and private sector leadership positions”).

86. “Underrepresented minorities” refers to African-American, American Indian, and Chicano/Latino students. UNIV. OF CALIF. STUDENT ACADEMIC SVCS., UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES 1 n.3, 20, 22, available at [http://www.ucop.edu/sas/publish/aa\\_final2.pdf](http://www.ucop.edu/sas/publish/aa_final2.pdf) (last visited Nov. 20, 2005) [hereinafter UNDERGRADUATE ACCESS].

87. *Id.* at 22.

88. See Gaiutra Bahadur, *Top 10% Admissions Rule Praised; Students Who Were Admitted under Law to Counter Hopwood are Doing Well, Colleges Say*, AUSTIN AM.-STATESMAN, May 24, 2000, at B1.

89. See *id.* From 1996 to 1997, the African-American freshman enrollment at UT declined from 4% to 3%, and Hispanic enrollment fell from 14% to 13%. See LAVERGNE & WALKER, *supra* note 20, at 4.

90. Bahadur, *supra* note 88.

91. See *supra* text accompanying notes 22–25.

Moreover, reliance on the race-based admissions model set forth in *Bakke* has significantly delayed efforts to explore and develop effective race-neutral alternatives. In 1997 and 1998, this delay greatly hindered the ability of institutions in California and Texas to achieve their diversity goals following the termination of race-based affirmative action mandated by the laws of those states.<sup>92</sup> Institutions of higher education should not make the same mistake with respect to the model set forth by the Court in *Grutter*. If, in their reliance on *Grutter*, institutions of higher education fail to currently develop and implement effective race-neutral programs, colleges and universities will once again experience severe declines in minority enrollment once race-based affirmative action has reached its endpoint.

In light of the Court's forewarning of the eventual termination of race-based affirmative action, colleges and universities should take advantage of this transition period that affords them the opportunity to employ both race-based and race-neutral measures simultaneously. "As we move slowly from where we are today to a" more preferable state "where we use means other than race consciousness to attain" diversity and educational goals,<sup>93</sup> taking a proactive (rather than reactive) approach is critical to ensuring that institutions of higher education are equipped with the means necessary to effectively provide educational opportunities for minority students following the termination of race-based affirmative action.

### C. Aftermath of *Grutter*

In the post-*Grutter* world in which we now find ourselves, the future of race-based affirmative action in higher education remains questionable.<sup>94</sup> As noted by Charles Ogletree:

If affirmative action is safe for the moment, it is so by the narrowest of margins and for reasons that retain, rather than eliminate, the problems of a system geared toward an attempt to remedy educational inequality that occurs too late to do any good to the majority of the population.<sup>95</sup>

Although colleges and universities are permitted to use race and ethnicity as factors in their admissions decisions, not all institutions will do so. For some, the decision to refrain from using racial preferences may be a choice, and for others, refraining from such action may be mandated by state law or executive order.<sup>96</sup>

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92. *But see infra* Part IV (discussing improvements in minority enrollment due to development and implementation of race-neutral approaches over several years).

93. Amar & Caminker, *supra* note 25, at 551.

94. *See* Flagg, *supra* note 28, at 827 (discussing fear that the Court's holding in *Grutter* "marks at best a partial and perhaps temporary victory in the struggle for racial justice") (emphasis added); Forsythe, *supra* note 77, at 187 (noting that the *Grutter* "decision leaves the future status of race-conscious admissions programs open and undetermined").

95. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 256 (2004).

96. *See supra* notes 4–6 and accompanying text (discussing California's Proposition 209 and Washington's Initiative 200, and Governor Jeb Bush's One Florida Initiative).

Because race-based affirmative action will not be implemented at all institutions following the *Grutter* Court's decision, there remains an immediate need for all colleges and universities to develop and employ effective race-neutral measures in their efforts to provide educational opportunities for minority students. Not only will those institutions that do not consider race in their admissions decisions benefit from such endeavors, but those institutions that must consider race-neutral alternatives to maintain constitutional race-based programs will benefit as well.

While some institutions reinstated or amended their affirmative action programs to conform to the standards set forth in *Gratz* and *Grutter*,<sup>97</sup> others—where racial preferences had previously been eliminated due to judicial holdings—decided not to reinstate such programs. One institution that made the latter choice is Texas A&M. Following the Fifth Circuit's ruling in *Hopwood*, race-based affirmative action was eliminated at all public colleges and universities in Texas, Louisiana, and Mississippi.<sup>98</sup> When *Grutter* overruled *Hopwood*, institutions such as Texas A&M were free to reestablish their race-based programs. While neighboring institutions such as the University of Texas quickly acted to reintroduce consideration of race and ethnicity in their admissions procedures,<sup>99</sup> Texas A&M President Robert Gates made the controversial decision not to do so.<sup>100</sup> Instead of considering race and ethnicity, Gates introduced a new admissions policy that would use race-neutral measures, including consideration of “whether an applicant has overcome socioeconomic disadvantage and other obstacles.”<sup>101</sup> Such measures—combined with other race-neutral programs—resulted in an increase in Texas A&M's minority student enrollment. During the Fall 2004 semester, the number of African-American freshmen increased by 35% from the prior year.<sup>102</sup> Hispanic freshman enrollment increased by 26%.<sup>103</sup> Although such increases mark “only the beginning” for Texas A&M, they demonstrate the potential of race-neutral measures as viable tools for helping colleges and universities achieve their diversity and educational goals.<sup>104</sup>

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97. See Doug Lederman, *Upturn for Minority Students at Michigan*, INSIDE HIGHER ED, June 7, 2005, available at <http://www.insidehighered.com/news/2005/06/07/mich> (discussing the University of Michigan's revision of its undergraduate admissions policies to include individualized review of applicants as mandated by *Grutter*).

98. *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996).

99. See Erik Rodriguez, *UT Regents to Allow Consideration of Race*, AUSTIN AM.-STATESMAN, August 8, 2003; *The University of Texas at Austin Reacts to the Supreme Court's Affirmative Action Decisions*, June 23, 2003, available at [http://www.utexas.edu/opa/news/03newsreleases/nr\\_200306/nr\\_affirmativeaction030623.html](http://www.utexas.edu/opa/news/03newsreleases/nr_200306/nr_affirmativeaction030623.html).

100. Marc Levin, *Texas A&M Slaps Down Reverse Discrimination*, FRONTPAGEMAGAZINE.COM, Dec. 11, 2003, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=11252>.

101. *Id.*

102. *Fall Enrollment Figures Show Significant Gains*, AGGIE DAILY, Sept. 15, 2004, available at <http://www.tamu.edu/univrel/aggiedaily/news/stories/04/091504-9.html>.

103. *Id.*

104. *Id.* Other institutions, including those that currently use race-based measures, should consider Texas A&M's efforts when developing their own race-neutral programs. As instructed by the Court in *Grutter*, institutions of higher education that currently use race-based admissions programs “can and *should* draw on the most promising aspects of these race-neutral alternatives

The immediate development of race-neutral measures is essential, not only because of decisions not to reinstate race-based programs, but also because of *Grutter*'s impact on the political climate surrounding race-based affirmative action. Following the Court's ruling, scholars correctly predicted that "*Grutter* is likely to motivate those who oppose any form of racial preferences to redouble their efforts to prohibit such preferences through new state ballot initiatives or legislation as they already have done in California, Florida and Washington."<sup>105</sup>

Less than a month after the Court sanctioned the narrowly tailored use of race-based admissions programs in higher education, Ward Connerly and other opponents of race-based affirmative action began an attempt to include the Michigan Civil Rights Act (the "Act") in the November 2004 ballot.<sup>106</sup> The Act was patterned after California's Proposition 209 and Washington's Initiative 200, which prohibit racial preferences in public education, employment, and contracting.<sup>107</sup> Although Connerly was not successful in placing the Act on the ballot, polling data suggest that it would have passed. According to a 1998 poll commissioned by *The Detroit News*, 53% of voters opposed race-based affirmative action in employment and other areas, while only 40% supported it.<sup>108</sup> That same year, the *Detroit Free Press* commissioned another study that concluded that 66% of respondents opposed racial preferences in admissions policies, while 23% supported them.<sup>109</sup>

Connerly has indicated that his efforts to abolish racial preferences in public education will not end with a ballot initiative in Michigan. He is exploring the feasibility of similar initiatives in states such as Utah, Colorado, and Arizona.<sup>110</sup> The potential reemergence of state initiatives banning the use of race-based admissions programs makes the immediate consideration and implementation of race-neutral alternatives necessary endeavors.

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as they develop." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (emphasis added).

105. David Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to be a Compelling Interest in University Admissions*, 180 EDUC. LAW REP. 401, 408 (2003). See also Flagg, *supra* note 28, at 827 (suggesting that "the societal battle over whether [race-conscious] programs actually will continue now shifts in large part to the legislatures and popular electoral processes, as already has taken place in California, Washington, and Florida").

106. Ward Connerly, *Taking It to Michigan—Announcing the "Michigan Civil Rights Act,"* NAT'L REV. ONLINE, July 8, 2003, available at <http://www.nationalreview.com/comment/comment-connerly070803.asp>.

107. *Id.*

108. Peter Schmidt, *Foes of Affirmative Action in Michigan Plan to Take Their Battle to the Ballot*, CHRON. HIGHER EDUC., July 9, 2003, available at [http://www.utwatch.org/oldnews/chron\\_affaction\\_7\\_9\\_03.html](http://www.utwatch.org/oldnews/chron_affaction_7_9_03.html).

109. *Id.* See also Schimmel, *supra* note 105, at 408 n.37 (discussing the findings of a "Gallup poll released a day after the *Grutter* decision [indicating] that 49% of adults supported 'affirmative action programs,' but 69% say college applicants 'should be admitted solely on the basis of merit, even if that results in fewer minority students being admitted,'" (quoting Gail Heriot, *U.S. Supreme Court Affirmative Action Rulings*, THE SAN DIEGO UNION-TRIB., June 29, 2003, at G-1)).

110. Steve Miller, *Connerly Expands Fight Against Race Preference*, THE WASH. TIMES, July 10, 2003, at A07, available at <http://www.washingtontimes.com/national/20030709-110059-4670r.htm>.

As demonstrated by the drastic decline in diversity levels at colleges and universities in California immediately following the passing of Proposition 209, it is extremely difficult, if not impossible, for institutions to reach and maintain their diversity goals without the use of race-neutral alternatives once race-based affirmative action has been prohibited. A comparison of African-American and Hispanic enrollment at the University of California's law schools in 1997 and 2003 suggests that such drastic declines may have been avoided if the universities had previously developed and employed race-neutral methods. In 1997, the first year in which race-based affirmative action was prohibited, the African-American and Hispanic enrollment decreased from 6.0% and 12.3% to 1.9% and 7.2%, respectively.<sup>111</sup> In 2003, with the assistance of race-neutral measures such as consideration of applicants' socioeconomic status,<sup>112</sup> the number of African-American law students increased to 4.7%, and the number of Hispanic law students increased to 11.9%.<sup>113</sup>

Once again, such increases demonstrate the utility of race-neutral measures. Race-neutral measures can help colleges and universities achieve their diversity and educational goals without the use of racial preferences.<sup>114</sup> However, it is evident in the gradual increase in diversity levels over the course of several years that the development and implementation of effective race-neutral admissions policies can take a considerable amount of time. Success cannot be achieved overnight. Effective measures may take years of experimentation to develop.<sup>115</sup> As more institutions begin to experiment with race-neutral measures, they will learn from each other's experiments, thereby improving the development and effectiveness of such measures across the board.

In light of the realities set forth by *Grutter* and the political resistance that continues to confront race-based affirmative action, institutions of higher education that currently employ race-based affirmative action should explore alternative methods to achieve their diversity and educational goals. To do this effectively, colleges and universities should first expand their affirmative action goals as they

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111. UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA'S LAW SCHOOLS: APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS BETWEEN 1993-2005 BY ETHNICITY (2005), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawnos.pdf> [hereinafter APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS].

112. See Michael A. Fletcher, *Wider Fallout Seen From Race-neutral Admissions: Fewer Minority MDs, Lawyers May Be Result*, April 19, 2003, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A53554-2003Apr18?> (discussing use of race-neutral admissions policies at California medical and law schools).

113. APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS, *supra* note 111.

114. See Schimmel, *supra* note 105, at 412-13 ("[T]here is a reasonable chance that an innovative, race-neutral point system might be devised that could enroll a significant number of minority students and have several additional advantages: it would be more transparent, inexpensive, and less controversial and also might head-off intensely polarizing legislative proposals or ballot initiatives to abolish any consideration of race in admissions.")

115. See, e.g., *infra* Part IV.A (comparing diversity levels at Texas colleges and universities immediately following the implementation of the Texas Ten Percent Plan to the diversity levels achieved in later years).

relate to providing meaningful opportunities and access for minority students. Then, they should develop and implement race-neutral approaches that will most effectively achieve their goals.

### III. MOVING BEYOND *GRUTTER*: A PROPOSAL TO REDEFINE AFFIRMATIVE ACTION AND ITS GOALS

Although jurists and scholars have defined (or attempted to define) “affirmative action” in many different ways,<sup>116</sup> contemporary concepts of race-based affirmative action in higher education often relate to the provision of racial preferences in favor of underrepresented minority students in attempts by colleges and universities to enroll a “critical mass” of minority students into each matriculating class.<sup>117</sup> Often in higher education, the goals of preference programs narrowly focus on increasing the number or percentage of minority students enrolled at a particular institution.<sup>118</sup> Such programs begin and end with the admissions decision. Preferential programs may also focus on benefiting individual students who apply to particular institutions rather than providing

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116. See generally John Valery White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117, 2118 & n.2 (2004) (discussing proposed definitions of “affirmative action”). See also Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 142 n.72 (2000) (noting that “[t]here simply is no generally accepted definition of affirmative action”).

117. See *Grutter v. Bollinger*, 539 U.S. 306, 316–20, 342–43 (2003) (referring to racial preferences in the context of race-conscious admissions policies); *Gratz v. Bollinger*, 539 U.S. 244, 249–50 (2003) (deciding whether the University of Michigan violated the Constitution by its use of racial preferences in undergrad admissions); Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003) (defining affirmative action “as minority-mindedness in decisionmaking resulting in . . . a preference”); Howard T. Everson, *A Principled Design Framework for College Admissions Tests: An Affirming Research Agenda*, 6 PSYCHOL. PUB. POL’Y & L. 112 (2000) (referring to racial preferences in the context of affirmative action in higher education); Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139 (1997) (broadly defining affirmative action programs “as those programs that seek to give racial and ethnic minorities . . . an institutional preference in . . . university admissions”); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 954 n.100 (2005) (defining “affirmative action” as “the act of considering the race of underrepresented racial minorities as a plus factor in hiring and recruitment”); Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 5 (2002) (“By affirmative action, I mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment. In this context, then, I use the terms ‘affirmative action’ and ‘preferences’ interchangeably.”) (footnotes omitted).

118. See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists in Support of Respondents at 9, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 539178 [hereinafter Brief Amici Curiae of Veterans of the Southern Civil Rights Movement] (characterizing “conscious efforts to increase minority enrollments . . . [as] affirmative action in one form or another”); Michael Boucai, *Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws*, 18 NAT’L BLACK L.J. 239, 247 n.50 (2004–2005) (discussing use of “affirmative action to increase minority enrollment” at institutions of higher education); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 542 (2003) (noting that the intent of affirmative action policies based on racial classifications “is to increase minority enrollment”).

assistance to racial groups as a whole. Once an underrepresented minority student has been admitted to and enrolled in an institution that employs racial preferences, the goals of present-day affirmative action have been accomplished.

Rarely do preferential admissions programs address other pertinent issues that confront minority students and their communities and impact their access to educational opportunities and development. For instance, modern concepts of race-based affirmative action do not call for the provision of resources, such as mentoring and guidance, to disadvantaged minority students who may not have considered applying to college. Such concepts also fail to provide assistance and guidance to minority students regarding course selection, internships, etc., once they begin their undergraduate or graduate careers, which could curtail their access to educational opportunities.

Modern race-based affirmative action narrowly focuses on quantitative rather than qualitative approaches to providing opportunities and access for minority students. While using racial preferences to admit greater numbers of minority students ensures racial representation,<sup>119</sup> that approach fails to address challenges that many minority students must face and overcome to apply, enroll, and successfully matriculate at an undergraduate or post-graduate institution. Such failure prevents traditional race-based affirmative action programs from most effectively contributing to the educational advancement of minority students and their communities.<sup>120</sup> In light of these deficiencies, the following section urges institutions to look beyond the numbers if they wish to accomplish the ultimate goal of providing minority students and minority groups with meaningful access to educational opportunities and advancement of their educational and social development.

#### B. Removing the Band-Aid: Provision of Resources Prior To Admissions Decision

Decisions to embrace a narrow, quantitative approach to affirmative action have greatly hindered the ability of colleges and universities to achieve the ultimate goal of contributing to the educational and social advancement of minority students and the racial groups to which they belong. Many argue that contemporary models of race-based affirmative action simply place a band-aid over the wounds attributable to decades of slavery, oppression, and discrimination rather than engaging in the more difficult task of attempting to heal such wounds.<sup>121</sup> As argued by Shelby

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119. See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement, *supra* note 118, at 8 (noting that race-based affirmative action has helped the number of African-American college graduates increase from less than 5% in 1960 to approximately 7.5% in 2000 and the number of African-American law students increase from 1% in 1960 to 7.4% in 1996) (footnotes omitted).

120. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 116 (1990) (“Racial representation is not the same thing as racial development, yet affirmative action fosters a confusion of these very different needs.”).

121. See *supra* note 21. See also Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the “Cold Numbers” in Hopwood v. Texas*, 16 *LAW & INEQ.* 359, 412 (1998) (arguing that “[t]ruly equal opportunity might require reconstruction of

Steele:

[T]he essential problem with [applying racial preferences] is the way it leaps over the hard business of developing a formerly oppressed people to the point where they can achieve proportionate representation on their own (given equal opportunity) and goes straight for the proportionate representation. This . . . does very little to truly uplift blacks.<sup>122</sup>

The forty-year reliance on racial preferences has proven insufficient to adequately address the disparities that continue to exist between racial groups.<sup>123</sup> “Fewer blacks go to college today than ten years ago; more black males of college age are in prison or under the control of the criminal justice system than in college. *This despite racial preferences.*”<sup>124</sup> Regarding gaps in educational achievement:

Black and Hispanic students are much more likely to be enrolled in vocational, technical, or business schools than white or Asian students, and are less likely to be enrolled in graduate schools . . . . Post-secondary completion rates also differ by race. Asians are much more likely to have a bachelor’s degree (40 percent) than whites (26 percent), blacks (14 percent), Native Americans (11 percent), or Hispanics (10 percent) . . . . Indeed, recent data indicate that, if America had reached racial equity in education, blacks would have more than two million

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testing and application procedures . . . rather than band-aids like policies that allow for admission of African-Americans and Latinos with lower test scores than Whites”); Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 498 n.152 (1999) (“[Race-based affirmative action is] a cosmetic substitute for the real work it would take to close the gap between the achievement of racial groups . . . . ‘Affirmative action is, at bottom, a dodge. It allows us to put off the far harder work: ending the isolation of young black people and closing the academic gap that separates black students—even middle-class black students—from whites.’” (citing James Traub, *Testing Texas*, THE NEW REPUBLIC, Apr. 6, 1998, at 21)); Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 212 (1996) (noting that “[w]hile the band-aid cosmetically masks the wound, it does nothing to prevent the cancer from ultimately devouring its victim”).

122. STEELE, *supra* note 120, at 115.

123. See *Grutter*, 539 U.S. at 377–78 (Thomas, J., concurring in part and dissenting in part) (arguing that because racial preferences may impede the narrowing of achievement gaps, such gaps will continue to exist in twenty-five years); *supra* notes 35–36 and accompanying text. See also A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1752–71 (2004) (noting significant racial gaps in unemployment and employment rates, income, wealth as indicated by home ownership, personal assets and business ownership, and education); OGLETREE, *supra* note 95, at 251 (noting that affirmative action has done little to change the existence of two Americas, “separated by race, income, and opportunity”).

124. STEELE, *supra* note 120, at 124 (emphasis added). See also Johnson & Onwuachi-Willig, *supra* note 20, at 9 (noting that “more young black men reside in prison than attend college”); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1196 n.175 (2005) (noting that “[t]here are now 39.8% more black men in the criminal justice system than in higher education”).

more high school and college degrees.<sup>125</sup>

To most effectively achieve the goals of educational and social development for minority students and communities, colleges and universities must expand their affirmative action concepts and programs to encompass more than admissions and enrollment. Institutions must develop and incorporate affirmative action programs that address the challenges facing disadvantaged students that impede their access to educational opportunities and achievement.<sup>126</sup>

One such challenge is the perceived devaluation of education in minority communities.<sup>127</sup> While students in majority communities are often labeled as “nerds” and “geeks” if they achieve academically, minority students who achieve similar successes are often branded with the accusation that they are “acting White.”<sup>128</sup> Inherent in such accusations are the beliefs that academic achievement is not expected or respected within certain minority communities and, thus, should not be pursued by minority students. Students who encounter such ridicule must possess the fortitude to reject such beliefs in order to achieve their educational goals. Otherwise, they may decide not to complete high school or attend college. Such beliefs may also cause minority students to “bypass opportunities to take advanced courses in math, computers, or other difficult and college-relevant areas, and thus reduce future opportunities in remunerative career paths.”<sup>129</sup>

Other challenges affecting minority students’ access to educational development are their lack of awareness about educational opportunities and the lack of encouragement to pursue such opportunities. Although often presumed, many disadvantaged minority students are not aware of the actions they must take to adequately prepare for applying to a college or university. A student may

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125. Dickerson, *supra* note 123, at 1769–70 (footnotes omitted).

126. See STEELE, *supra* note 120, at 125 (concluding that “the goals have not been reached, and the real work remains to be done”); Oko, *supra* note 121 (concluding that “[o]ur quest for increased minority representation in legal education will be a mirage unless we systematically identify and methodically address the underlying reasons for poor academic qualifications possessed by minority applicants to law schools”).

127. See Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 335–36 (2000) (discussing negative consequences resulting from the devaluation of academic achievement by gang-affiliated Black youth); Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 806 (1989) (noting how “confront[ing] peers who devalue education” can negatively impact minority students’ academic achievement); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 728 & n.162 (2004) (discussing the “emergence of an ‘oppositional culture’” in disadvantaged African-American communities, which “tends to devalue academic achievement”).

128. See George W. Dent, Jr., *Race, Trust, Altruism, and Reciprocity*, 39 U. RICH. L. REV. 1001, 1027 & n.158 (2005); Forde-Mazrui, *supra* note 127, at 688 n.10; Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls For Brown?*, 103 MICH. L. REV. 1507, 1530 n.110 (2005).

129. NAT’L HISPANIC CAUCUS OF STATE LEGISLATORS & THE THOMAS RIVERA POLICY INST., CLOSING ACHIEVEMENT GAPS: IMPROVING EDUCATIONAL OUTCOMES FOR HISPANIC CHILDREN 12 (2003), available at <http://www.naleo.org/AC2003/cag.pdf> [hereinafter CLOSING ACHIEVEMENT GAPS].

possess the desire to attend college, but not be aware of necessary strategies to accomplish his or her goal. For instance, although studies show that Hispanic students who take two or more Advanced Placement classes in high school are three times more likely to attend college than those that take none,<sup>130</sup> Hispanic students are less likely to enroll in such classes.<sup>131</sup> In many cases, minority parents, especially those who have little income or educational background themselves, are not aware of such college preparatory opportunities or their importance for college or university admission.<sup>132</sup> Therefore, they do not encourage their children to take advantage of such opportunities.

The failure of minority students to make academically optimal choices regarding their commitment to academics, course selection, and participation in college preparatory courses negatively impacts their access to future educational opportunities. To help avoid such outcomes, institutions of higher education should expand their traditional models of affirmative action to include programs that actively and effectively address the challenges hindering minority students' academic achievement. As noted by Steele, "preferential treatment does not teach skills, or educate, or instill motivation."<sup>133</sup> To achieve these goals and thereby most effectively contribute to the educational advancement of minority students and communities, institutions must take a more comprehensive approach to affirmative action.

Implementing programs that provide resources, guidance, and assistance to disadvantaged students *prior to* their decision to apply to a particular college or university will aid in this endeavor.<sup>134</sup> Undergraduate institutions should partner with high schools to establish mentoring programs to assist disadvantaged students who may be interested in attending college.<sup>135</sup> Student or administrative mentors could meet with students and parents to discuss the importance of attending college and the processes by which to do so.<sup>136</sup> Such meetings could positively affect a

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130. See Richard W. Riley, U.S. Sec'y of Educ., *Excelencia Para Todos—Excellence for All: The Progress of Hispanic Education and the Challenges of a New Century*, Remarks at Bell Multicultural High School (Mar. 15, 2000), available at <http://www.ed.gov/Speeches/03-2000/000315.html>.

131. See CLOSING ACHIEVEMENT GAPS, *supra* note 128, at 12.

132. *Id.* See also Jennifer C. Vergara, *New Study Probes Lack of College-bound Latino Students*, THE TIDINGS, July 19, 2002, available at [http://www.the-tidings.com/2002/0719/college\\_text.htm](http://www.the-tidings.com/2002/0719/college_text.htm) (discussing study's findings linking Latino students' low matriculation rate in post-secondary institutions to Latino parents' lack of knowledge regarding college preparation).

133. STEELE, *supra* note 120, at 121.

134. See *infra* Parts IV.C, V (discussing outreach measures designed to improve minority students' access to educational opportunities).

135. See Alvin W. Cohn, *Juvenile Focus*, 68 FED. PROBATION 64, 67 (2004) (citing improvements in educational achievement as a benefit of mentoring programs for disadvantaged youths).

136. See Harold McDougall, *School Desegregation or Affirmative Action?*, 44 WASHBURN L.J. 65, 80 n.96 (2004) (noting that "the single most effective way to increase minority enrollment is to increase the number of minorities applying to college. That means improving educational opportunity at every level, beginning in the early school years." (citing Curt Levey, Dir. of Legal & Pub. Affairs, Ctr for Int'l Rights, Testimony before the Texas Senate

student's desire to attend college as well as encourage and motivate him or her to take advantage of opportunities that will enhance his or her potential of being accepted into an institution, such as enrolling in college preparatory and other academically rigorous courses.<sup>137</sup>

Providing such encouragement and motivation would help reach the countless disadvantaged minority students who are raised in families or cultures that do not value or support academic achievement. Instead of being "left behind" by a decision to drop out of high school,<sup>138</sup> or not to continue their education beyond high school,<sup>139</sup> students who receive guidance and encouragement concerning their academic careers are more likely to make more beneficial choices.

Other measures that colleges and universities should implement are those that help close the information gap regarding college preparation that exists in non-English speaking communities.<sup>140</sup> One proposed measure is to print and disseminate recruitment materials in languages other than English. Institutions interested in bridging the information gap for Hispanic students and parents should print and distribute their materials in Spanish to encourage non-English speaking parents to read and discuss the materials with their children. The University of Georgia has gone a step further by instituting Spanish websites in the course of their efforts to educate parents and students about their programs.<sup>141</sup> By moving beyond individual racial preferences to distribute information that may encourage and empower students and parents to seek and take advantage of educational opportunities, such affirmative action measures have the potential to benefit a greater number of minority students and their communities. Institutions that employ such measures are not only opening the door to minority students but also

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Subcommittee on Higher Education (June 24, 2004), *available at* [http://www.cir-usa.org/legal\\_docs/grutter\\_v\\_bollinger\\_levy\\_test.pdf](http://www.cir-usa.org/legal_docs/grutter_v_bollinger_levy_test.pdf)).

137. An example of such program is the Student Ambassador Program implemented at St. Mary's College in Los Angeles, where students return to their inner-city high schools to serve as peer educational counselors. By serving as role models to other students, the ambassadors encourage students to complete high school, enroll in necessary courses to prepare them for college, and continue their education beyond high school. The ambassadors often interact with the parents as well to bridge the information gap regarding college preparation for their children. *See Vergara, supra* note 132.

138. In 2002, the drop-out rates for African-Americans and Hispanics, age 16–24, were 11.3% and 25.7%, respectively, compared to 6.5% for Whites. Since 1984, there has been no measurable change in the gap between African-Americans and Whites, and there has been no measurable change in the gap between Hispanics and Whites since 1972. *See* NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, STATUS DROPOUT RATES BY RACE/ETHNICITY (2005), *available at* [http://nces.ed.gov/programs/coe/2005/pdf/19\\_2005.pdf](http://nces.ed.gov/programs/coe/2005/pdf/19_2005.pdf).

139. In 2003, the percentages of African-Americans and Hispanics between the ages of 25–29 that had not completed at least some college were 48.8% and 68.9%, respectively, as compared to 34.5% of Whites. *See* NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, EDUCATIONAL ATTAINMENT tbls. 23-2, 23-3 (2005), *available at* [http://nces.ed.gov/programs/coe/2005/pdf/23\\_2005.pdf](http://nces.ed.gov/programs/coe/2005/pdf/23_2005.pdf).

140. *See supra* note 132 and accompanying text.

141. *See* News Release, UGA Office of Public Affairs, Spanish-language Web Site Launched by UGA College of Family and Consumer Sciences (Feb. 17, 2005), *available at* <http://www.uga.edu/news/artman/publish/050215facswbsite.shtml>.

encouraging them to walk through it.

Furthermore, the expansion of affirmative action to include programs designed to provide minority students with greater access to educational opportunities should not be limited to secondary education. Because a disproportionate number of minority students fail to enroll in postgraduate programs, such measures are also needed at undergraduate institutions.<sup>142</sup> Mentoring relationships could be established between graduate and undergraduate students through which minority students could obtain information regarding graduate programs and the application process. The mentors could also assist students in preparing for graduate entrance exams such as the Graduate Record Exam (GRE) and the Law School Admissions Test (LSAT). Graduate institutions may also consider awarding stipends or scholarships to disadvantaged students to allow them to enroll in entrance exam preparatory courses.<sup>143</sup> Such courses may be effective in improving an individual's standardized test scores, which, in turn, can provide him with more (and better) educational opportunities.<sup>144</sup> The awarding of exam preparatory stipends or scholarships could be conditioned upon completion of a formalized graduate school preparation program through which minority students receive advice and guidance regarding graduate programs.<sup>145</sup> Undergraduate institutions could also provide graduate school advisors to help educate minority students and encourage them to apply to graduate programs.

Providing resources to disadvantaged students for exam preparation may help lessen the disparities that exist between racial groups regarding their performance

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142. In Fall 2002, the percentages of African-Americans enrolled in Master's and Doctoral programs were 8.8% and 12.7%, respectively. Hispanics accounted for only 6.4% of students enrolled in Doctoral programs and 7.9% of students enrolled in Master's programs. Whites, however, accounted for 69.2% and 70.4% of Doctoral and Master's students, respectively. See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, MINORITY STUDENT ENROLLMENTS tbl. 31-3 (2005), available at <http://nces.ed.gov/programs/coe/2005/section5/indicator31.asp>. See also Johnson & Onwuachi-Willig, *supra* note 20, at 10 n.52 (citing Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 617 (1998)); Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 617-18 (1998) ("The real tragedy . . . is the low numbers of Chicano/Latino students in graduate schools, which in turn reflects the low number of Latino undergraduates in colleges and universities. Instead of eliminating affirmative action programs in admissions, we should be increasing our efforts to bring more Chicano/Latino students into graduate school . . .").

143. Preparatory courses such as Kaplan are often very expensive, and thus, not feasible for students who may be economically disadvantaged. Prices for Kaplan's GRE courses range from \$900 for online courses to \$4000 for private tutoring. See Kaplan Test Prep and Admissions, [http://www.kaptest.com/course\\_options.jhtml?coi=GRE-Graduate&zip=77396&needeng=false&prodid=null&delivery\\_type=4&\\_requestid=35033](http://www.kaptest.com/course_options.jhtml?coi=GRE-Graduate&zip=77396&needeng=false&prodid=null&delivery_type=4&_requestid=35033) (last visited Sept. 23, 2005). Similarly, its LSAT courses range from \$1100 to \$4050. See Kaplan Test Prep and Admissions, [http://www.kaptest.com/course\\_options.jhtml;jsessionid=MT4ZMACL32F11LA3AQJHBOFMDUCBG2HB?pi=3600046&zip=77396&needeng=false&\\_requestid=36907](http://www.kaptest.com/course_options.jhtml;jsessionid=MT4ZMACL32F11LA3AQJHBOFMDUCBG2HB?pi=3600046&zip=77396&needeng=false&_requestid=36907) (last visited Sept. 23, 2005).

144. Kaplan guarantees that an individual's score on standardized tests will increase after completion of its preparatory courses. See Kaplan Higher Score Guarantee, <http://www.kaptest.com/hsg/> (last visited Nov. 30, 2005).

145. See *infra* p. 143 (discussing the positive results of the Law School Preparation Institute implemented at the University of Texas Law School).

on standardized tests.<sup>146</sup> Such disparities could be due, in part, to disadvantaged minority students' lack of knowledge regarding certain aspects of graduate standardized tests and a deficiency of test-taking skills associated with such examinations. Simply granting minority students racial preferences in admissions decisions does nothing to address these problems. Contemporary concepts of race-based affirmative action fail to impart skills and knowledge that students can use to improve their performance on standardized tests. Without improvement, the educational opportunities available to minority students will continue to be limited. Thus, institutions of higher education should consider providing resources for exam preparation to disadvantaged minority students as they endeavor to broaden the scope of their affirmative action programs. Doing so will help to ensure that institutions are using the most effective programs to provide educational opportunities to minority students.

Evident in the education disparities that continue to exist between racial groups despite the use of racial preferences<sup>147</sup> is the necessity that affirmative action policies and programs look beyond the admissions decision to ensure that students of all races and ethnicities are receiving equal access to educational opportunities. To accomplish this goal, institutions of higher education must expand their use of contemporary affirmative action to include programs that effectively address the numerous challenges faced by minority students. Not only do minority students need to receive admission to undergraduate and graduate programs—which traditional race-based affirmative action provides—but they also need to receive information, encouragement, and skills necessary to successfully apply to such programs. Once admitted, institutions must continue their affirmative action efforts to ensure that minority students continue to receive access to educational opportunities following enrollment.

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146. See William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1074 (2001) ("African-Americans trail their equally accomplished White classmates by 9.2 points on the LSAT, with Chicanos and Latinos 6.8 points behind, Native Americans 4.0 points lower, and Asian Pacific Americans 2.5 points behind . . ."); Walter Williams, *Poor Education Prognosis*, CAPITALISM MAG., April 28, 2004, <http://capmag.com/article.asp?ID=3655> (noting a 200-point difference between "the 2002 average SAT scores of black students (857) compared to white students (1060)"). In 2002, there were 4461 law school applicants who had both LSAT scores of 165 or above and undergraduate GPA of 3.5 or above. Of that number, just 29 were African-Americans and 114 were Hispanic. In 2001, 24 African-American and 78 Hispanic applicants out of 3724 total applicants were in that range; in 2000, 26 African-Americans and 83 Hispanics out of 3542; in 1999, 22 African-American and 91 Hispanic applicants out of 3475; in 1998, 24 African-Americans and 82 Hispanics out of 3461; in 1997, 17 African-Americans and 59 Hispanics out of 3447 applicants nationwide were in that range. See Brief of the Law School Admission Council as Amicus Curiae in Support of Respondents at 8, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399229.

147. See *supra* notes 35, 122–25 and accompanying text, 138–39, 142, 146. See also *infra* note 149.

### B. Minority Students' Access to Educational Opportunities Following Enrollment

By narrowly focusing on increasing the number of minority students admitted and enrolled into a particular institution, contemporary concepts of affirmative action succeed in opening the doors for minority students. Such concepts, however, fail to fully integrate minority students into an institution's community once they have walked through those doors.<sup>148</sup> Such failure contributes to the disproportionate number of minority students who decide not to complete their undergraduate or graduate education.<sup>149</sup> Contemporary concepts of affirmative action must be expanded to address this problem. As recognized by Annette B. Almazan, "It would not be enough for students to be accepted to the college or university and attend for a short time. A successful affirmative action program is one where students graduate from the educational institutions."<sup>150</sup>

As previously discussed, traditional race-based affirmative action programs use racial preferences to admit and enroll a greater number of minority students, thereby providing educational opportunities to minority students. Without affirmative action, many minority students would not be admitted into certain universities and graduate programs.<sup>151</sup> Educational opportunities, however,

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148. See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1826–27 (2005) (discussing the failure of affirmative action programs to fully integrate minorities and women into the "social fabric" of police departments).

149. See John C. Duncan, Jr., Two "Wrongs" Do/Can Make a Right: Remembering Mathematics, Physics, & Various Legal Analogies (Two Negatives Make a Positive; Are Remedies Wrong?) The Law Has Made Him Equal, but Man Has Not, 43 BRANDEIS L.J. 511, 536 n.154 (2005) ("[A]t each educational level there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and non-minorities and the percentages of the respective groups that graduate from high school and college . . . . College graduate rates for [1990] reflect 25.2% non-Hispanic whites, 12% black, and 7.3% Hispanic." (citing *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5th Cir. 1996))). See also Linda Seebach & Scripps Howard, *Law-School Racial Disparities*, AM. RENAISSANCE, Nov. 12, 2004, available at [http://www.amren.com/mtnews/archives/2004/11/lawschool\\_racia.php](http://www.amren.com/mtnews/archives/2004/11/lawschool_racia.php) ("[F]or students starting law school in 1991 . . . 19.2 percent of black students failed to complete their studies within six years, compared with 8.2 percent of white students.").

150. Annette B. Almazan, Comment, *Looking at Diversity and Affirmative Action Through the Lens of Pilipino/a American Students' Experience at UCLA and Berkeley*, 9 ASIAN PAC. AM. L.J. 44, 80 & n.187 (2004). See also Kelli Levey, *A&M Regents Approve Race Factor*, THE BRYANT-COLL. STATION EAGLE, May 29, 2004, available at <http://www.theeagle.com/aandmnews/052904regents.php> (quoting Texas A&M Regents Vice Chairman Erle Nye as stating, "As I understand it, Texas A&M University beat all the other state institutions in the completion—that is, graduation—rate for minority students in six years . . . . I think that's part of the package: Not only do you bring students in, but you make sure they're successful once they get here").

151. See David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1867–68 (2005) (stating that the elimination of race-based affirmative action would result in a 32.5% decline in the number of current African-American law students due to their inability to be admitted into a school based on their low LSAT scores and undergraduate GPAs); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV.

encompass more than admission and enrollment into a particular college or university. There are myriad educational opportunities awaiting students once they enroll in an institution. Opportunities such as study abroad programs, internships, and research opportunities are all valuable experiences that contribute to a student's educational development. Students can also parlay such experiences into networking and future employment opportunities. Current affirmative action programs must be expanded to ensure minority students' access to such opportunities.

Because minority students often make up a small percentage of an institution's student body, many may feel isolated and, thus, excluded from the institution's community.<sup>152</sup> Unfortunately, these feelings contribute to decisions by minority students to remove themselves from the community and not to take advantage of educational opportunities available to them. Other minority students do not participate in educationally enriching activities because of their lack of knowledge regarding such opportunities. Because of their lack of involvement in campus groups and activities and their failure to develop relationships with faculty members and administrators, many minority students are not aware of and not encouraged to participate in beneficial programs offered by an institution.

To effectively address these problems, institutions should expand their current affirmative action policies to include measures that make minority students feel welcome and included in the institutions' communities. Institutions should also implement measures that provide minority students access to information regarding educational opportunities. These measures should also encourage minority students to participate in educationally enriching programs. One such measure could be a separate orientation session for minority students to welcome them to an institution and to inform them about educational opportunities available to them. During such sessions, administrators, faculty, and students should encourage entering minority students to become involved in campus activities and groups and to seek and take advantage of educational opportunities such as internships and study abroad programs. Institutions could also provide mentors to minority students throughout their educational careers to assist them in their efforts to take advantage of these and other opportunities. Institutions could also establish multicultural enrichment centers that could serve as a meeting place for minority students as well as a place to receive information regarding job opportunities, internships, etc. The centers could be staffed by administrators or counselors who

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367, 441 (2004) ("Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences."); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 14 (1997) (hypothesizing that abandoning race-based affirmative action would result in "a substantial reduction in the overall number of applicants of color who [would be] offered admission to ABA-approved law schools").

152. See Johnson & Onwuachi-Willig, *supra* note 20, at 15 ("As an African-American woman who recently graduated from Harvard Law School explained, 'The problem is not so much the entry; it's what happens while you're there . . . . [Y]ou're more likely to feel isolated and marginalized, and feel like 'nobody gets my experience.' That, in turn, can undermine a student's confidence." (quoting Katherine S. Mangan, *Does Affirmative Action Hurt Black Law Students?*, CHRON. HIGHER EDUC., Nov. 12, 2004, at 35)).

could assist students in their educational and employment endeavors.

The implementation of such support systems would positively impact minority students' educational experiences by lessening their feelings of isolation. These measures could also have a positive effect on graduation and completion rates since students who feel welcomed and involved in their institutions' communities are less likely to prematurely terminate their educational careers.<sup>153</sup> Expanding contemporary concepts of affirmative action to include programs that inform minority students of educational opportunities and encourage the students to take advantage of them helps to ensure equal access to information and opportunities for minority students. Minority students do not obtain such access by merely being awarded preferences based on their race or ethnicity during the admissions process. Rather, they obtain access through an institution's use of comprehensive programs that seek to fully integrate minority students into the social and academic fabric of that college or university.

In their efforts to provide minority students meaningful access to educational opportunities, institutions of higher education must move beyond traditional race-based affirmative action as sanctioned in *Grutter*. Colleges and universities should "move toward another kind of affirmative action, one in which the emphasis is on opportunity and the goal is educational equity in the broadest possible sense."<sup>154</sup> Instead of focusing on racial preferences that fail to effectively address challenges facing many minority students and fail to provide necessary resources and assistance to minority students beyond the admissions decision, institutions should develop and employ race-neutral alternatives to accomplish their educational goals.

#### IV. CURRENT IMPLEMENTATION OF RACE-NEUTRAL ALTERNATIVES

To most effectively provide educational opportunities and access to disadvantaged minority students, institutions of higher education should immediately begin to develop and use race-neutral approaches. By considering factors other than race and by providing resources and assistance both before and after the admissions decision has been made, race-neutral alternatives stretch beyond traditional race-based affirmative action in their efforts to provide students access to educational opportunities.

In response to court decisions and ballot initiatives prohibiting the use of race-based affirmative action in higher education, colleges and universities in states such as California and Texas began implementing race-neutral admissions programs in their efforts to achieve their diversity and educational goals. Such programs included percentage plans, under which applicants graduating in a certain top percentage of their graduating class are guaranteed admission into

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153. See Paula Lipp, Go to the Head of the Class, <http://www.phdproject.com/phd23.html> (discussing the impact that Hispanic students' feelings of isolation have on their decision to discontinue their participation in doctoral programs).

154. Joel Seguire, *Redefining Affirmative Action*, THE UNIV. RECORD ONLINE, May 23, 2005, available at [http://ipumich.temppublish.com/cgi-bin/pr.cgi?/~urecord/0405/May23\\_05/03.shtml](http://ipumich.temppublish.com/cgi-bin/pr.cgi?/~urecord/0405/May23_05/03.shtml) (quoting Richard Atkinson, President Emeritus of the University of California system).

public colleges and universities, and class-based affirmative action, which affords preferences to applicants based on their socioeconomic status rather than their race or ethnicity. Educational institutions have also employed other race-neutral measures such as increased outreach and recruitment at secondary schools and establishment of new scholarships to help minority students achieve their educational goals. As instructed by the *Grutter* Court, institutions of higher education that currently use race-based admissions programs “can and *should* draw on the most promising aspects of these race-neutral alternatives as they develop.”<sup>155</sup>

#### A. Percentage Plans

Following the termination of race-based affirmative action in their states, California, Texas, and Florida implemented percentage plans in an effort to achieve diverse student bodies, an objective previously accomplished by race-based programs.<sup>156</sup> Although all three plans guarantee admission to a certain top percentage of high school graduating classes, the plans differ in their requirements, criteria, and implementation.<sup>157</sup> For example, while the California plan (Four Percent Plan) guarantees admission to the top 4% of graduates from comprehensive public high schools and accredited private schools, the Florida plan (Talented Twenty Plan) guarantees admission to those students graduating in the top 20% of their public high school class.<sup>158</sup> Students graduating from private schools are not eligible for guaranteed admission under the Talented Twenty Plan.<sup>159</sup> Students graduating in the top 10% of their public or private high school class are eligible for automatic admission under the Texas plan (Ten Percent Plan).<sup>160</sup>

The three percentage plans also differ regarding the institutions to which the applicants are guaranteed admission. Under the Ten Percent Plan, eligible applicants are automatically admitted to the public college or university of their choice.<sup>161</sup> Under the Four Percent and Talented Twenty Plans, however, applicants are automatically admitted to a member institution of their state’s university system institution, “although not necessarily the one of [the applicant’s]

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155. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (emphasis added).

156. In California, race-based affirmative action was terminated by the Board of Regents Resolution SP-1 and confirmed by Proposition 209. The Fifth Circuit’s decision in *Hopwood v. Texas* prohibited the use of race-conscious admissions programs in Texas, Louisiana, and Mississippi. By executive order, Governor Jeb Bush prohibited the consideration of race or ethnicity in admissions decisions in Florida.

157. For an in-depth analysis and comparison of the percentage plans implemented in California, Texas, and Florida, see CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

158. *Id.* at 24, tbl. 1.

159. *Id.*

160. *Id.*

161. *Id.*

choice.”<sup>162</sup> Therefore, under the Ten Percent Plan, students are automatically admitted into the state’s flagship and most competitive colleges and universities, regardless of their Grade Point Average (GPA) or performance on standardized tests such as the ACT and SAT. In California and Florida, eligible students that do not meet a particular campus’s admissions requirements are denied admission and, thus, must attend a less-competitive institution.

By not guaranteeing admission to the state’s most competitive schools, the California and Florida plans may address one of the common criticisms of percentage plans: that such plans may compromise institutions’ high academic standards by admitting students who do not meet the usual objective standards previously required for admission, such as GPA and standardized tests scores.<sup>163</sup> This criticism has particularly been launched against the Ten Percent Plan because it guarantees admission to the state’s most competitive colleges and universities.<sup>164</sup> Opponents of the Ten Percent Plan are concerned that students ranked in the top ten percent at lower quality high schools in lower socioeconomic neighborhoods will be admitted at greater rates than students who attend more academically challenging schools in middle to high socioeconomic neighborhoods but who are not ranked in the top 10% of their graduating class.<sup>165</sup> While this may be true, analysis of the academic performance of students admitted to UT suggests that students admitted under the Ten Percent Plan significantly outperform those not admitted under the plan.<sup>166</sup> According to the Fall 2003 demographic analysis of the implementation and results of the Ten Percent Plan at UT since 1996, “among all racial/ethnic groups, top 10% [students] outperformed non-top 10% students even when the non-top 10% groups had higher SAT scores.”<sup>167</sup> Therefore, it does not appear that a college or university’s academic standards will be compromised

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162. *Id.*

163. *See id.* at 18 (quoting Ward Connerly, leader of the voter referendum to end affirmative action in California as stating, “If you admit the top 4 percent at every high school, while that sounds good politically, the effect is that . . . without a doubt it does amount to a relaxing of statewide standards”).

164. *See* Sylvia Moreno & George Kuempel, *House OKs Measure on Admissions; Diversity Bill Guarantees Entrance for Top Seniors*, THE DALLAS MORNING NEWS, Apr. 16, 1997, at 27A (noting that Rep. Frank Corte (R-San Antonio) believes that the Ten Percent Plan would weaken traditional academic standards used by Texas’s leading colleges and universities).

165. *See* *Premature Celebration*, DAILY TEXAN, Sept. 25, 2000 (“Students from traditionally well-off school districts with high test scores and GPAs are finding admission to the University [of Texas] is no longer a sure thing. And many are watching helplessly as students with lower SAT scores and GPAs are routinely admitted to the University.”). *See also* Starita Smith, *Much Effort Required to Make Percent Laws Work*, KNIGHT-RIDDER/TRIB. NEWS SERVICE, Aug. 25, 2000 (“Some critics are complaining that students at competitive and academically strong high schools who would have gotten spots at elite state universities previously won’t get those invitations any more. Instead, students from weaker high schools might get these spots.”); Moreno & Kuempel, *supra* note 164 (noting Rep. Corte’s concern that students from low-performing schools would gain unfair advantage over better qualified students).

166. *See* LAVERGNE & WALKER, *supra* note 20, at 3 (discussing findings that the average freshman year GPA for students admitted under the Ten Percent Plan was 3.24 compared to 2.90 for students not admitted under the plan).

167. *Id.* at 3, 10–13.

by granting automatic admission to applicants who graduate in the top percentage of their graduating class.

Another criticism that is often made against percentage plans is that they fail to achieve the same level of racial and ethnic diversity previously attained through the use of race-based affirmative action.<sup>168</sup> Recent statistics, however, show that at some colleges and universities, implementation of race-neutral programs such as percentage plans can help to achieve the same diversity levels as those previously attained through the use of racial preferences. In 2003, the percentage of Hispanic students enrolled at UT was 16%, which exceeded pre-*Hopwood* levels of 14%.<sup>169</sup> The percentage of African-American students enrolled at the university was 4%, which equaled pre-*Hopwood* levels.<sup>170</sup>

While prior racial and ethnic diversity levels have not been restored at some flagship universities in California, such as Berkeley and UCLA, California colleges and universities have experienced a steady increase in their diversity levels since implementing race-neutral measures such as the Four Percent Plan. In 1995, prior to the elimination of race-based affirmative action, Berkeley and UCLA enrolled 24.3% and 30.1% of underrepresented minorities, respectively.<sup>171</sup> In 1998, following the termination of race-based affirmative action, the percentages decreased to 11.2% and 14.3%, respectively.<sup>172</sup> In 2002, however, following the implementation of the Four Percent Plan, Berkeley and UCLA experienced an increase in the number of underrepresented minorities enrolled in their schools: 15.6% and 19.3%, respectively.<sup>173</sup> Therefore, race-neutral alternatives such as percentage plans can be effective in helping institutions of higher education achieve their educational and diversity goals.

Despite the ability of percentage plans to positively impact diversity levels without categorizing or selecting students based on their race or ethnicity, many proponents of race-based affirmative action are critical of such race-neutral measures because they believe their effectiveness depends on “continued racial segregation at the secondary school level.”<sup>174</sup> This argument fails to recognize one

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168. See Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 262 (1999) (stating that the Ten Percent Plan did not have a significant impact on the number of minorities enrolled as freshman at Texas’s two flagship institutions in its first year of implementation); William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 187–88 (1999) (stating that in 1999, the Ten Percent Plan in and of itself had only “modest” effects on the achievement of racial and ethnic diversity at UT and that the number of minorities attending the school prior to *Hopwood* was significantly higher than the number of minorities attending UT after the implementation of the plan in 1999).

169. LAVERGNE & WALKER, *supra* note 20, at 3–4.

170. *Id.* See also Torres, *supra* note 24, at 1600 (“Since 1997, the University of Texas has essentially restored pre-*Hopwood* ethnic and racial diversity to the undergraduate college.”).

171. See UNDERGRADUATE ACCESS, *supra* note 86, at 20, 22.

172. *Id.* at 22.

173. *Id.* at 20, 22.

174. *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). See also Brief of Amici Curiae on Behalf of Concerned Black Graduates, *supra* note 30, at 23 (stating that percentage plans “rely on and tacitly condone secondary school segregation”); Brief of the Harvard Black Law Students Association et al. as Amici Curiae Supporting Respondents at 23–

of the most significant advantages of percentage plans: their ability to afford educational opportunities to minority students who would not otherwise have them. Because so many colleges and universities rely on traditional merit standards such as GPA and standardized test scores when making their admissions decisions, institutions that deny admission to students who do not meet traditional criteria miss students who possess the academic potential to succeed.<sup>175</sup> Percentage plans open college and university doors to these students whose academic potential is evidenced by their ability to graduate in the top 4, 10, or 20% of their graduating class. Minority students who previously would have been denied admission because of their lower GPAs or standardized test scores now have more educational opportunities available to them due to the use of percentage plans. Percentage plans have also succeeded in admitting minority students from high schools and school districts that did not traditionally feed into a particular college or university,<sup>176</sup> thereby providing educational opportunities to students who were previously excluded from particular institutions.

As evidenced by the findings in Texas and California,<sup>177</sup> percentage plans can positively affect institutions' racial and ethnic diversity levels; they may not, however, have a great impact in the first or second year of usage. Indeed, this may be true for all race-neutral programs. The development and implementation of effective race-neutral admissions policies is a very involved process that requires a considerable amount of time and effort. The complexity of this process makes it necessary for colleges and universities to begin experimenting with such programs. Such experimentation is crucial to institutions' abilities to continue providing educational opportunities to minority students following the inevitable termination of race-based affirmative action as foreshadowed in *Grutter*.

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24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399207 ("Percentage plans' ability to bring meaningful numbers of minority high school graduates to competitive universities has, perversely, depended on the existence of segregated secondary school systems."); Walsh, *supra* note 35, at 452 ("Percentage plans seek to solve one problem, low black enrollment, by relying on the existence of another problem, residential segregation.").

175. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996) (arguing that reliance on standardized tests denies minority students higher education opportunities and excludes those students "who can actually do the job"); Torres, *supra* note 24, at 1602 (noting that the University of Texas's "traditional admission schemes were causing it to miss students with the academic potential to prosper at the university level"). See also Kidder, *supra* note 146, at 1100 (arguing that "heavy reliance on standardized tests . . . penalize[s] underrepresented minority applicants"); Shelli D. Soto, *Responding to Attacks on Affirmative Action*, 51 DRAKE L. REV. 753, 755 (2003) (discussing UT Law School's decision to give less weight to the LSAT in its admissions decisions following *Hopwood*).

176. See Torres, *supra* note 24, at 1602.

177. For a detailed analysis of Florida's Talented Twenty Plan, see PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf>.

### B. Class-based Affirmative Action

In an effort to achieve their educational and diversity goals following the termination of race-based affirmative action, many institutions of higher education now consider applicants' socioeconomic status in their admissions decisions. In 1997, UT expanded its admissions policies to include personal achievement index factors such as "socio-economic status of family" and "socio-economic status of school attended."<sup>178</sup> Similarly, campuses within the University of California system revised their admissions policies to "expand[] the weight given in their . . . review to such factors as socio-economic status (defined by various combinations of family income, parental occupation, and parental education level). In addition, many added as a factor attendance at a disadvantaged high school."<sup>179</sup>

Proponents of class-based affirmative action argue that such programs avoid the infliction of harms that may result from the use of race-based admissions programs: harms such as promotion of racial inferiority, strengthening of racial stereotypes, heightening of racial hostility, and encouragement of racial resentment.<sup>180</sup> As argued by Kim Forde-Mazrui, "racial classification, by awarding benefits and burdens along racial lines, reinforce[s] beliefs in the inferiority of racial minorities, who are treated as disadvantaged because of their race, and in the superiority of whites, who are treated as too privileged to deserve a compensatory preference."<sup>181</sup> He argues that by awarding preferences to individuals who suffer from "tangible disadvantage[s]" regardless of race, class-based affirmative action avoids this negative consequence.<sup>182</sup>

Indeed, the notion of rewarding applicants by providing them a preference based on their ability to achieve academically while overcoming economic and social disadvantages is the central theme of class-based affirmative action.<sup>183</sup>

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178. LAVERGNE & WALKER, *supra* note 20, at 2.

179. UNDERGRADUATE ACCESS, *supra* note 86, at 9.

180. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612–14 (1970) (O'Connor, J., dissenting) (arguing that race-based classifications and unjustified stereotypes promote racial hostility); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 298 (1978) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."); Banks, *supra* note 35, at 1034 (arguing that a race-blind measure "furthers racial inclusion without formal consideration of race and does so in a manner that may mute the stereotypes and stigma that depress the academic performance of some racial minority students"); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (concluding that racism will not disappear if different treatment based on race is tolerated in the practices of government); *supra* note 69.

181. Forde-Mazrui, *supra* note 39, at 2371.

182. *Id.*

183. Although Resolution SP-1 eliminated race-based affirmative action from the University of California higher education system, it also included the request that

the Academic Senate . . . develop new supplemental admissions criteria giving consideration to students who "despite having suffered disadvantage economically or in terms of their social environment . . . have nonetheless demonstrated sufficient character and determination in overcoming obstacles to warrant confidence that the applicant can pursue a course of study to successful completion."

Inherent in this theme is a holistic, individualized approach to analyzing and making admissions decisions.<sup>184</sup> Both the *Gratz* and *Grutter* decisions urge institutions of higher education to adopt such a comprehensive, individualized review of their applicants.<sup>185</sup> In fact, some scholars argue that adoption of such holistic admissions procedures is required to maintain a constitutional race-based affirmative action program.<sup>186</sup> In upholding the Law School's race-based admissions policies, the *Grutter* Court found that "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."<sup>187</sup> In *Gratz*, however, the Court held that the undergraduate institution's twenty-point policy was unconstitutional because it failed to be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."<sup>188</sup>

While considering an applicant's socioeconomic background and experiences does provide a more comprehensive, individualized review of each applicant, implementing such measures involves complex and occasionally administratively costly tasks such as determining which socioeconomic factors to consider and verifying those factors. Colleges and universities that wish to award preferences to applicants based on their ability to overcome disadvantaged circumstances may choose to consider one or several socioeconomic factors in their admissions decisions. These factors include "family characteristics such as parental income, education, occupation and wealth," as well as neighborhood and school socioeconomic factors.<sup>189</sup> Richard D. Kahlenberg proposes three different methods for measuring socioeconomic disadvantage: (1) the simple method, which measures disadvantage solely by an applicant's family income; (2) the moderately sophisticated method, which considers an applicant's parents' income, education, and occupation, and (3) the most sophisticated method, which measures

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UNDERGRADUATE ACCESS, *supra* note 86, at 7 (citation omitted). See also Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 410–11 (1987) (arguing that preferences should be awarded based on "obstacles that have been unfairly placed in . . . individuals' paths, rather than on the basis of race or gender").

184. See Flagg, *supra* note 94, at 834 (discussing comprehensive admissions policies that consider various "dimensions of human experience" as expressed by factors such as applicants' geographic place of origin, gender, race, personal and professional goals and ambitions, and socioeconomic status).

185. See *Gratz v. Bollinger*, 539 U.S. 244, 269–75 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003).

186. See *Bloom*, *supra* note 78, at 495 (concluding that "race may only be used as a factor in admissions pursuant to an individualized, competitive process in which all relevant diversifying factors are taken into account").

187. *Grutter*, 539 U.S. at 337.

188. *Gratz*, 539 U.S. at 271 (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 317) (1978). See also Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 48 (1992) ("Affirmative action that takes into account individual circumstances such as racial discrimination, economic hardship, or family disintegration, which the applicant has worked hard to overcome, asks the right question—a question about the individual. This brand of affirmative action is a far cry from the program that simply awards points on the basis of race.").

189. *Banks*, *supra* note 35, at 1061–64.

disadvantage by an applicant's parents' income, education, occupation, and net worth and by an applicant's quality of secondary education, neighborhood influences, and family structure.<sup>190</sup> Some proponents of class-based affirmative action advocate a broad formulation of socioeconomic status, such as the most sophisticated method, because it "account[s] for environmental disparities that might influence early academic achievement."<sup>191</sup> Adopting broad measures of economic disadvantage help to address critics' concerns that class-based affirmative action fails to capture the extent of minority applicants' disadvantage.<sup>192</sup>

Deborah C. Malamud argues that class-based programs designed to benefit minority students will fail to achieve adequate levels of racial diversity because such programs fail to account for differences in wealth, social status, and social advantage that exist between African-American and White individuals.<sup>193</sup> She argues that "middle-class African-Americans have markedly less wealth than whites of the same income level."<sup>194</sup> Therefore, in order for class-based policies to effectively impact racial and ethnic diversity levels, their socioeconomic and disadvantage measures must take into account the disparity in wealth and social status that exists between African-American and White individuals. Some scholars are beginning to experiment with this concept by proposing class-based admissions programs that consider "family wealth and the socioeconomic characteristics of one's neighborhood and school" as socioeconomic factors.<sup>195</sup>

Although broad formulations of socioeconomic status may be preferred, they may also be the most costly to implement.<sup>196</sup> To ensure that applicants are truthful in their reporting of personal information, institutions using class-based affirmative action may need to implement administrative procedures such as interviewing applicants and their parents or conducting home and/or school visits to observe applicants' family, neighborhood, and school circumstances. Obviously, the

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190. Richard D. Kahlenberg, *Class-based Affirmative Action*, 84 CAL. L. REV. 1037, 1074–85 (1996). See also Schimmel, *supra* note 105, at 413 (discussing the use of "a wide variety of socioeconomic and 'disadvantage' factors such as a family's net worth, whether the student came from an under-resourced school, or a high crime or poor neighborhood, parent's income, occupation, and whether they graduated from high school, linguistic background, overcoming adversity, work experience, and so on" to develop race-neutral admissions approaches).

191. Banks, *supra* note 35, at 1061–62.

192. See Roithmayr, *supra* note 37, at 11–12 (discussing class-based affirmative action's failure to account for economic differences and disadvantages resulting from racial discrimination).

193. See Deborah C. Malamud, *Assessing Class-based Affirmative Action*, 47 J. LEGAL EDUC. 452, 464 (1997) [hereinafter Malamud, *Assessing Class-based Affirmative Action*]; Deborah C. Malamud, *Class-based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1893 (1996).

194. Malamud, *Assessing Class-based Affirmative Action*, *supra* note 193, at 464.

195. Banks, *supra* note 35, at 1066–70 (concluding that a "broad measure of socioeconomic status" that includes family wealth and the socioeconomic characteristics of one's neighborhood and school "would significantly alter the relative rankings of students from different racial groups because it would more fully capture the resource disparities associated with race than would an income-based conception of socioeconomic status").

196. Kahlenberg, *supra* note 190, at 1083.

implementation of such procedures would require time, personnel, and resources. These costs, however, are outweighed by the benefits of providing educational opportunities to minority students who have achieved academically though faced with tremendous challenges and obstacles.

A common criticism launched against class-based affirmative action and other race-neutral policies is that such programs are unable to achieve significant levels of racial and ethnic diversity at institutions of higher education.<sup>197</sup> Opponents of class-based affirmative action argue that because the number of poor White people surpasses the number of poor African-American and Hispanic people in this country, admissions preferences based solely on family income will not significantly enhance racial and ethnic diversity levels.<sup>198</sup> Although class-based affirmative action has yet to produce the same levels of racial and ethnic diversity as race-based programs, college and university consideration of applicants' socioeconomic background has helped to increase their diversity levels. At the three University of California law schools, class-based affirmative action has helped to increase the level of Mexican-American enrollment from 7.2% in 1997 to 11.9% in 2003.<sup>199</sup> The institutions experienced similar increases in their African-American enrollment: from 1.9% in 1997 to 4.7% in 2003.<sup>200</sup> In 1997, the University of California, Berkeley School of Law enrolled only one African-American and fourteen Hispanic students.<sup>201</sup> By 2003, those numbers had increased to sixteen and thirty-eight, respectively.<sup>202</sup> The number of Hispanic students surpassed the number enrolled prior to the termination of race-based affirmative action in 1997.<sup>203</sup> Thus, the use of race-neutral admissions programs such as class-based affirmative action can be effective in helping colleges and universities provide educational opportunities for minority students.

The development and implementation of effective race-neutral policies such as class-based affirmative action require the consideration of several factors and issues. Only through experimentation with such policies can colleges and universities develop effective programs that are successful in helping them achieve their educational and diversity goals.<sup>204</sup>

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197. See Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-based Allocation: Administering Race-conscious Financial Aid After Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237, 244 (2005) (arguing that "most studies relying on socioeconomic indicators alone have proved ineffectual in maintaining previous levels of racial diversity, and largely tend to benefit low socioeconomic whites instead of racial minorities"); Wightman, *supra* note 151, at 40–45 (concluding that an institution's use of socioeconomic status as an admissions factor independent of race would not maintain racial diversity in higher education).

198. See Malamud, *Assessing Class-based Affirmative Action*, *supra* note 193, at 465.

199. APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS, *supra* note 111.

200. *Id.*

201. *Id.*

202. *Id.*

203. See *Id.* See also Tanya Schevitz, *Affirmative Action Upheld, but High Court Sets Limits*, S.F. CHRON., June 24, 2003, at A1.

204. See Schimmel, *supra* note 105, at 412–13 (noting that institutions of higher education should consider the possibility of developing and testing various new and creative race-neutral models that "give[] different weights to a wide variety of socioeconomic and 'disadvantage'").

### C. Outreach, Recruitment, and Financial Aid Measures

Although race-neutral programs such as percentage plans and class-based affirmative action can be effective in providing minority students access to educational opportunities, they suffer from the same flaw as traditional race-based affirmative action: both measures narrowly focus on the admissions decision itself rather than on the provision of resources and assistance to minority students both before and after the admissions decision has been made. While such narrow concepts of affirmative action may open the door for minority students, they do nothing to encourage them to walk through it or to support and assist them once they have. Therefore, perhaps the most effective race-neutral measures that have been implemented at institutions of higher education following the termination of race-based affirmative action are those that concern community outreach and recruitment. Such measures encourage minority students to seek and take advantage of educational opportunities available to them. Institutions have also developed new financial aid programs to help minority students take advantage of educational opportunities. As recognized by Gerald Torres, “[a]ctivities like outreach, recruitment, and financial aid are critical to a university in making a diverse student body possible.”<sup>205</sup> Indeed, many of the improvements in diversity levels at colleges and universities in California and Texas are due to the implementation of innovative outreach, recruitment, and financial aid measures.<sup>206</sup>

One such measure is the Law School Preparation Institute (Institute) implemented at the University of Texas Law School. The Institute seeks to “better prepare students, especially students of color, for the rigors of law school, for the application process, and for the legal profession.”<sup>207</sup> To accomplish this goal, the Institute provides intensive preparation for sophomores attending the University of Texas at El Paso (UTEP), which has a population of 80% Hispanic students, during the summers before their junior and senior years.<sup>208</sup> Participants receive instruction on various topics such as analytical thinking, logical reasoning, writing skills, and LSAT preparation.<sup>209</sup> They also receive guidance throughout their law school application process.<sup>210</sup> According to Shelli D. Soto, one of the Institute’s

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factors . . . . It is worth considering whether such new, creative race-neutral approaches might succeed where such attempts have not succeeded in the past”).

205. Torres, *supra* note 24, at 1599.

206. See News Release, The University of Texas at Austin, Office of Public Affairs, The University of Texas at Austin’s Experience with the “Top 10 Percent” Law (Jan. 16, 2003), available at [http://www.utexas.edu/opa/news/03newsreleases/nr\\_200301/nr\\_toptenpercent030116.html](http://www.utexas.edu/opa/news/03newsreleases/nr_200301/nr_toptenpercent030116.html) (“The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students.”). See also BRIAN BUCKS, AFFIRMATIVE ACCESS VERSUS AFFIRMATIVE ACTION: HOW HAVE TEXAS’ RACE-BLIND POLICIES AFFECTED COLLEGE OUTCOMES? 30 (2003), available at <http://www.ssc.wisc.edu/~bbucks/files/october31.pdf> (concluding that “revised recruiting and [financial] aid policies may in fact offer a means of partially offsetting losses in campus diversity and of ensuring minorities’ academic success”).

207. Soto, *supra* note 175, at 753, 756–58.

208. *Id.* at 757–58.

209. *Id.*

210. *Id.*

developers, the outreach program “has been incredibly successful.”<sup>211</sup> Since the Institute began, there has been more than a 50% increase in the number of UTEP students who have been offered admission to top fifty law schools.<sup>212</sup>

Other law schools have also implemented similar preparation programs that are designed to assist undergraduate students who are considering applying to law school.<sup>213</sup> The creation of outreach centers in select cities is another measure that colleges and universities are implementing in an effort to provide academic preparation for middle and high school students.<sup>214</sup> These programs succeed not only in making students aware of the importance of furthering their education but also in encouraging them to do so. Moreover, outreach programs can also increase the likelihood that minority students will be admitted into undergraduate and graduate programs by informing them of the processes by which to apply and by preparing them for admissions tests, including the SAT, GRE, and LSAT.

Simply increasing the number of minority students who apply and are admitted to undergraduate and graduate programs, however, does not ensure that they will actually enroll in a particular institution. As indicated by the findings of “a post-*Hopwood* study conducted by the Race and Ethnic Studies Institute at Texas A&M[,] . . . minority students were not enrolling at the university primarily because of lack of personal attention and inadequate financial aid packages.”<sup>215</sup> Thus, institutions of higher education must implement innovative recruitment and financial aid measures to achieve their educational and diversity goals.

Effective recruitment programs are critical to the achievement of racial and ethnic diversity in undergraduate and graduate programs. In their efforts to increase minority applications and enrollment, colleges and universities have begun implementing more assertive recruitment measures. For example, college and university presidents, recruiters, and counselors are making routine trips to underrepresented schools that have a high minority population to foster relationships and to encourage students to apply for admission;<sup>216</sup> institutions are opening admissions offices in cities heavily populated by minority citizens;<sup>217</sup> and colleges and universities are conducting application workshops to assist minority

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211. *Id.* at 758 (reporting that since the Institute’s inaugural summer of 1998, “[m]ore than 90 law schools have offered admission to one or more of [the 144 students who have completed the program]”).

212. *Id.*

213. For discussion of the King Hall Outreach Program implemented at the UC-Davis School of Law, see the outreach website, <http://www.law.ucdavis.edu/admissions/outreach.html> (last visited Nov. 20, 2005).

214. HORN & FLORES, *supra* note 157, at 55 (discussing collaborative efforts by UT and Texas A&M to establish outreach centers in Austin, Corpus Christi, Dallas, Houston, San Antonio, and the Rio Grande Valley).

215. *Id.* at 53–54.

216. *Id.* at 52–53.

217. Mary Ann Roser, *Minority Applicants Rise at UT: Overall Numbers are Up at A&M and Texas—Officials See It as a Trend*, AUSTIN AM.N-STATESMAN, Feb. 23, 2000, at B1. See also HORN & FLORES, *supra* note 157, at 55 (discussing UT’s decision to open regional admissions offices in Houston and Dallas that focus on recruitment efforts and distribution of enrollment information to students).

students with the application process.<sup>218</sup> Aggressive recruiting has been invaluable to institutions in their efforts to establish and maintain student bodies that are racially and ethnically diverse.

Other admissions policies that have enhanced educational opportunities for minority students are newly created race-based and race-neutral scholarships. Following the Fifth Circuit's decision in *Hopwood*, colleges and universities in Texas—including UT and Texas A&M—terminated all race-based admissions programs, including scholarships. At UT alone, the decision ended the expenditure of \$5.6 million annually for minority grants and scholarships.<sup>219</sup> After suffering a steep decline in minority enrollment, those Texas institutions began to offer new scholarships such as the Longhorn Opportunity Scholarship (LOS) and the Century Scholars Program (CSP) that target students who are from high schools that traditionally have been underrepresented at Texas undergraduate programs and who graduate in the top 10% of their classes.<sup>220</sup> The LOS is awarded to low-income students who graduate from high schools in low-income areas; thus, traditionally it has benefited African-American and Hispanic applicants.<sup>221</sup> Although the CSP is available to students from all income levels, it targets students who graduate from high schools with large minority populations.<sup>222</sup>

Some colleges and universities have also created new scholarships that reinforce class-based affirmative action by targeting students who have excelled academically while overcoming socioeconomic disadvantages. For example, UT has established the Presidential Achievement Scholars Program, which was intended to “identify students from economically disadvantaged backgrounds who may have attended an academically inferior high school, but found a way to excel academically at much higher levels than their peers within the same high school and socioeconomic circumstances.”<sup>223</sup> Berkeley also awards scholarships to students “who, despite socioeconomic hardship, exhibit exceptional academic potential and leadership promise.”<sup>224</sup>

Private organizations and individuals, as well as public colleges and universities, recognize the positive impact adequate financial aid can have on enrollment of minority students. Following the termination of minority scholarships at UT, the Texas Exes Student Association (Texas Exes), the UT

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218. Holley & Spencer, *supra* note 168, at 276–77.

219. See Christy Hoppe, *UT Outlines New Steps, Broader Criteria for Attracting Minorities*, THE DALLAS MORNING NEWS, Nov. 14, 1997, at 24A.

220. See HORN & FLORES, *supra* note 157, at 53–54. See also Jodi S. Cohen, *Answer to Affirmative Action Falts in Texas*, THE DETROIT NEWS, Jan. 24, 2003, at 1A, available at <http://www.detnews.com/2003/schools/0301/24/a01-68096.htm> (discussing the LOS award of \$4000 a year to cover recipients' tuition and fees).

221. See HORN & FLORES, *supra* note 157, at 53.

222. See *id.* at 54.

223. GARY R. HANSON & LAWRENCE BURT, RESPONDING TO *HOPWOOD*: USING POLICY ANALYSIS RESEARCH TO RE-DESIGN SCHOLARSHIP CRITERIA 4 (1999), <http://www.utexas.edu/student/research/reports/Hopwood/Hopwood.html>.

224. See HORN & FLORES, *supra* note 157, at 56 (quoting The University of California, Berkeley, The Incentive Awards Program, <http://students.berkeley.edu/incentive> (last visited Nov. 20, 2005)).

alumni group, succeeded in raising private funds to be used for freshman minority scholarships.<sup>225</sup> In just one year, the Texas Exes raised over \$1 million in private donations.<sup>226</sup> These private funds allowed UT to award full-tuition, four-year scholarships to minority students who graduated in the top 10% of their high school classes.<sup>227</sup> Financial aid is critical to ensuring that minority students have access to educational opportunities. By developing and implementing race-neutral admissions programs that include outreach, recruitment, and financial aid measures, institutions of higher education will be better prepared to provide educational opportunities to minority students following the termination of race-based affirmative action.

#### V. SUGGESTIONS AND RECOMMENDATIONS FOR IMPLEMENTING RACE-NEUTRAL APPROACHES

Due to the tenuous legal and legislative environment that continues to exist regarding race-based affirmative action, institutions of higher education should immediately begin developing and implementing race-neutral programs.<sup>228</sup> As a result, institutions will be able to actively participate in the expansion of affirmative action concepts beyond the admissions decision. Without efforts to provide assistance and resources to minority students both before and after the admissions decision has been made, colleges and universities will continue to employ substandard measures in their attempts to provide meaningful access and educational opportunities for minority students.

As experienced by colleges and universities in California, Texas, and Florida, implementation of one race-neutral program, such as a percentage plan, will not succeed in effectively providing educational opportunities for minority students unless the program is accompanied by other race-neutral measures such as outreach, recruitment, and financial aid. Institutions should also develop programs to help ensure that minority students continue to have access to educational opportunities following enrollment.

Colleges and universities that currently use race-based programs should examine race-neutral alternatives implemented at other institutions and attempt to include effective aspects of those measures in their own admissions policies. Percentage plans, for instance, have been effective in expanding and diversifying the applicant pool by expanding the number and character of high schools from which applicants are graduating.<sup>229</sup> Undergraduate institutions that do not use

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225. Amanda Smith, *Hopwood Means Loose Ends for A&M, UT*, THE BATTALION, April 28, 1998.

226. Linda K. Wertheimer, *Program to Give Helping Hand to College-bound: Top Seniors at Lower-income High Schools are Targeted*, THE DALLAS MORNING NEWS, Dec. 12, 1997, at 35A.

227. *Id.*

228. See BUCKS, *supra* note 206 (“[A]dministrators can control [race-neutral] policies better than they can their legal or legislative environment, so that understanding their effect is crucial to formulating effective post-affirmative action policies in higher education.”).

229. See Torres, *supra* note 24, at 1607–08 (discussing the effectiveness of percent plans implemented in California, Florida, and Texas in enhancing geographic diversity at public

percentage plans can simulate this effect by establishing recruitment and outreach programs at high schools from which their current applicants do not traditionally graduate. Graduate programs can implement similar programs at undergraduate institutions. Graduate institutions that are located in the same city or state as a historically Black college or university (HBCU) should actively recruit at the HBCU to encourage minority students to apply to their programs.<sup>230</sup> Graduate institutions could also establish preparatory and advisory programs at HBCUs to help educate and encourage minority students regarding graduate programs. Preparatory programs could be as involved as the Institute implemented by the UT School of Law,<sup>231</sup> or they could simply involve the establishment of mentor relationships with undergraduate students who are interested in applying to particular graduate programs.

Partnerships and collaborations between educational institutions can also have positive effects on the academic achievement of minority students. Outreach programs linking high schools with undergraduate institutions, undergraduate institutions with community colleges, and undergraduate institutions with graduate institutions establish an educational system in which educational institutions work together to further the goal of preparing students, including minority and economically disadvantaged students, for the successful pursuit of educational opportunities.<sup>232</sup> To aid in this effort, undergraduate as well as graduate institutions could conduct workshops and seminars at which students are provided information, guidance, and advice regarding educational opportunities. Such programs may encourage students to pursue such opportunities, despite any socioeconomic disadvantages they may have to overcome to do so.

In their efforts to provide minority students meaningful access to educational opportunities, institutions of higher education should also consider amending their admissions criteria to deemphasize standardized test scores and to give more weight to factors such as socioeconomic disadvantage, leadership skills, and work experience.<sup>233</sup> As instructed by the Supreme Court in *Grutter*, colleges and

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colleges and universities by “broadening the feeder school number and geographic range”).

230. See Crump, *supra* note 32, at 531 (discussing the University of Houston Law Center’s efforts to increase its level of racial diversity by recruiting at Prairie View A&M, “a historically black college”). As Professor Crump notes in his article, “Emory could partner in this manner with Spellman, Georgetown with Howard.” *Id.* Other partnerships could be formed between Wake Forest University School of Law and HBCUs such as North Carolina A&T State University and Winston-Salem State University.

231. See *supra* notes 207–12 and accompanying text.

232. See Maurice Dyson, *In Search of the Talented Tenth: Diversity, Affirmative Access, and University-driven Reform*, 6 HARV. LATINO L. REV. 41, 44 (2003) (discussing the need for colleges and universities to partner with secondary and elementary schools to “ensure that the academic community is more diverse”). See also News Release, The University of Texas at Austin, Office of Public Affairs, Community College Leadership Program Receives \$1.8 Million to Help Underserved Students (July 8, 2004), available at [http://www.utexas.edu/opa/news/04newsreleases/nr\\_200407/nr\\_education040708.html](http://www.utexas.edu/opa/news/04newsreleases/nr_200407/nr_education040708.html) (discussing a \$1.8 million grant that was awarded to the Community College Leadership Program at UT-Austin to help raise success rates for low-income students and students of color attending community colleges).

233. See Schimmel, *supra* note 105, at 412–13 (proposing a race-neutral point system that

universities should begin to take a more holistic approach to reviewing applications.<sup>234</sup> Such an approach allows for the use of admissions preferences based on socioeconomic disadvantages that some students must overcome to achieve academically. Institutions could award preferences to students based on socioeconomic and disadvantage factors such as a student's "family's net worth, whether the student came from an under-resourced school, or a high crime or poor neighborhood, parent's income, occupation, and whether they graduated from high school, linguistic background, overcoming adversity, work experience and so on."<sup>235</sup> As previously discussed, class-based affirmative action has been effective in helping institutions achieve their educational and diversity goals;<sup>236</sup> therefore, it can serve as an effective tool for providing educational opportunities to minority students.

Institutions could also implement a "direct measures" program such as that proposed by Daria Roithmayr. Under the Roithmayr program, institutions would grant preferences to students whose applications demonstrate that they meet "any of three criteria: (1) that [they] had suffered from the effects of racial discrimination; (2) that [they] likely would contribute an important and under-represented viewpoint to the classroom on issues of social and racial justice; and/or (3) that [they] likely would provide resources to underserved communities."<sup>237</sup> Employing a direct measures program would enable institutions to provide educational opportunities to minority students without categorizing or selecting them based on their race or ethnicity.<sup>238</sup>

Another race-neutral alternative that institutions should implement is modification of their use of standardized test scores. Because minority students traditionally score lower on standardized tests than do their White counterparts,<sup>239</sup> deemphasizing test scores and expanding admissions policies to include other factors that measure merit would provide minority students greater access to institutions of higher education. As previously discussed, heavy reliance on traditional standards of merit—including standardized test scores—may result in the denial of admission to qualified minority students.<sup>240</sup> To prevent such

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gives different weights to various socioeconomic and disadvantage factors); Soto, *supra* note 175, at 755 (discussing UT Law School's decisions to give less weight to the LSAT and to expand its admissions factors); Torres, *supra* note 24, at 1604, 1606 (recognizing need to expand admissions policies in light of faults associated with standardized test scores as predictors of undergraduate performance).

234. See *supra* notes 185–88 and accompanying text.

235. Schimmel, *supra* note 105, at 413.

236. See *supra* notes 199–203 and accompanying text.

237. Roithmayr, *supra* note 37, at 6.

238. See *id.* at 30 (noting that a "direct measures" approach could serve as a "constitutional race-neutral means to remedy the effects of discrimination").

239. See Levey, *supra* note 35; Walsh, *supra* note 35; *supra* note 146.

240. See *supra* note 175 and accompanying text. See also Roithmayr, *supra* note 37, at 4–5 ("[A]n increasing number of schools are abandoning or modifying the use of standardized tests, largely because such tests disproportionately exclude applicants of color. In a move widely noted by the educational community, the president of the University of California system recently called for the elimination of the Scholastic Aptitude Test in the admissions process. Likewise, the

outcomes, institutions should reconsider their means of determining “merit.” Colleges and universities should employ other factors, including work ethic and leadership skills as evidenced by their high school records,<sup>241</sup> work experience, extracurricular activities, and teacher recommendations to ascertain those students who deserve admission.

Institutions should also develop race-neutral financial aid programs to encourage admitted minority students to actually enroll in undergraduate and graduate programs. Scholarships and grants could be awarded to students based on their ability to achieve academically while overcoming socioeconomic disadvantages.<sup>242</sup> Institutions could also award scholarships to students graduating from disadvantaged high schools and school districts.<sup>243</sup> Colleges and universities could also establish scholarship programs targeting graduates of community colleges to encourage them to continue their educational pursuits. On the graduate level, graduate programs could partner with HBCUs to award scholarships to students graduating at the top of their class.

Finally, institutions of higher education should implement programs to assist minority students once they have matriculated and begun their undergraduate or graduate studies. As previously discussed, educational opportunities for minority students should not end once the admissions decision has been made.<sup>244</sup> Institutions should provide support systems such as mentoring programs, multicultural enrichment centers, and guidance counselors to ensure minority students continue to have access to educational opportunities following their enrollment. Implementation of these and other race-neutral alternatives is imperative to effectively providing meaningful educational opportunities for minority students.

#### CONCLUSION

As evidenced by racial disparities that continue to exist between Whites and minorities regarding educational achievement,<sup>245</sup> reliance on traditional, race-based affirmative action will not win the war to most effectively provide minority students access to educational opportunities. While racial preferences succeed in providing minority students admission to educational institutions, their usefulness ends there. Traditional race-based affirmative action fails to address challenges that many minority students must face and overcome to achieve academically. It also fails to provide resources, assistance, and guidance to help minority students overcome these challenges. To remedy these failures, institutions of higher

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outgoing chancellor of the Florida university system has urged schools to place less emphasis on standardized test scores. Indeed, several hundred colleges and universities already have abandoned the standardized test score as part of their admissions criteria.” (footnotes omitted).

241. See Torres, *supra* note 24, at 1604 (stating that “[h]igh school performance is a better indicator of college performance than are standardized test scores”).

242. See *supra* notes 223–24 and accompanying text.

243. See Torres, *supra* note 24, at 1604–05 (discussing scholarship program targeting underprivileged high schools and school districts rather than individual students).

244. See *supra* Part III.B.

245. See *supra* notes 35, 125 and accompanying text.

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education should expand contemporary concepts of affirmative action to include the provision of resources both before and after the admissions decision has been made.

In light of the inevitable termination of race-based affirmative action,<sup>246</sup> institutions should include the development and implementation of race-neutral alternatives in this expansion. Use of broad race-neutral programs that encompass outreach, expanded admissions criteria, financial aid, and support systems is essential to most effectively providing minority students with meaningful access to educational opportunities.

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246. See *supra* Part II.B.



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# THE RIGHT OF EDUCATIONAL INSTITUTIONS TO WITHHOLD OR REVOKE ACADEMIC DEGREES

MARY ANN CONNELL\*  
DONNA GURLEY\*\*

## I. INTRODUCTION

One of the most important functions of an educational institution is the awarding of an academic degree.<sup>1</sup> An academic degree is an institution's "certification to the world at large of the recipient's educational achievement and the fulfillment of the institution's standards."<sup>2</sup> Employers rely upon the holding of a degree in making employment decisions. The prestige of the institution may vicariously extend to the graduate.<sup>3</sup> Finally, a degree may be a prerequisite for licensing in the professions.<sup>4</sup> Because of the importance of a degree, educational institutions have the right and responsibility to set standards for its award.<sup>5</sup> Standards may include not only the completion of course work, but also compliance with conduct standards and fulfillment of financial obligations to the

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1. The term "degree" is used when discussing an academic rank conferred by a college or university after examination or completion of a course of study; the term "diploma" is used when discussing a certificate awarded by a secondary educational institution. See THE NEW OXFORD AMERICAN DICTIONARY 449, 482 (2001).

2. *Waliga v. Bd. of Trustees of Kent State Univ.*, 488 N.E.2d 850, 852 (Ohio 1986).

3. See generally 3 JAMES A. RAPP, EDUCATION LAW § 8.06[1] (2005).

4. *Id.*

5. See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) ("[T]he 'four essential freedoms' of a university [are] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.") (alteration in original) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres *et al.*, eds., Johannesburg: Witwatersrand Univ. Press 1957) (the statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)).

institution.<sup>6</sup>

Whether a student conforms to standards required for a degree is a determination to be made by the educational institution.<sup>7</sup> What happens, however, when a student has completed all course and academic requirements but violates school policies or rules by engaging in acts of misconduct or academic dishonesty before the degree is awarded? Can the school refuse to award the degree? What if, after conferring a degree, the institution discovers that the student received credit for courses he or she had not taken or engaged in some other act of academic dishonesty or non-academic misconduct? Can the institution revoke a degree already conferred? If so, what due process rights does a student at a public institution hold? What protections exist for a student at a private institution? Is there a difference in procedural requirements for withholding a degree as opposed to revoking one already granted?

This article examines whether public and private institutions of higher education have the authority to withhold academic degrees already earned or to revoke academic degrees already conferred for acts of academic dishonesty or for student misconduct. It also discusses the procedural safeguards required to ensure fairness in withholding or revocation procedures and analyzes the degree of deference given to educational institutions in making such decisions.

## II. WITHHOLDING OR REVOKING A DEGREE FOR FAILURE TO MEET ACADEMIC REQUIREMENTS OR FOR ACTS OF ACADEMIC DISHONESTY.

Although there has been relatively little judicial attention paid to the matter,<sup>8</sup> both public and private institutions generally have authority to withhold and revoke improperly awarded degrees.<sup>9</sup> This authority exists whenever “good cause such as fraud, deceit, or error is shown.”<sup>10</sup>

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6. See generally 3 RAPP, *supra* note 3, § 8.06[6][d][i].

7. See *Susan M. v. New York Law Sch.*, 556 N.E.2d 1104, 1107 (N.Y. 1990).

[Academic] determinations play a legitimate and important role in the academic setting since it is by determining that a student's academic performance satisfies the standards set by the institution and ultimately, by conferring a diploma upon a student who satisfies the institution's course of study, that the institution, in effect, certifies to society that the student possesses the knowledge and skills required by the chosen discipline.

*Id.* at 1106-07.

8. The Sixth Circuit Court of Appeals noted the scarcity of case law on this subject in *Crook v. Baker*, 813 F.2d 88, 91 (6th Cir. 1987), as did Ralph D. Mawdsley, *Judicial Deference: A Doctrine Misapplied to Degree Revocations*, 71 EDUC. L. REP. 1043, 1044 (1992).

9. See generally WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 474-77 (3d ed. 1995). Cases and authorities on this point are collected in Lori J. Henkel, Annotation, *College's Power to Revoke Degree*, 57 A.L.R. 4th 1243 (1987 & Supp. 2004).

10. *Waliga v. Bd. of Trustees of Kent State Univ.*, 488 N.E.2d 850, 852 (Ohio 1986). See also *Crook*, 813 F.2d at 93.

### A. Withholding a Degree

A student who enrolls in an institution of higher learning, pays all fees, completes all academic requirements in a prescribed course of study, and abides by the institution's rules and regulations is generally entitled to a degree.<sup>11</sup> Courts grant substantial discretion and significant deference to faculties and governing bodies of colleges and universities in evaluating students and in determining whether a student has performed all the conditions prescribed by the institution.<sup>12</sup> There are occasions, however, when a student completes all academic requirements, but the college or university refuses to grant a degree.

Academic institutions generally withhold a degree for one of three reasons: first, for academic problems, such as failing grades or academic dishonesty; second, for non-academic problems, such as failure to pay tuition or fees; and, third, for social misconduct of which the college or university disapproves.<sup>13</sup>

Courts have upheld the right of institutions in both the public and private sectors to withhold academic degrees because students failed to meet academic requirements or engaged in acts of academic dishonesty. For example, the Superior Court of New Jersey in *Napolitano v. Trustees of Princeton University* addressed the withholding of a student's degree for one year because of plagiarism.<sup>14</sup> The court found the charge of plagiarism valid and the withholding of the degree an appropriate punishment for the act of academic dishonesty. The court interpreted Princeton's regulation allowing suspension of a student under these circumstances to include the power to withhold degrees and held that "a withheld degree . . . is a less severe variation of suspension."<sup>15</sup> The court noted that the sanction was imposed only upon second semester seniors. This sanction permits the student to finish his or her academic requirements and wait the prescribed period to receive the degree, rather than requiring the student to lose tuition and repeat the last semester during the following academic year. In addition, the court acknowledged "the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student."<sup>16</sup>

Deferring to the institution's discretion in awarding or withholding an academic

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11. See, e.g., *Johnson v. Lincoln Christian Coll.*, 501 N.E.2d 1380, 1384 (Ill. App. Ct. 1986); *Anthony v. Syracuse Univ.*, 224 A.D. 487, 490 (N.Y. App. Div. 1928); 14A C.J.S. *Colleges and Universities* § 41 (1991).

12. See *Bruner v. Petersen*, 944 P.2d 43, 48 (Alaska 1997) ("In matters of academic merit, curriculum, and advancement, courts afford university faculty and administrators substantial discretion."). See generally 15A AM. JUR. 2D *Colleges and Universities* § 29 (2003).

13. William H. Sullivan, *The College or University Power to Withhold Diplomas*, 15 J.C. & U.L. 335, 337 (1989) (discussing whether colleges and universities can withhold diplomas after students have met all graduation requirements); 14A C.J.S. *Colleges and Universities*, § 41 (2003). For cases in which students have sought a writ of mandamus to force an institution to confer a degree, see Lori J. Henkel, Annotation, *Student's Right to Compel School Officials to Issue Degree, Diploma, or the Like*, 11 A.L.R. 4th 1182 (1982 & Supp. 2004).

14. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

15. *Id.* at 265. The court noted that, excluding plaintiff's case, Princeton had withheld 20 degrees for disciplinary reasons since the 1972-73 academic year. *Id.*

16. *Id.* at 273.

degree, the court in *Cieboter v. O'Connell* refused to force a public university to consider a dissertation where the student in question had not fulfilled the graduate school's requirements.<sup>17</sup> The Florida court, like many other courts, held that the University of Florida did not have to consider the dissertation because "[t]hese are determinations which fall peculiarly within the competence of the University officials charged with the responsibility of granting doctorate degrees only to students whom they find to be fully qualified in all respects and for whose competence the University must vouch."<sup>18</sup>

In *Mahavongsanan v. Hall*, the plaintiff had completed course work for a graduate degree at Georgia State University, but had twice failed the comprehensive examination required of all degree candidates.<sup>19</sup> Georgia State offered the plaintiff the opportunity to take extra course work in lieu of the comprehensive examination, but the plaintiff declined and instead filed a lawsuit. The lower court enjoined Georgia State from withholding the degree.<sup>20</sup>

On appeal, the Fifth Circuit noted that the case involved a purely academic decision and held that, although the court had been in the vanguard of the legal development of due process protection for students ever since *Dixon v. Alabama State Board of Education* in cases involving *misconduct*,<sup>21</sup> such due process concerns are not triggered when a school applies purely *academic* standards.<sup>22</sup>

Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarships. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals.<sup>23</sup>

The Fifth Circuit found Georgia State's decision to withhold the degree to be "a reasonable academic regulation within the expertise of the university's faculty," and reversed the decision of the lower court.<sup>24</sup>

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17. 236 So. 2d 470 (Fla. Dist. Ct. App. 1970).

18. *Id.* at 473.

19. 529 F.2d 448 (5th Cir. 1976).

20. *Id.* at 449.

21. 294 F.2d 150 (5th Cir. 1961).

22. *Mahavongsanan*, 529 F.2d at 449 (emphasis added).

23. *Id.* at 450.

24. *Id.* Interestingly, the plaintiff had argued that Georgia State's appeal was moot as the plaintiff had already received the previously withheld degree upon the order of the lower court. The Fifth Circuit disagreed, stating that the plaintiff's possession of the degree was an "ongoing stigma of erosion of their academic certification process," and that the degree would be revoked upon a finding for the university. *Id.* at 449.

In *Bilut v. Northwestern University*, 645 N.E.2d 536, 541 (Ill. App. Ct. 1994), a Ph.D. candidate brought an action for breach of contract when the university, based on her failure to successfully complete a dissertation, refused to grant her degree. The court found for Northwestern, reasoning that the plaintiff had "failed to meet her burden of proving that [the University] was arbitrary and capricious in determining that her prospectus was unacceptable or that the faculty members who reviewed her prospectus based their conclusions on anything other than academic grounds." *Id.* at 538.

### B. Revoking a Degree<sup>25</sup>

The issue of whether an academic institution has the authority to revoke a former student's degree was addressed as early as 1334. In *The King v. University of Cambridge*,<sup>26</sup> the plaintiff sought the restoration of his doctoral degree which Cambridge had rescinded. Although the court granted plaintiff's writ of mandamus to restore the degree because it had been taken from him without a hearing, the court clearly recognized the right of the University to "revoke a degree for 'a reasonable cause.'"<sup>27</sup>

One of the earliest cases in the United States discussing the revocation of a degree is *Waliga v. Board of Trustees of Kent State University*.<sup>28</sup> In *Waliga*, the Ohio Supreme Court addressed whether Kent State had authority to revoke a degree it determined had been improperly granted.<sup>29</sup> The court began its analysis

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Another case involving a withheld degree is *North v. West Virginia Board of Regents*, 332 S.E.2d 141 (W. Va. 1985), in which a medical student was expelled for providing false information on his application for admission. He sued. The court ordered West Virginia to allow the student to continue his medical training during the pendency of his lawsuit. During that time, he completed all the requirements for an M.D. degree. Nevertheless, the court affirmed the decision of the West Virginia Board of Regents to withhold his degree. *Id.* at 143.

The court was greatly disturbed by the student's fraudulent conduct in providing false information concerning his grade point average, courses taken, degrees held, birth date, and marital status, and stated that there was no doubt but that the student was admitted into medical school because of his application, interview, and supporting documents that placed him in a more favorable light than the facts would have allowed. *Id.* at 143, 145. Observing that the student had "shown a substantial capacity for fraud and deceit by a carefully contrived plan to cheat his way into medical school," the court concluded that awarding the degree would constitute some degree of reward for fraudulent misconduct on the part of the student. *Id.* at 147. Therefore, the court concluded that "not only was the action complained of justified, it may well have been the only appropriate response available to the University." *Id.*

25. For an excellent discussion of the subject, see Robert Gilbert Johnston and Jane D. Oswald, *Academic Dishonesty: Revoking Academic Credentials*, 32 J. MARSHALL L. REV. 67 (1998).

26. *Waliga v. Bd. of Trustees of Kent State Univ.*, 488 N.E.2d 850, 852 (Ohio 1986) (citing *The King v. Univ. of Cambridge*, 8 Mod. Rep. 148 (1334)). The focus of this article is on institutions in the United States. However, degree revocation is not confined to this country. For examples of instances in which institutions abroad have dealt with revocation issues, see Lila Guterman, *German University Revokes Ph.D. of Scientist Who Falsified Data as a Bell Labs Researcher*, CHRON. HIGHER EDUC., June 16, 2004 (reporting that the University of Konstanz revoked the doctoral degree of a physicist who fabricated data as a Bell Labs researcher, even though the alleged wrongful conduct took place after he received his degree), and David Cohen, *New Zealand Institution Refuses to Revoke Degree of Student Whose Thesis Questioned the Holocaust*, CHRON. HIGHER EDUC., May 15, 2000.

27. *Waliga*, 488 N.E.2d at 852 (citing *The King v. Univ. of Cambridge*, 8 Mod. Rep. at 161-62).

28. 488 N.E. 2d 850 (Ohio 1986).

29. *Id.* at 851-52. In its "Syllabus by the Court," the court noted that the two former Kent State students had "discrepancies" in their official academic records. *Id.* at 850-851. After an investigation, the University determined that the academic records were incorrect and that the students had not met the necessary requirements to graduate. No mention was made as to whether the students had played a role in falsifying their records. Furthermore, although the syllabus discussed the procedural due process provided to the students by the University, the

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by noting that Ohio statutes provided Ohio's universities with the power to "confer such . . . academic degrees as are customarily conferred by colleges and universities in the United States" and to "do all things necessary for the proper maintenance and successful and continuous operation of such universities."<sup>30</sup>

The court went on to note that, unless an institution has the power to revoke or rescind a previously granted degree, it would be placed in the untenable position of continuing to certify to the public that the former student did, in fact, meet all of its degree requirements. The court's reasoning is summarized in one of the most frequently cited paragraphs of degree revocation jurisprudence:

Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.<sup>31</sup>

*Crook v. Baker*, decided in 1987 by the Sixth Circuit Court of Appeals, also treated the issue of the power to revoke a degree as a clear question of state law.<sup>32</sup> Although the court relied heavily on *Waliga* in its analysis, the Sixth Circuit also pointed out that Michigan universities owe their status to specific provisions of the Michigan State Constitution. Because public universities in Michigan derive the authority to administer their programs from the state constitution, such authority implies the right to revoke a degree previously granted:

We conclude that there is nothing in Michigan constitutional, statutory or case law that indicates that the Regents do not have the power to rescind the grant of a degree. Indeed, the administrative independence granted to the University by the Michigan Constitution in educational matters indicates that the University does have such authority.<sup>33</sup>

Thus, the authority of an educational institution to withhold or revoke degrees for academic misconduct is well-settled so long as necessary procedural requirements are followed.<sup>34</sup>

### III. WITHHOLDING OR REVOKING A DEGREE FOR NON-ACADEMIC REASONS

The law and educational policy are clear that colleges and universities have the

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court noted that it was not asked to decide whether the level of due process provided was sufficient, but only whether the University could revoke a degree previously granted. *Id.*

30. *Id.* at 852. Many of the public institution degree revocation decisions begin with an analysis of the power granted the institution or its governing body by the state constitution or state statutes.

31. *Id.*

32. 813 F.2d 88 (6th Cir. 1987).

33. *Id.* at 92.

34. *See infra* Section IV.

power—and perhaps a corresponding duty—to withhold a degree for fraud or academic misconduct such as plagiarism or receiving credit for courses not actually taken. Neither the law nor educational policy are as well-settled when withholding or revoking a degree for non-academic misconduct is the issue.

A. Withholding a Degree

1. Social Misconduct

In addition to possessing authority to withhold a degree for academic reasons, colleges and universities also have authority to withhold a degree for social misconduct that the institution prohibits. In *Harwood v. Johns Hopkins University*, the court dealt with an unusual and tragic circumstance.<sup>35</sup> In that case, Johns Hopkins refused to award a degree to Robert J. Harwood, Jr., despite the fact that he had completed all academic requirements necessary for graduation, because he shot and killed a fellow student, Rex Chao, on the University's campus on April 10, 1996.<sup>36</sup>

Harwood enrolled at Johns Hopkins in 1992, and by the end of the fall 1995 semester he had completed all the classes required for his degree. Harwood was scheduled to receive his degree at the June 1996 commencement exercises, and did not register for classes or pay tuition for the spring 1996 semester. He lived with his grandmother in Rhode Island during that time, but continued to maintain consistent contact with the Johns Hopkins community, and even manned a student election table during March of 1996. He visited the campus on numerous occasions. Those visits resulted in a number of individuals filing complaints of harassment against him—including Chao and the Dean of Students—eventually erecting the requirement that he notify campus security or the Dean's Office before coming onto the campus.<sup>37</sup>

Harwood attended a meeting of a student political organization on April 10, 1996. While there, he distributed flyers and spoke out in opposition to the candidacy of Chao for president of the organization. Later that evening, while still on campus, Harwood confronted Chao, shot, and killed him. Harwood pled guilty to murder in addition to related handgun violations.<sup>38</sup>

On May 15, 1996, the Dean of Students informed Harwood that his diploma would be withheld pending resolution of the criminal charges against him. Johns Hopkins based its decision to withhold Harwood's degree on provisions of the *Student Handbook*, which provided, in pertinent part:

*The university does not guarantee the award of a degree or a certificate of satisfactory completion of any course of study or training program to students enrolled in any instructional or training program. The award of degrees and certificates of satisfactory completion is conditioned upon*

35. 747 A.2d 205 (Md. Ct. Spec. App. 2000).

36. *Id.* at 207.

37. *Id.*

38. *Id.*

satisfaction of all current degree and instructional requirements at the time of such award, *compliance with the university and divisional regulations, as well as performance meeting bona fide expectations of the faculty.*<sup>39</sup>

After the dean learned of Harwood's guilty plea, she notified him that she was initiating disciplinary proceedings against him, that he could submit any materials he wished her to consider, and that he or his parents could speak with her by telephone. Harwood responded that he was not subject to the jurisdiction of the Dean's Office because he was no longer a student, that his actions were not punishable under the Undergraduate Student Conduct Code, and that the Dean continued to violate the Conduct Code by denying him a hearing.<sup>40</sup>

The Dean informed Harwood shortly thereafter that he was expelled from Johns Hopkins and would not be awarded his degree, reiterating that he remained subject to the Conduct Code until the award of his diploma. Harwood appealed the Dean's decision within the University and his appeal was denied. On May 1, 1998, Harwood filed a declaratory judgment action seeking the award of his diploma.<sup>41</sup> Johns Hopkins moved for summary judgment. The court concluded that Harwood was subject to the disciplinary action of the University and that Johns Hopkins did not act arbitrarily or capriciously in denying Harwood his degree.<sup>42</sup>

Harwood appealed. The Maryland Court of Special Appeals affirmed the grant of summary judgment in favor of Johns Hopkins, holding that it had the right to withhold a diploma from a student who has completed all required course work, and that it did not act arbitrarily and capriciously in doing so with respect to Harwood.<sup>43</sup>

In another high-profile case involving a prestigious private institution, a federal district court held in *Dinu v. President and Fellows of Harvard College* that two Harvard students, suspended by the school's disciplinary board after having been found guilty of stealing money from Harvard Student Agencies, were not entitled to the award of their degrees, even though they had completed all degree

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39. *Id.* at 207–08 (quoting *Johns Hopkins Student Handbook*) (emphasis added by the court).

40. *Id.* at 208.

41. *Id.*

42. *Id.* at 208, 213.

43. *Id.* See also, Ben Gose, *Court Upholds Right of a University to Deny Degree to Student Who Killed Another*, CHRON. HIGHER EDUC., March 17, 2000, at A52 (reporting that Johns Hopkins was pleased with the ruling: "It certainly accomplishes what we were seeking, which was to be able to uphold the principle that a degree from Johns Hopkins says more than just that you completed your courses . . . . It says something about your behavior as a citizen of the university during the time you were here"). *Id.* However, not all agreed with the actions taken by Johns Hopkins. For example, a Professor Emeritus of English at the University of Illinois at Urbana-Champaign wrote in a letter to the *Chronicle of Higher Education*: "Unacceptable as Robert Harwood's shooting of a fellow student is, Harwood has met the requirements for the degree he was seeking during his years at the university. To withhold this degree from him for the reasons set forth by Johns Hopkins is a travesty." R. Baird Shuman, Letter to the Editor, CHRON. HIGHER EDUC., Oct. 24, 1997, at B11.

requirements prior to the board's disciplinary action.<sup>44</sup> Harvard relied on language in its *Handbook for Students*, which stated that "instances of theft, misappropriation, or unauthorized use of or damage to property or materials not one's own will ordinarily result in disciplinary action, including requirement to withdraw from the College."<sup>45</sup> A disciplinary committee investigated allegations that the students had accepted money for work they had not performed, determined that the students had indeed committed the acts of which they were accused, and recommended to the Administrative Board that the students be required to withdraw from Harvard for one year. The Administrative Board accepted this recommendation. As a result, the students were not permitted to participate in Harvard's June 1999 commencement.<sup>46</sup>

The students sued, asking the court to order Harvard to award them their degrees. They asserted that because they had contractually satisfied the formal requirements for a degree prior to the Board's action, their right to a degree had vested, and the Board was powerless to punish their misconduct by withholding their diplomas. They further argued that since the misconduct in question occurred after they had fulfilled all academic requirements, they had ceased being students and were no longer subject to Harvard's disciplinary jurisdiction.<sup>47</sup>

The court found the students' arguments "fundamental[ly] flaw[ed]" and recognized that Harvard's position was based on "logic that is unassailable."<sup>48</sup> The court quoted with approval the following hypothetical from Harvard's memorandum in support of its summary judgment motion: "Assume, for example, that a senior completes his course work, learns that he will not graduate with honors, and, in a rage, attacks the chair of his department. Plaintiffs cannot seriously suggest that Harvard would be powerless to enforce its disciplinary r[ul]es in that instance."<sup>49</sup>

In other cases, courts have also upheld the right of educational institutions to withhold degrees for student activity unrelated to academics but contrary to institutional policy. For example, in the often-cited case *People ex rel. O'Sullivan v. New York Law School*, the Law School withheld a student's diploma for an incident involving a protest against the choice of a graduation speaker.<sup>50</sup> In 1893, the Court of Appeals of New York stated that:

It cannot be that a student having passed all examinations necessary for a degree can, before his graduation, excite disturbance and threaten injury to the school or college without being amenable to some punishment. No course would seem open except to forthwith expel him or refuse his degree. . . . The faculties of educational institutions having power to confer degrees . . . are necessarily vested with a broad

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44. 56 F. Supp. 2d 129 (D. Mass. 1999).

45. *Id.* at 130 n.3 (quoting 1998–99 HANDBOOK FOR STUDENTS at 307).

46. *Dino*, 56 F. Supp. 2d at 131.

47. *Id.* at 132.

48. *Id.* at 133.

49. *Id.* (alteration in original).

50. 22 N.Y.S. 663, 665 (N.Y. Sup. Ct. 1893).

discretion as to the persons who shall receive those honors. . . . Any other rule would be subversive of all discipline in the schools . . . . We see no reason why the right to discipline is not as great between the final examination and the graduation as before . . . .<sup>51</sup>

Courts have also granted great latitude to religious institutions where they have withheld the diplomas of students who have completed all required course work but have violated some institutional policy or rule.<sup>52</sup> In *Lexington Theological Seminary v. Vance*, the Kentucky Court of Appeals ruled that the Seminary could deny a Master of Divinity Degree to a student who was an admitted homosexual.<sup>53</sup> The court's decision rested on its finding of a contract between the student and the Seminary, arising from the words used in the school catalogue, such as "Christian ministry," "gospel transmitted through the Bible," and "fundamental character."<sup>54</sup> It held that these words constituted contract terms that created "reasonably clear standards" upholding the exclusion of homosexuals based on the institution's Christian ministry.<sup>55</sup> Similarly, the court in *Carr v. St. John's University*, held that the dismissal of four students by St. John's, two of whom were married in a civil ceremony and two of whom acted as witnesses, was within the discretion of the Catholic university.<sup>56</sup>

## 2. Non-payment of Fees

Courts have also upheld the right of colleges and universities to withhold degrees for nonpayment of fees.<sup>57</sup> For example, the court in *Martin v. Pratt Institute* upheld the right of the school to withhold a student's diploma and transcript at the time of her graduation because of her outstanding financial obligations.<sup>58</sup> Likewise, in *Haug v. Franklin*, the University of Texas refused to confer a student's law degree because he failed to pay a large number of campus parking tickets that he had accumulated.<sup>59</sup> The Texas Court of Appeals found the withholding of the degree valid because the University's traffic and parking regulations, as well as another regulation of the Board of Regents, specifically authorized such a sanction for refusal to pay traffic charges.<sup>60</sup>

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51. *Id.* at 665.

52. *See* Sullivan, *supra* note 13, at 340.

53. 596 S.W.2d 11 (Ky. Ct. App. 1979).

54. *Id.* at 13.

55. *Id.* at 12, 13. *But cf.* Johnson v. Lincoln Christian Coll., 501 N.E.2d 1380, 1382 (Ill. App. Ct. 1986) (holding that a student who met all requirements for graduation had valid cause of action for breach of contract when the college withheld his degree because there were claims that he "might be homosexual").

56. 231 N.Y.S.2d 410, 414 (N.Y. App. Div. 1962).

57. *See* 3 RAPP, *supra* note 3, § 8.06[6][d][i].

58. 717 N.Y.S.2d 356 (N.Y. App. Div. 2000).

59. 690 S.W.2d 646 (Tex. Ct. App. 1985).

60. *Id.* at 650.

### B. Revoking a Degree

Maurice Goodreau sued the University of Virginia (“UVA”) in 1998 after it revoked the Bachelor of Science degree he had received in 1990.<sup>61</sup> During the spring of 1989, his final year at UVA, Goodreau had used his position as president and treasurer of a student club to steal more than \$1500 in University funds by submitting forged or false reimbursement vouchers. Goodreau’s actions remained undetected during the remainder of his days as a student.<sup>62</sup>

At the beginning of the following academic year, the incoming president of Goodreau’s former club noticed discrepancies in the organization’s records and referred the matter to University police. Goodreau eventually admitted taking the funds for personal use and pled guilty to misdemeanor embezzlement.<sup>63</sup> In addition to the criminal matter, the UVA’s Honor Committee initiated an honor case against Goodreau. He did not cooperate with the investigation because he thought there should not be a hearing since he was no longer a student.<sup>64</sup>

A member of the Honor Committee testified that he both wrote and called Goodreau to inform him of his right to a hearing and that there was a possibility that his degree could be revoked.<sup>65</sup> Goodreau made no response. Eventually the Honor Committee informed the Registrar’s Office of its binding determination that Goodreau could not re-enroll in the University.<sup>66</sup>

Later, when Goodreau applied for admission to UVA for a master’s degree in business administration, he was informed that there was a notation on his transcript that his enrollment was “discontinued.” Goodreau filed a grievance to have the “enrollment discontinued” notation on his transcript removed. In his grievance letter, Goodreau once again admitted misappropriating the funds. Considerable dispute existed as to whether Goodreau was informed that a possible result of the grievance would be the revocation of his degree.<sup>67</sup> Eventually the Honor Committee recommended to the General Faculty that it revoke Goodreau’s degree. University President John Casteen informed Goodreau that he could submit materials to the faculty committee for consideration. Goodreau submitted materials, but he was not invited to attend a hearing. On April 15, 1998, the General Faculty revoked Goodreau’s degree.<sup>68</sup>

After Goodreau sued, UVA moved for summary judgment. The district court acknowledged that UVA had the implied power, with proper procedural safeguards, to revoke the degree of a student who violated its Honor System.<sup>69</sup> The court, however, found material questions of fact as to whether UVA had given Goodreau proper notice of the possible sanctions against him (degree revocation)

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61. Goodreau v. Rector and Visitors of Univ. of Va., 116 F. Supp. 2d 694 (W.D. Va. 2000).

62. *Id.* at 698.

63. *Id.*

64. *Id.*

65. *Id.* at 698–99.

66. *Id.* at 699.

67. *Id.* at 698–99.

68. *Id.* at 700.

69. *Id.* at 703.

and had properly considered the information he submitted. It therefore denied UVA's motion for summary judgment on grounds of insufficient notice.<sup>70</sup>

In a highly visible case, the Massachusetts Institute of Technology ("MIT") revoked the degree of Charles Yoo, a 1998 graduate, for a period of five years because of his alleged involvement in the death of Scott Krueger, a freshman fraternity pledge.<sup>71</sup> Yoo was a pledge trainer in Phi Gamma Delta fraternity at MIT during the time of the incident that caused Krueger's death, and he allegedly purchased the alcohol involved in the incident and instructed pledges on the amount of it they were expected to drink.<sup>72</sup> Yoo denied these allegations. Criminal charges were brought against the fraternity but eventually dropped after the fraternity dissolved. No charges were brought against Yoo.<sup>73</sup> MIT paid the Krueger family six million dollars for the institution's role in the tragic incident.<sup>74</sup>

Yoo's attorney complained that the punishment was too harsh and that the disciplinary hearing had been unfair since Yoo was not given an opportunity to confront his accusers.<sup>75</sup> Yoo eventually filed suit against MIT, who then moved for summary judgment. The trial court granted MIT's motion, and Yoo appealed. The Massachusetts Court of Appeals affirmed the trial court and dismissed Yoo's complaint.<sup>76</sup> Notably, MIT's published policy provided that it reserves the right to withdraw academic degrees "in the event that a case is brought after graduation, for actions that occurred before graduation but were unknown at the time."<sup>77</sup>

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70. *Id.* at 704.

71. Leo Reisberg, *MIT Revokes Diploma of Graduate for Alleged Role in Drinking Death of Freshman*, CHRON. HIGHER EDUC., Aug. 13, 1999, at A44 (describing the incident and MIT's response).

72. *Id.*

73. Jayme L. Butcher, *MIT v. Yoo: Revocation of Academic Degrees for Non-Academic Reasons*, 51 CASE W. RES. L. REV. 749 (2001) (discussing the more stringent judicial review given instances involving expulsion, withholding, and revoking of degrees by colleges and universities for non-academic reasons).

74. Leo Reisberg, *MIT Pays 6 Million to Settle Lawsuit over a Student's Death*, CHRON. HIGHER EDUC., Sept. 29, 2000, at A49 (describing the settlement, which awarded \$1.25 million to endow a scholarship in Scott Krueger's name and \$4.75 million to the family).

75. Reisberg, *supra* note 71.

76. *Yoo v. Massachusetts Institute of Technology*, 801 N.E.2d 324 (Mass. App. Ct. 2004).

77. Reisberg, *supra* note 71. The decision of MIT to revoke the degree based upon Yoo's alleged misconduct has been controversial, both in legal and educational circles. *See* Butcher, *supra* note 73, at 750 (describing MIT's action as a "flagrant abuse of power" that should not be permitted); Reisberg, *supra* note 71 ("The action marks a rare, if not unprecedented, effort by a university to discipline an alumnus for a non-academic violation that took place during college."). Numerous individuals have written letters to the editor of the *Chronicle of Higher Education* expressing strong disagreement with MIT's handling of the matter. *See* James L. Breed, Letters to the Editor, CHRON. HIGHER EDUC., Sept. 17, 1999, at B3 ("I don't believe that educational institutions should revoke degrees for any reason other than academic fraud."). On the other hand, Gary Pavella, Director of Judicial Programs and Student Ethical Development at the University of Maryland, a nationally recognized scholar in the field of law and higher education and a frequent contributor to higher education publications, wrote a thoughtful analysis arguing that institutions should retain the right to revoke degrees for non-academic, as well as academic, misconduct. *See* Gary Pavella, *For the Same Reasons That Students Can Be Expelled, Degrees Ought to Be Revocable*, CHRON. HIGHER EDUC., Oct. 22, 1999, at B6 ("If courts and higher

Utilizing an interesting theory, the plaintiff in *Sheridan v. Trustees of Columbia University* sued Columbia for refusing to forward his transcript to graduate schools until he paid his outstanding tuition bill.<sup>78</sup> He argued that by not forwarding his transcript, Columbia was effectively revoking his degree.<sup>79</sup>

The court easily disposed of the plaintiff's claim, recognizing that, while Columbia's refusal to forward his transcript to graduate schools to which he was applying might jeopardize his chances of being accepted, Columbia had not revoked its certification that the plaintiff possessed all the knowledge and skills represented by the degree.<sup>80</sup>

Degree revocation has serious implications outside the loss of the degree. For example, the Supreme Court of New Jersey revoked the license of John Benstock to practice law in the State of New Jersey after New York Law School revoked his law degree for failing to reveal material information on his application to law school and admission to the bar.<sup>81</sup> The Georgia Professional Standards Commission notified teachers in Gwinnett County, Georgia that it intended to recall their certification as a result of finding that certain of them had obtained graduate degrees by buying them online from Internet "diploma mills."<sup>82</sup>

Acknowledging that sharp differences of opinion exist regarding whether institutions should withhold or revoke degrees for non-academic reasons, many legal scholars agree that before any drastic action is taken, an affected student or degree-holder is entitled to extensive procedural safeguards.<sup>83</sup>

#### IV. PROCEDURAL CONSIDERATIONS IN WITHHOLDING OR REVOKING DEGREES

Given the power of an institution of higher education to withhold or revoke a degree for both academic and non-academic reasons, there are necessary procedural protections the institution must grant to the affected student.<sup>84</sup> When the institution is public, it is subject to procedural Due Process protections under the Fourteenth Amendment, particularly if the court finds the student holds a property interest in the possession of the degree.<sup>85</sup> If the institution is private,

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education institutions support the revocation of degrees received through fraud or error, they should also support revoking degrees for serious, proven misconduct in violation of established institutional rules." Although acknowledging that Pavella's essay was "intelligently reasoned and engagingly presented," one person writing in response strongly disagreed with Pavella, saying that this approach "raises some frightening specters." R. Baird Shuman, Letters to the Editor, *Limited Grounds for Revoking Degrees*, CHRON. HIGHER EDUC., Nov. 26, 1999, at B10 ("If someone's past conduct has not been what society expects of an educated person, the punishment should not involve the revocation of a degree, unless that degree has been obtained through deception . . .").

78. 745 N.Y.S.2d 18 (N.Y. App. Div. 2002).

79. *Id.* at 318.

80. *Id.* at 317.

81. In the Matter of John E. Benstock, 701 A.2d 129 (N.J. 1997).

82. Jaime Sarrío, *Teachers buy degrees, hike pay*, GWINNETT DAILY POST, March 14, 2004.

83. See, e.g., KAPLIN & LEE, *supra* note 9, at 495; Butcher, *supra* note 73, at 769.

84. See Gilbert and Oswald, *supra* note 25 (discussing procedural issues involved in revoking academic credentials).

85. *Amelunxen v. Univ. of Puerto Rico*, 637 F. Supp. 426, 430 (D.P.R. 1986)

principles of fundamental fairness in decision-making and adherence to contract terms will come into play.<sup>86</sup>

#### A. Public Institutions

Although courts give deference to the academic decisions of institutions and will rarely try a student's claims *de novo*, they will review the procedural safeguards that were afforded a plaintiff whose degree has been withheld or revoked. In *Crook v. Baker*, the Sixth Circuit discussed at length the sufficiency of due process rights afforded the plaintiff, providing a road map for other institutions seeking to revoke or withhold a degree.<sup>87</sup> Crook received a master's degree from the University of Michigan in geology and mineralogy, claiming to have discovered a new, naturally occurring mineral as part of his research for his master's thesis.<sup>88</sup> After Crook received his degree, several faculty members became concerned that Crook might have fabricated most of his test data, and that the "naturally" occurring mineral was most likely a synthetic compound created in a different lab at the University of Michigan and taken by Crook for his thesis.<sup>89</sup> Prior to taking any other action, the University invited Crook to return to campus for more tests on the mineral.<sup>90</sup> Crook returned. The faculty monitored his research and discovered that, instead of running tests, Crook simply fed his final data into a computer and asked it to regurgitate the data for him.<sup>91</sup> Shortly thereafter, Michigan informed Crook in writing of the claims against him, the facts supporting those claims, and the procedures to be used in a hearing on the matter.<sup>92</sup> The letter also warned him that, if the charges against him were proven, Michigan might revoke his master's degree.<sup>93</sup>

Following a hearing, an *ad hoc* committee found that Crook had indeed fabricated research data while writing his thesis, and the Executive Board of the Graduate School recommended the revocation of Crook's degree. The Board of Regents followed the Executive Board's recommendation and voted to rescind.<sup>94</sup> Crook filed suit in response, and a federal district court found in his favor.

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("[Defendants] may assume, as the Supreme Court has done, and we will do, that a student has either a property or liberty interest in continuing education."). *See also* *Merrow v. Goldberg*, 672 F. Supp. 766, 771 (D. Vt. 1987) ("Since degrees are awarded as the result of accumulated credits, the parties agree that credits should be entitled to protection similar to that afforded degrees.").

86. *See, e.g.*, *Palmer Coll. of Chiropractic v. Iowa Dist. Ct. for Scott County*, 412 N.W.2d 617 (Iowa 1987) (involving successful breach of contract claim against private school that had failed to award degree to student who had been expelled shortly before graduation); *Southern Methodist Univ. v. Evans*, 115 S.W.2d 622 (Tex. Comm'n App. 1938) (finding that private institution had entered into a contract to offer plaintiff instruction in subjects necessary to obtain degree—but not a contract to confer a degree).

87. 813 F.2d 88 (6th Cir. 1987).

88. *Id.* at 95.

89. *Id.*

90. *Id.*

91. *Id.* at 95–96.

92. *Id.* at 96.

93. *Id.*

94. *Id.* at 97.

However, the Sixth Circuit reversed, including the district court's finding that Crook had been denied due process.<sup>95</sup>

The Sixth Circuit found that Crook had been given written notice of the charges against him and the basis of those charges.<sup>96</sup> Crook had also been afforded an opportunity to be heard in that he had responded to the charges in writing prior to the hearing, and he had appeared at the hearing and spoke on his own behalf and was allowed to question other witnesses.<sup>97</sup> His attorney had even argued his case before the Michigan Board of Regents, although this was apparently not part of the written process originally proposed.<sup>98</sup> Finding that Crook had been awarded sufficient notice and an opportunity to be heard, the court held that the requirements of the Due Process Clause of the Fourteenth Amendment had been satisfied.<sup>99</sup>

It is helpful to contrast the procedural safeguards that were followed in *Crook* to those observed in *Driscoll v. Stucker*.<sup>100</sup> In the latter case, Dr. Driscoll successfully completed a six-year accredited residency in otolaryngology at Louisiana State University's Health Science Center ("LSUHSC").<sup>101</sup> Residents who successfully completed the program were given a letter of recommendation from LSUHSC allowing them to sit for the examination for board certification.<sup>102</sup> Driscoll received such a letter and, with plans to take the examination, applied for and received temporary staff privileges at a hospital while he considered an offer for a contract position there.<sup>103</sup> Two months later, Driscoll was informed by the American Board of Otolaryngology—not by LSUHSC—that he would not be permitted to take the examination because his letter of recommendation had been withdrawn.<sup>104</sup> Driscoll filed suit against LSUHSC and against Dr. Stucker individually.<sup>105</sup> The court determined that Driscoll had a property and liberty interest in receiving a recommendation that would allow him to sit for the board certification examination, thus entitling him to notice and an opportunity to be

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95. *Id.* at 99–100.

96. *Id.* at 97.

97. *Id.* at 97–98.

98. *Id.* at 98.

99. *Id.* at 99–100. *See also* *Easley v. Univ. of Michigan Bd. of Regents*, 627 F. Supp. 580 (E.D. Mich. 1986) (holding that law student who enrolled in five-hour civil procedure course had no substantive due process right to six credit hours, even though he had taken the same exam as students the following year who received six credit hours).

100. 893 So. 2d 32 (La. 2005).

101. *Id.* at 37.

102. *Id.* at 38.

103. *Id.*

104. *Id.* at 39. Dr. Stucker, the director of the program at LSUHSC, had written the Board informing them that he was withdrawing Driscoll's letter of recommendation. *Id.* at 38–39. Dr. Stucker had learned from a third party that Driscoll had performed a minor surgical procedure one weekend in a closed clinic. *Id.* It is unclear whether performing such a procedure violated any LSUHSC rule or policy as the case mentions that other doctors and residents engaged in the practice from time to time. *Id.* at 40–41.

105. *Id.* at 40.

heard—both of which had been denied him.<sup>106</sup> Finding in Driscoll's favor, the court affirmed an award of lost wages, although amended slightly, and general damages.<sup>107</sup>

Comparing the facts in *Crook* with *Driscoll*, Crook received written notice of the charges against him and was given ample opportunity to respond to those accusations in writing and at a hearing.<sup>108</sup> However, in *Driscoll*, the program director withdrew the letter of recommendation (thus denying Driscoll the opportunity to sit for his board examinations) with no notice to Driscoll, leaving him to discover his penalty from a third party, the American Board of Otolaryngology.<sup>109</sup> Furthermore, Driscoll was adjudged to be in violation of an unwritten regulation on the basis of hearsay evidence, and was given no opportunity to confront his accusers, examine the evidence, or present his side of the story.<sup>110</sup>

### B. Private Institutions

When private institutions seek to revoke a degree, constitutional requirements usually do not apply.<sup>111</sup> However, those institutions, like their public counterparts, must provide students and graduates with "procedural fairness" when they attempt to withhold or revoke degrees.<sup>112</sup> In *Abalkhail v. Claremont University Center*, for example, a private institution awarded a Ph.D. to a student whose dissertation later was challenged as having been partially plagiarized.<sup>113</sup> In response to the challenge, Claremont appointed a committee to investigate and determine whether

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106. *Id.* at 43–44.

107. *Id.* at 53–54. Another case involving a university's failure to give adequate due process is *Univ. of Texas Med. Sch. at Houston v. Than*, 874 S.W.2d 839 (Tex. App. 1994). The Medical School accused Than of cheating on an exam by copying from another student and withheld his degree. Than sued. The court found that Texas had not afforded Than sufficient due process because (1) Than was informed of the charges against him too late to be able to locate witnesses, (2) Than was not provided with a copy of the evidence to be used against him, (3) Than was excluded from part of the hearing in which the hearing officer went to the testing room to see and observe the testing conditions (this took place well after the test had been completed), and (4) the hearing officer placed the burden of proof on Than. *Id.* at 845–52. The appellate court affirmed the trial court's injunction ordering Texas to issue Than his diploma, noting that, because of errors made by the University, it was impossible at that point to cure the procedural deficiencies that had infected the case. *Id.* at 854.

108. *Crook v. Baker*, 813 F.2d 88, 97–99 (6th Cir. 1987).

109. *Driscoll*, 893 So. 2d at 39.

110. *Id.* at 43–51.

111. *See, e.g., Imperiale v. Hahnemann Univ.*, 966 F.2d 125 (3d Cir. 1992) (finding no state action involved in revocation of plaintiff's medical degree by private university medical school).

112. *Butcher*, *supra* note 73, at 759.

113. 2d Civ. No. B014012 (Cal. Ct. App. 1986), *cert. denied*, 479 U.S. 853 (1986). The authors have been unable to locate the trial court decision in this matter but have chosen to discuss this case anyway because of its importance to private institutions addressing possible degree withholding or revocation. The authors have relied extensively on the work of Bernard D. Reams and have cited to his excellent article on degree revocation in discussing the *Abalkhail* case. *See* Bernard D. Reams, Jr., *Revocation of Academic Degrees by Colleges and Universities*, 14 J.C. & U.L. 283, 299–301 (1987). *See also* KAPLIN & LEE, *supra* note 9, at 476–77.

plagiarism had occurred and whether degree revocation was warranted.<sup>114</sup>

After receiving the committee's report concluding that academic dishonesty may have occurred, the dean of the graduate school gave Abalkhail notice of a formal hearing to be held and of the procedures that would be used.<sup>115</sup> At the hearing, Abalkhail was given a copy of the complaint instigating the proceedings and an opportunity to present his views in the matter. Abalkhail was permitted to question a witness and to suggest any additional procedures he deemed necessary to ensure him a fair hearing.<sup>116</sup>

The investigative committee met with Abalkhail on a second occasion, apprised him of additional evidence in the matter, and allowed him to give an explanation.<sup>117</sup> Two times after that, a committee member wrote Abalkhail to inform him of the evidence against him and invite him to respond.<sup>118</sup> The committee then concluded that Abalkhail had plagiarized substantial portions of his thesis and recommended that his degree be revoked. Claremont accepted the committee's recommendation, revoked the degree, and notified Abalkhail of its action. Abalkhail then sued, alleging deprivation of due process and lack of a fair hearing.<sup>119</sup>

The California Court of Appeals reviewed Claremont's due process procedures extensively and upheld the University's action. The court noted that an educational institution's decisions are subject to limited judicial review because educators are uniquely qualified to evaluate student performance.<sup>120</sup> That being the case, the court said it would set aside an institution's decisions only if an abuse of institutional discretion had occurred.<sup>121</sup>

The court found no such abuse of discretion in *Abalkhail*. According to the court, while Mr. Abalkhail was entitled to procedural fairness because revocation of a degree constitutes deprivation of a significant interest, he was entitled only to the "minimum requisites of procedural fairness."<sup>122</sup> The court also declared that Abalkhail received adequate notice of the charges against him, of the possible consequences, and of the process to be used. These procedures afforded him fair notice, a fair opportunity to present his position, and a fair hearing.<sup>123</sup>

In summary, although private institutions are not required to afford the complete package of constitutional due process that public institutions must provide, courts expect them to afford students or degree-holders minimal procedural protection to ensure at least fundamental fairness in decisions to withhold or revoke academic degrees.<sup>124</sup> At least one court has suggested that

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114. Reams, *supra* note 113, at 299.

115. *Id.* at 299–300.

116. *Id.* at 300.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 301.

124. *Id.* at 297. Although some courts have applied the rules of contracts or the rules of

procedural protections for students at private institutions should parallel the protections available to their peers at public institutions. In *Slaughter v. Brigham Young University*, BYU dismissed a student for using, without permission, a professor's name as coauthor of an article the student submitted for publication.<sup>125</sup> The student sued and won at the trial level.<sup>126</sup> On appeal, the Tenth Circuit used constitutional due process as its guide in determining the adequacy of BYU's procedural protections. It concluded that the BYU procedures met the requirements of due process as applied to public colleges and universities, and commented that there was no need to "draw any distinction, if there be any, between the requirements . . . for private and public institutions."<sup>127</sup> Although this case dealt with the expulsion of a student rather than a situation in which a degree was withheld or revoked, it demonstrates the point that if due process is satisfied under constitutional standards, then the procedures in question are automatically sufficient with respect to the lower standard for private institutions as well.

### C. Entity Making Final Revocation Decision

While an institution that grants a degree may later, after providing appropriate process, revoke that degree, courts require that an appropriate officer or body effectuate the revocation. In *Hand v. Matchett*, a doctoral student's Ph.D. was revoked after evidence indicated that the student had plagiarized his dissertation.<sup>128</sup> Prior to the litigation, the Board of Regents at New Mexico State University had approved a lengthy process for determining whether a degree should be revoked. Upon allegations of academic misconduct, the graduate dean would do a preliminary investigation; if the investigation indicated that the misconduct had actually occurred, then an ad hoc committee would be formed to hear the evidence. The decision of the committee could be appealed to the executive vice president of the University and the president. Along the way, the student, or former student, would be invited to respond to the charge and present his evidence.

In *Hand*, the student challenged the basic right of the University to revoke his degree, as well as the process by which the degree had been revoked. The federal district court granted summary judgment in favor of Hand, reasoning that the University's procedures for revoking a degree violated New Mexico law.<sup>129</sup> The Tenth Circuit agreed, also reaching its decision on a single issue of state law—

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private associations to the relationship between a student and a private college or university, courts are increasingly viewing this as a unique relationship. *See, e.g.,* *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 263, 272–73 (N.J. Super. Ct. App. Div. 1982) ("The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category."); *Bilut v. Northwestern Univ.*, 645 N.E.2d 536, 541 (Ill. App. Ct. 1994) ("It is the opinion of this court that the relationship between a student and a private college or university is unique and cannot be strictly categorized or characterized in purely contractual terms.").

125. 514 F.2d 622 (10th Cir. 1975).

126. *Id.* at 624.

127. *Id.* at 625.

128. 957 F.2d 791 (10th Cir. 1992).

129. *Id.* at 794.

whether the entity revoking the degree was the proper body to do so.<sup>130</sup> Determining that New Mexico state statutes granted the Board of Regents alone the power to confer (and, therefore, to revoke) degrees, the court reasoned that the Board could not delegate that authority to a lower body such as the committee or the University president.<sup>131</sup> Thus, the court held the degree revocation to be void.<sup>132</sup>

Another case illustrating the connection between legislative authorization of a governing body to make degree decisions and the importance of recognizing that authority is *Mendez v. Reynolds*.<sup>133</sup> The Board of Trustees for the City University of New York (“CUNY”) community colleges was statutorily authorized to impose graduation requirements. One requirement imposed by the Board provided that all candidates for graduation must pass a particular writing assessment (the CWAT).<sup>134</sup> Hostos Community College, one of six CUNY community colleges, substituted its own writing assessment.<sup>135</sup> Five days before graduation, the President of Hostos informed students that they must pass the CWAT in order to graduate, regardless of whether they had passed the Hostos writing assessment.<sup>136</sup> The students filed suit, claiming that CUNY should be bound by the acts of Hostos’ administrators—its apparent agents—or that CUNY should be equitably estopped from withholding their degrees. The court held for CUNY:

[I]t would contravene public policy to force an institution of higher learning to award degrees where the students had not demonstrated the requisite degree of academic achievement. “Requiring the college to award [the student] a diploma on equitable estoppel grounds would be a disservice to society, since the credential would not represent the college’s considered judgment that [the student] possessed the requisite qualifications.”<sup>137</sup>

#### D. Degrees of Due Process

Courts delineate a dichotomy between a student’s due process rights in

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130. *Id.* at 795.

131. *Id.* at 795–96.

132. *Id.* at 796.

133. 681 N.Y.S.2d 494 (N.Y. App. Div. 1998).

134. *Id.* at 495–96.

135. *Id.* at 495.

136. *Id.* at 496.

137. *Id.* at 497 (quoting *Matter of Olsson v. Bd. of Higher Educ. of the City of New York*, 402 N.E.2d 1150). “In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis.” *Olsson*, 402 N.E.2d at 1153. *See also* *Faulkner v. Univ. of Tenn.*, No. 01-A-01-9405-CH00237, 1994 WL 642765 (Tenn. Ct. App. 1994) (holding that Tennessee was not estopped from revoking Ph.D. degree based on discovery that student had plagiarized professor’s work in writing thesis, even though professor had instructed student to plagiarize the work).

disciplinary dismissals and in academic dismissals.<sup>138</sup> “The higher of the two standards, which requires due process for disciplinary matters, typically is used when a degree is to be revoked, given that the cause for revocation generally alleges misconduct, fraud, cheating, misrepresentations, or the like.”<sup>139</sup>

#### V. JUDICIAL DEFERENCE TO ACADEMIC DECISIONS OF UNIVERSITIES

The academic decisions of colleges and universities are generally awarded great deference by the courts.<sup>140</sup> Absent arbitrary or capricious actions, courts prefer not

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138. See, e.g., *Wright v. Texas Southern Univ.*, 392 F.2d 728, 729 (5th Cir. 1968). Although the dichotomy is clear between academic and disciplinary dismissals, once the right to due process is triggered, courts use a “sliding scale” to determine the adequacy of the due process offered. *University of Texas Med. Sch. v. Than*, 874 S.W.2d 839, 847 n.4 (Tex. Ct. App. 1994). “The harsher the punishment, the more process the student is due.” *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (“Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more harsh than having a degree withheld or revoked. See also *Morrow v. Goldberg*, 672 F. Supp. 766, 772 (D. Vt. 1987) (“Within the broad category of decision making affecting interests of individual students, the Court has distinguished between disciplinary decisions and academic decisions in evaluating the process provided in particular cases.”)).

Although the courts have in theory embraced two mutually exclusive subclasses of revocation decisions—one based on academic considerations and the other on misconduct—in actuality, the line is often blurred. As Fernand N. Dutile has pointed out, “In reality, situations in which higher-education students face adverse institutional decisions occupy a spectrum ranging from the purely academic through the purely disciplinary.” Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 626 (2003). Rather than being alarmed at the difficulty encountered in differentiating between academic and misconduct cases, Dutile points out that in academic cases, the student receives an ample opportunity to be heard through his academic work. For example, a student who takes a three hour exam or writes a ten-page paper receives a “hearing” that would satisfy almost any procedural protection required in a misconduct case. *Id.* at 650.

139. Stephen B. Thomas and Deborah L. Barber, *The Right to Rescind a Degree*, 33 EDUC. L. REP. 1, 2–3 (1986) (commenting that most courts will defer to the judgment of the college or university in revoking a degree if adequate due process is provided). See also *Amelunxen v. Univ. of Puerto Rico*, 637 F. Supp. 426, 431 (D.P.R. 1986) (“Since the procedural requirements in the case of an academic dismissal are so minimal, in only extremely rare situations would an educational institution’s actions be found to violate the Fourteenth Amendment procedural due process right. If a school’s decision is to be reversed, it must be done on the basis of substantive due process; that the decision was based on unconstitutional criteria or was ‘arbitrary and capricious.’”).

140. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“Our holding today [in the University of Michigan Law School affirmative action case] is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (stating that courts have given academic institutions great deference in their decisions on who may be admitted); *Kashani v. Purdue Univ.*, 763 F. Supp. 995, 997 (N.D. Ind. 1991) (“It is not for this court to rewrite the criteria for a doctorate in electrical engineering at Purdue University, and it is not for this court to superimpose its most limited and irrelevant scholastic and educational judgments upon those of the educational officials at Purdue University.”); *North v. West Virginia Bd. of Regents*, 332 S.E.2d 141, 146 (W. Va. 1985) (reasoning that deference should be given to school officials as they “are in the best position to understand and appreciate the implications of various [academic] disciplinary decisions”); *Waliga v. Bd. of Trustees of Kent State Univ.*, 488

to alter decisions regarding admissions, grading, degree requirements, and other purely academic matters.<sup>141</sup> The Supreme Court reiterated its judicial deference to institutions of higher education in *Regents of the University of Michigan v. Ewing*:

When judges are asked to review the substance of a genuinely academic decision . . . 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.<sup>142</sup>

In *Board of Curators of the University of Missouri v. Horowitz*, the United States Supreme Court upheld the dismissal—without a formal hearing—of a fourth-year medical student for failure to meet the academic standards set by the University.<sup>143</sup> The Supreme Court determined that the student had been fully informed by the faculty that her progress was inadequate and that she was in danger of dismissal. Showing great respect for the judgment of the faculty in academic matters, the Court declared that due process requirements must be adapted to a particular situation and that a certain set of procedures cannot be applied in every situation: “The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.”<sup>144</sup>

Similar deference has been extended to decisions that withhold or revoke degrees for academic reasons. In *Napolitano v. Trustees of Princeton University*, the Princeton disciplinary committee determined that a graduating senior had plagiarized a term paper and withheld her degree for one year.<sup>145</sup> At trial, rather than conduct a full-fledged hearing, the judge reviewed the sufficiency of the evidence against the student and found it adequate to sustain Princeton's decision to withhold.<sup>146</sup> On appeal, the student challenged the deference that the trial court had given Princeton's determination. The appellate court found that a claim of plagiarism was one of academic fraud, not general misconduct.<sup>147</sup> Relying on

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N.E.2d at 852–53 (stating that courts generally do not interfere with fundamental university functions, including the granting and revoking of academic degrees).

141. See KAPLIN & LEE, *supra* note 9, at 465–500 (3d ed.) and KAPLIN & LEE, *supra* note 9, at 291–96 (Supp. 2000) (discussing comprehensively the level of judicial deference given to decisions made by both public and private institutions of higher education).

142. 474 U.S. 214, 225 (1985).

143. 435 U.S. 78 (1978).

144. *Id.* at 86.

145. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

146. *Id.* at 270. While the trial judge emphasized his personal disagreement with the harshness of the decision, he held that he could not find “that Princeton could not in good faith have assessed the penalties it did against plaintiff.” *Id.*

147. *Id.* at 271 (“It is clear that plaintiff was charged with plagiarism—in other words, that plaintiff attempted to pass off as her own work, the work of another. That act, if proven, constituted academic fraud. We do not view this case as involving an appeal from a finding of general misconduct; instead, we are concerned with the application of academic standards by the authorities at Princeton.”). See also *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976)

*Horowitz*, the court came to the conclusion that the trial judge “should not have become a super-trier under due process considerations.”<sup>148</sup>

Although courts defer to the academic decisions of colleges and universities, such deference has its limits. An institution may not act arbitrarily or with malice in withholding or revoking a degree. In *Tanner v. Board of Trustees of the University of Illinois*, a graduate student had completed both a dissertation and comprehensive examinations when he was informed that both accomplishments were unacceptable because his thesis committee had never been formally recognized by the University.<sup>149</sup> The student sought a writ of mandamus ordering Illinois to issue his degree. Although his claims were dismissed by the lower court, the appellate court found that Tanner had presented sufficient evidence of arbitrary and capricious conduct on the part of the University to proceed on his mandamus theory.<sup>150</sup>

## VI. SUMMATION

Courts have recognized the right of colleges and universities to withhold and revoke degrees for both academic and non-academic violations. Courts show considerable deference to decisions of academic institutions when degrees are withheld or revoked for purely academic reasons. Greater procedural safeguards are required when withholdings or revocations are enforced against students for non-academic reasons, granting to students in those situations the full range of procedural protections.

Commentators have raised concerns over withholding and revoking degrees for non-academic reasons, asking precisely where the line will be drawn. “The main problem with allowing the revocation of an academic degree for non-academic reasons is the question of where it will end. If universities are permitted to revoke degrees years after graduation, on what grounds may they do so?”<sup>151</sup> Should an institution set forth a list of misconduct that merits degree revocation or withholding in advance? Should there be a distinction between procedural protections afforded students in private and public institutions? These questions are legitimate and deserve thoughtful contemplation by those in academic policy-making positions.

After extensive research and personal experience in this area, the authors have

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(“Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship.”); *but cf.* *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987) (pointing out that university regents’ process for determining whether to rescind a degree based on academic fraud involved elements of both academic and disciplinary decisions and student was, therefore, accorded notice that was usually given in disciplinary matters).

148. *Napolitano*, 453 A.2d at 275. *But cf.* Ralph Mawdsley, *Judicial Deference: A Doctrine Misapplied to Degree Revocations*, 70 EDUC. L. REP. 1043 (1992) (arguing that judicial deference should not be applied once student has graduated and no longer has on-going relationship with college or university).

149. 363 N.E.2d 208, 209 (Ill. Ct. App. 1977).

150. *Id.* at 209–10.

151. *Butcher*, *supra* note 73, at 765.

reached several conclusions. (1) Colleges and universities clearly have legal authority and educational responsibility to withhold or revoke a degree obtained through error or academic fraud. Prior to graduation, an institution may also withhold a degree if a student is guilty of serious non-academic misconduct. (2) The particular entity, i.e., the governing board, that conferred a degree is the proper entity for conducting degree revocation proceedings—not the courts. (3) Once a student graduates, a college or university should not attempt to revoke a degree already conferred for any reason other than error or academic fraud. (4) The highest level of procedural process should be granted to a student, whether at a public or private institution, when the institution seeks to revoke a degree already conferred, including a hearing, advanced notice of the charges, the name of the person(s) making the charges, the names of witnesses who will testify, the substance of their testimony, the right to have a legal adviser, and the right to present witnesses and evidence on his or her behalf. (5) The institution should place a statement in the student handbook setting forth the college or university's authority to withhold or revoke a degree received through error or academic fraud and describing the process that will be used should such a circumstance arise in the future.<sup>152</sup>

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152. See generally Butcher, *supra* note 73, at 766–73 (laying out an excellent model for revocation of academic degrees); Pavella, *supra* note 77 (describing another good model for revocation processes).



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# EVIDENTIARY AND CONSTITUTIONAL DUE PROCESS CONSTRAINTS ON THE USES BY COLLEGES AND UNIVERSITIES OF STUDENT EVALUATIONS

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*"I continue to believe that before the decision is made to terminate an employee's wages, the employee is entitled to an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence.'"*<sup>1</sup>

## INTRODUCTION

We do not know if Plato was invited by Socrates to evaluate his discourse; nor do we know whether or not Aristotle insisted on giving Plato teaching feedback! What is certain, however, is that if he were teaching at a modern business school, Plato would have little alternative but to confront ratings from all of his students.<sup>2</sup>

Faculty and teaching professionals at most (perhaps all) colleges and universities today in the United States are subject to summative student evaluations.<sup>3</sup> Summative student evaluations<sup>4</sup> use numerical scores to regularly establish and

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1. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 548 (1985) (Marshall, J., concurring) (emphasis omitted) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting)).

2. Thomas E. Barry & Rex Thompson, *Some Intriguing Relationships In Business Teaching Evaluations*, 72 J. EDUC. FOR BUS. 303, 303 (1997).

3. See, Peter Seldin, *How Colleges Evaluate Professors: 1983 v. 1993*, AAHE BULL., Oct. 1993, at 6.

4. Hereinafter "student evaluations."

compare median scores of faculty in order to make employment and personnel decisions, including those regarding hiring, merit, promotion, retention, and tenure, often with life-changing consequences.<sup>5</sup> Student evaluations are widely used in both public and private colleges and universities, including unionized and non-unionized environments, as a standard technique for assessing the teaching effectiveness of faculty. Given the life-changing nature of employment and personnel decisions based upon student evaluations, and given “the evaluation process is important to the teacher, the student, the educational institution, and society itself,”<sup>6</sup> it is critically important that their meaning, use, and constitutionality be well understood when such crucial administrative decisions are made.<sup>7</sup> Given today’s heightened emphasis on accountability and assessment, an increase in importance of the usage of student evaluations for assessment can only be expected. Yet, as shall be seen, the use by administrators of student evaluations with questionable validity, reliability, and evidentiary usefulness raises a substantive due process issue.

### I. THE PROCESS AND USE OF STUDENT EVALUATIONS

At most colleges and universities, students are given evaluation question and answer sheets during a regularly-scheduled class period in one of the last few weeks of the semester. An answer sheet typically uses a Likert scale<sup>8</sup> rating system—often from one through five—that students utilize to rate a professor. The answer sheets are then processed to provide a mean and median for each faculty member for each class he or she teaches. Students’ feedback remains anonymous supposedly in order to promote honest evaluations and to alleviate

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5. See Philip C. Abrami, *Improving Judgments About Teaching Effectiveness Using Teacher Rating Forms*, New Directions for Institutional Research, Spring 2001, at 59–60 (“Anecdotal reports suggest that there is wide variability in how promotion and tenure committees use the results of [Teacher Rating Forms]. At one extreme are reports of discrimination between faculty and judgments about teaching based on decimal-point differences in ratings. Experts in the area are often shocked to learn of such decisions but do not have sufficient means to prevent such abuses. At the other extreme are reports that discrimination between faculty and judgments about teaching fail to take into account evidence of teaching effectiveness (in other words, instructors are assumed to teach adequately), meaning that the importance of instructional quality is substantially reduced when assessing faculty performance.”).

6. Deborah C. Haynes & Holly Hunts, *Using Teaching Evaluations as a Measurement of Consumer Satisfaction*, 46 CONSUMER INTERESTS ANN. 134, 134 (2000). See also, Cathy King Pike, *A Validation Study of an Instrument Designed to Measure Teaching Effectiveness*, 34 J. SOC. WORK EDUC. 261 (1998); Mark Clayton, *Give Me an ‘A’ Professor—I’ll Give You One Too*, CHRISTIAN SCI. MONITOR, Mar. 17, 1998 at B6; and Susan S. Lang, *Student Ratings Soar When Professor Uses Enthusiasm*, 25 HUMAN ECOLOGY F., Fall 1997, at 24.

7. See Janice L. Nerger, Wayne Viney, & Robert G. Riedel II, *Student Ratings of Teaching Effectiveness: Use and Misuse*, 38 MIDWEST Q. 218 (1997) (discussing the various issues with student evaluations).

8. A type of survey question where respondents are asked to rate the level at which they agree or disagree with a given statement. A Likert scale is used to measure attitudes, preferences, and subjective reactions. See Usability Glossary: Likert Scale, [http://www.usabilityfirst.com/glossary/main.cgi?function=display\\_term&term\\_id=968](http://www.usabilityfirst.com/glossary/main.cgi?function=display_term&term_id=968) (last visited Nov. 6, 2005).

students' and administrators' concerns regarding the potential of "retaliation" by a faculty member receiving unfavorable evaluations. This concern is especially acute in small classes where such identification might be made more easily and in graduate-level classes where faculty members exert considerable control over important outcomes other than grades (e.g., fellowships, theses, dissertations). The median and mean generated by the electronic analysis is then compared to all of the other faculty scores in a department, college, or entire campus in order to quantify and rate the professional characteristics of a particular faculty member or group of faculty members. College and university administrators use the evaluation scores and numerical referencing as factors to determine the "quality" of teaching and/or the "qualifications" of the teacher, often without giving any substantial weight to alternative assessment mechanisms, such as peer and self evaluations.

Even though at some institutions other sources of information are gathered, in practice, the most important pieces are the student evaluations.<sup>9</sup> The reason for this reliance on student evaluations is that they provide quantitative evidence that appears to be "black and white."<sup>10</sup> On the surface, at least, student evaluations produce numbers, which seem not to lie.<sup>11</sup> One author calls this the "micrometer

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9. See, e.g., Mary Gray & Barbara R. Bergmann, *Student Teaching Evaluations: Inaccurate, Demeaning, Misused*, ACADEME, Sept.-Oct. 2003, at 44; Kathryn M. Obenchain, Tammy V. Abernathy, & Lynda R. Wiest, *The Reliability of Students' Ratings of Faculty Teaching Effectiveness*, 49 C. TEACHING 100 (2001) (noting that student evaluations are critical in tenure and promotion decisions and much emphasis is placed on student evaluations and faculty concerns regarding the use of student-completed evaluation forms as the sole or most important assessment of teaching quality have been well documented) (citing Robert E. Haskell, *Academic Freedom, Tenure, and Student Evaluations of Faculty: Galloping Polls in the 21st Century*, 5 EDUC. POL'Y ANALYSIS ARCHIVES (1997), available at: <http://epaa.asu.edu/epaa/v5n6.html>; Herbert W. Marsh, *Students' Evaluations of University Teaching: Research Findings, Methodological issues, and Directions for Future Research*, 11 INT'L J. EDUC. RES. 253 (1987); William E. Cashin, *Concerns About Using Student Ratings in Community Colleges*, NEW DIRECTIONS COMMUNITY COLLEGES, Mar. 1983, at 57; S.F. Mark, *Faculty Evaluation in Community College*, 6 Community Junior College Research Quarterly 167 (1982)); William J. Read, Dasartha V. Rama, & K. Raghunandan, *The Relationship Between Student Evaluations of Teaching and Faculty Evaluations*, 76 J. EDUC. FOR BUS. 189, 192 (2001) ("The results from our study show that SEs continue to be the tool most used by administrators of accounting departments for evaluating teaching."); Ronald L. Jirovec, Chathapuram S. Ramanathan, & Ann Rosengrant Alvarez, *Course Evaluations: What are Social Work Students Telling Us About Teaching Effectiveness?*, 34 J. SOC. WORK EDUC. 229, 229 (1998) ("Because student evaluations often receive paramount consideration when assessing teaching effectiveness, they contribute greatly to perceptions of a faculty member's competence among colleagues and administrators."); Nerger, *supra* note 7, at 218 ("In recent years, data from student ratings of instructional activities of faculty have occupied an increasingly conspicuous role in tenure, promotion, and salary exercises."); George W. Carey, *Thoughts on the Lesser Evil: Student Evaluations*, 22 PERSP. ON POL. SCI. 17, 17 (1993) ("[At Georgetown University,] student evaluations are by far the most important factor in determining how many teaching points an individual will receive.")

10. See, e.g., David A. Dowell & James A. Neal, *The Validity and Accuracy of Student Ratings of Instruction: A Reply to Peter A Cohen*, 54 J. HIGHER EDUC. 459 (1983).

11. See, e.g., Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?* 40 J. LEGAL EDUC. 407 (1990).

fallacy” because one attributes meanings to numbers simply because they can be calculated.<sup>12</sup> “Administrators may understand that the ratings imperfectly reflect actual teaching but continue to use them anyway because they are inexpensive to administer and provide data that can be interpreted in various ways to suit the administration’s purpose.”<sup>13</sup> In fact, colleges and universities rely heavily on student evaluations as measures of teaching effectiveness primarily because they are inexpensive, quantifiable, and easy to acquire, not because evaluations tell them much about teaching effectiveness. Well-conceived and -executed teaching assessment programs would take considerable time, energy, and money.<sup>14</sup>

The practice of solely or primarily using student evaluations to make these decisions goes counter to what most writers in the field recommend, because the almost universal recommendation is the use of multiple sources and types of data. As one author states, “Viewing student ratings as data rather than as evaluations [of teaching quality] may also help to put them in proper perspective. . . . No single source of data, including student rating data, provides sufficient information to make a valid judgment about teaching effectiveness.”<sup>15</sup> Student evaluations should only be utilized as one source of data; their use must be considered both in the context of who provided the data and under what circumstances the data was provided. Effective assessment of teaching requires triangulation of multiple methods, including both direct and indirect assessment measures. The typical usage, however, means that student evaluations carry an inordinate amount of weight in making life-changing decisions regarding faculty teaching competence. In most situations, administrators’ use of student evaluations is to determine whether or not a faculty member has the skill and ability to help students learn the material. If a faculty member is above the median then that faculty member is considered to be a “good” teacher. The higher a given faculty score above the median, the better that faculty member is perceived as a teacher. The presumption is that the higher the faculty member scores above the median, the more the students will learn. However, few would contend that college and university teaching and learning have improved as the use of ratings has increased.<sup>16</sup> Just as challenging as the absence of reliable and valid measures of both teaching and learning is the resistance to developing them within academia itself; yet such assessment is increasingly needed.<sup>17</sup>

#### A. Effective Teaching—What Is It?

Because of the inordinate amount of weight given to student evaluations and the

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12. *Id.* at 428–29 (citations omitted).

13. Judith D. Fischer, *The Use and Effects of Student Ratings in Legal Writing Courses: A Plea for Holistic Evaluation of Teaching*, 10 *LEGAL WRITING* 111, 121–22 (2004).

14. Richard H. Hersch, *What Does College Teach?*, *Atlantic Monthly*, Nov. 2005, at 140.

15. WILLIAM E. CASHIN, CTR. FOR FACULTY EVALUATIONS & DEVELOPMENT, IDEA PAPER NO. 20, *STUDENT RATINGS OF TEACHING: A SUMMARY OF THE RESEARCH* (Kan. St. Univ. Div. Continuing Educ. 1988), <http://www.idea.ksu.edu/index.html>.

16. Fischer, *supra* note 13, at 112.

17. Hersch, *supra* note 14.

fact that they are used to purportedly measure effective teaching, there are a number of issues that need to be addressed. One such issue is how those involved in the process define “learning.” Faculty members, students, and administrators each have different views as to what should occur in the classroom to help students “learn.”

In fact, not surprisingly, research has found that teaching effectiveness is defined differently by students and the institution.<sup>18</sup> Research on intellectual development has shown that “knowing” evolves “from absolute knowing, through transitional and independent knowing, to contextual knowing.”<sup>19</sup> This research has shown that most students enter the college or university at the very first stage of knowing and do not reach the last stage until after they have graduated.<sup>20</sup> At the start of their college or university career, students are only at the absolute knowing stage and may evolve to the transitional knowing stage, and, therefore, expect the material to fit those states of knowing. At both of these stages they want to be passive recipients of information, not active participants in the learning process.

Many faculty understand that students developmentally progress from a stage of

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18. See Obenchain, *supra* note 9 (“Whereas previous studies looked for reliability across a group of students and over time, the comparison in this study examined the reliability of the individual student. However, if, as this study found, individuals are not consistent in their evaluations, then aggregated reliability measures are giving faculty a false sense of security. . . . The reliability of student evaluators may be further confounded by research indicating that student-completed evaluations measure ‘popularity of the instructor’ rather than ‘teaching effectiveness’ . . . . Teachers perceived as enthusiastic, good-humored, and warm consistently fare better on student evaluations. Although these characteristics are pleasant, they do not equate with teaching effectiveness. As stated earlier, student-completed evaluations are more about the instructor than about the actual course. The results, then, could be not just an issue of unreliable student evaluations or an invalid instrument. Rather, the system for evaluation itself may be inconsistent. This system requires that students use an instrument corresponding with the institution’s definition of teaching effectiveness, rather than the students’ definitions of teaching effectiveness. This inconsistency only becomes evident when students complete multiple measures, including measures that reflect the institution’s definition and ones that reflect the students’ definitions.”) *Id.* at 102–03.

19. JANET DONALD, LEARNING TO THINK: DISCIPLINARY PERSPECTIVES 3 (2002), available at <http://s11.Stanford.edu/projects/tomprof/newtomprof/postings/405.html>.

20. *Id.* at 3–4 (“In Baxter Magolda’s longitudinal study, most students—68 percent—entered university in a stage of absolute knowing, considering knowledge to be certain or absolute and conceiving their role as learners to be limited to obtaining knowledge from the instructor. The remaining 32 percent of entering students were in a stage of transitional knowing, considering knowledge to be partially certain and partially uncertain; their role was to understand knowledge. In both stages, students depict themselves as passive recipients of their professors’ wisdom. During their senior year, some students—16 percent—displayed independent knowing; that is, they considered knowledge to be uncertain. In this stage, everyone has his or her own beliefs, and students are expected to think for themselves, share views with others, and create their own perspective. Independent knowing increased to 57 percent the year following graduation. Only in the year following graduation did a small number of students—12 percent—reach the stage of contextual knowing, where knowledge is judged on the basis of evidence in context, and the student’s role is to think through problems and to integrate and apply knowledge. These findings suggest that two-thirds of entering students limit their role as learner to obtaining knowledge, and most will not be actively constructing meaning (independent knowing) until after they have graduated.”) *Id.*

“transitional knowing” (acquisition of facts) to a stage of realizing that knowledge is not absolute and that understanding is more crucial. This stage of “independent knowing” heralds the perception that knowledge is uncertain and the creation of one’s own perspective is paramount. This paves the way for development to the final stage, “contextual knowing,” where independent thinking remains vital but is now contextualized so that certainty is dependent on context.<sup>21</sup> Much of learning in colleges and universities, especially at the undergraduate level, occurs at the first two stages; yet significantly more ought to occur in the latter stage. Faculty who believe that transitional knowing is not adequate education thus teach with the purpose of trying to achieve, at a bare minimum, the independent knowing stage, and, ideally, the contextual knowing stage. Hence, their approach to teaching is very different from the students’ expectations of what teaching ought to be, and often much more demanding of students’ efforts than students expect or believe teaching ought to be.

Many faculty members believe that their responsibility is to teach material that will be useful in the students’ future professional career. Faculty members are making professional decisions as to pedagogy and the substantive content of the class. In Uniform Commercial Code terms, faculty want to teach material that is “merchantable”—fit for the purpose of the students’ careers and for the reasonable future into each student’s career.<sup>22</sup> This requires that students learn the material, understand the material, and be able to apply the information—think critically—in their future career decision-making situations. The goal of faculty is to get students to the independent knowing stage.<sup>23</sup> This is a difficult and time-consuming process, and one many students view as unnecessary and painful.

Students, essentially want class material to “fit for their particular purpose”—meaning their immediate and current level of understanding, which is to be able to use the information to pass all of the exams with very good grades, ideally with minimal effort. If the information is not going to be on the test, it is not relevant in their minds, and they do not want to learn it. Part of the reason for this expectation is the students’ level of intellectual development.

Based on this research, it is fairly clear why students’ expectations in the classroom are very different from faculty expectations. Most students’ intellectual development has not progressed to the point where they care about the future use of educational material. In addition they are focused on grades, not learning. With a grade orientation, rather than a learning orientation, “students . . . expect[] . . . knowledge [to be] ‘neatly packaged’ and arranged for ease of access.”<sup>24</sup> Therefore, when most students complete the student evaluations, they evaluate the “teaching effectiveness” of the professor based on their belief of what knowledge

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21. This is not unlike legal reasoning at its best.

22. This Uniform Commercial Code term was chosen by the authors, however, *see*, Lynn Clouder, *Getting the ‘Right Answers’: Student Evaluation as a Reflection of Intellectual Development?*, 3 *TEACHING IN HIGHER EDUC.* 185 (1998), where the author also uses a Uniform Commercial Code analogy.

23. *See* DONALD, *supra* note 19, at 2–6 (2002), available at <http://sll.stanford.edu/projects/tomprof/newtomprof/postings/405.html>.

24. Clouder, *supra* note 22, at 190.

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means and whether there was enough information provided to easily pass the exams with a minimal amount of effort.

Administrators also want the classroom material to be “fit for a particular purpose,”<sup>25</sup> i.e., quelling students’ fears by allowing them to pass coursework more easily, thereby increasing the likelihood they remain happy and do not drop out of the college or university, taking their money with them. In addition, administrators want the evaluation process to be cheap, efficient, and require little time; therefore easily quantifiable student evaluations are often the most effective way to accomplish those multiple purposes. Note that accurately assessing learning is not generally one of those purposes. In fact, even as external demand for comprehensive educational assessment builds, at the college and university level, current measures of college and university quality and student learning are typically inexpensive, readily available measures that do not actually tell the institutions much.<sup>26</sup>

Essentially students and administrators use a “McDonald’s Happy Meal” educational philosophy, i.e., making material readily available with minimal input or thought by and/or for the “consumer” students. If these “consumers” are kept happy, then they will return with their money and buy more prepackaged, easy-to-digest “educational meals.” Whether or not such a *McDonaldized*<sup>27</sup> education nourishes students intellectually and professionally or otherwise provides sustenance for all involved is irrelevant to most students and administrators. It is, instead, easily digested and satisfies the immediate needs of both, though its long term value to these constituents or to society as a whole is highly suspect; research has shown that education is significantly more complex than making people happy. Education requires much more effort than many students are willing to invest in the process. Under *McDonaldized* educational circumstances, student evaluations do not address whether or not real teaching and actual learning outcomes take place, even though that is the stated purpose of the student evaluations. The evaluations simply measure the “happiness index”—positive affect—of both students and administrators relative to the ease of the educational experience and the ease of calculating the results based on the time and money each is willing to commit to the process.

Because, as seen above, the students’ expectations of education is typically very different from the faculty members’ definitions, those differing expectations will have an impact on evaluating the professors’ ability to teach. “For example, students who adopt a surface approach [absolute learning] to learning and focus more on rote recall will typically prefer teachers who provide information and design assessment around a specifically defined set of criteria.”<sup>28</sup> The students’

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25. *Id.* (Clouder used the UCC analogy in her article, and the use of this phrase by the authors continues the Uniform Commercial Code analogy.)

26. Hersh, *supra* note 14, at 140.

27. In 1996, George Ritzer developed the term *McDonaldization*. See George Ritzer, *THE MCDONALDIZATION THESIS: EXPLORATIONS AND EXTENSIONS* (1998).

28. William W. Timpson & Desley Andrew, *Rethinking Student Evaluations and the Improvement of Teaching: Instruments for Change at the University of Queensland*, 22 *STUDIES IN HIGHER EDUC.* 55, 58 (1997).

expectations are that they will be passive recipients; if the professor expects them to be active participants they will not consider this “proper teaching.” On the other hand, “[s]tudents who adopt a deep approach and focus more on understanding . . . will generally prefer teaching which is intellectually challenging,”<sup>29</sup> and, as noted above, leads to “contextual learning” which will be important in their future. Teaching evaluations may thus reflect the degree of mismatch between student-faculty expectations and behaviors, rather than accurately evaluating teaching effectiveness.

Though relationships between teaching and learning do exist, those relationships, as well as the relationships among the expectations of those involved, are highly complex and both improperly and inadequately measured by the summative evaluations. Critically important differences occur between and among students, faculty, and the teaching environment itself, yet neither evaluation documents themselves, nor the use of the raw data, account even minimally for any of these complex differences.

#### B. Additional Factors That Need to Be Considered

In addition to the lack of a common understanding of what teaching effectiveness actually means, there are other factors, discussed briefly below, which bias student evaluation results.

“Student ratings of teaching effectiveness [are not determined solely by the quality of the teacher, but rather are] driven more strongly by a student characteristic than they [are] by a teaching condition or a teacher characteristic.”<sup>30</sup> Researchers “using data from several sources . . . support the view that teaching is multidimensional. Specifically, they identified nine dimensions of teaching: learning/value, instructor enthusiasm, group interaction, individual rapport, organization/clarity, breadth of coverage, examinations/grading, assignments/readings, and workload/difficulty.”<sup>31</sup> It should be recognized that “[t]he implications [of such differing approaches, expectations and characteristics] for students’ evaluations of teaching are substantial.”<sup>32</sup>

The Center for Faculty Evaluation & Development at Kansas State University and others have found that the research suggests that there are factors that may bias student rating data, such as:

- (1) Courses in the students’ major fields versus elective courses,<sup>33</sup>

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29. *Id.*

30. Kelly W. Crader & John K. Butler, Jr., *Validity Of Students’ Teaching Evaluation Scores: The Wimberly-Faulkner-Moxley Questionnaire*, 56 EDUC. & PSYCHOL. MEASUREMENT 304, 304 (1996).

31. Eugene P. Sheehan & Tara DuPrey, *Student Evaluations Of University Teaching*, 26 JOURNAL OF INSTRUCTIONAL PSYCHOL. 188, 189 (1999).

32. Timpson & Andrew, *supra* note 28, at 58.

33. “Students tend to rate courses in their major fields and elective courses higher than required courses outside their majors.” Barbara Gross-Davis, *Tools for Teaching—Student Rating Forms* (1993), <http://teaching.berkeley.edu/bgd/ratingforms.html>. See also, William E. Cashin, *IDEA Paper No 32: Student Ratings of Teaching: The Research Revisited* (1995), [http://www.idea.ksu.edu/papers/Idea\\_Paper\\_32.pdf](http://www.idea.ksu.edu/papers/Idea_Paper_32.pdf); John C. Ory and Katherine Ryan, *How Do*

- (2) Level of the course,<sup>34</sup>
- (3) Academic field<sup>35</sup> and/or specific discipline,<sup>36</sup>
- (4) Faculty rank,<sup>37</sup>
- (5) Gender of an instructor,<sup>38</sup>
- (6) Workload/difficulty,<sup>39</sup>
- (7) Class size,<sup>40</sup>
- (8) Lecture versus discussion type of class format,<sup>41</sup>
- (9) Expressiveness,<sup>42</sup>
- (10) Student expectations,<sup>43</sup>
- (11) Student motivation,<sup>44</sup>
- (12) Expected grades,<sup>45</sup>

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*Student Ratings Measure up to a New Validity Framework?*, 109 NEW DIRECTIONS FOR INSTITUTIONAL RES. 27 (2001).

34. “[H]igher level courses, especially graduate courses, tend to receive higher ratings.” Cashin, *supra* note 33.

35. “[S]ome studies [suggest] that humanities and arts type courses receive higher ratings than social science type courses, which in turn receive higher ratings than math-science type courses.” *Id.*

36. Davis, *supra* note 33.

37. “[R]egular faculty tend to receive higher ratings than graduate teaching assistants.” Cashin, *supra* note 33 (citation omitted).

38. Davis, *supra* note 33; Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23, 25, 29 (1989); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 326–327 (1994); Kristi Andersen & Elizabeth D. Miller, *Gender and Student Evaluations of Teaching*, 30 POLITICAL SCI. & POL. 216, 217 (1997); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools Dirty Little Secret*, 16 BERKELEY WOMEN’S L.J. 3, 4 (2001).

39. Richard John Stapleton & Gene Murkison, *Optimizing the Fairness of Student Evaluations: A Study of Correlations Between Instructor Excellence, Study Production, Learning Production, and Expected Grades*, 25 J. MGMT. EDUC. 269, 280–81 (2001) (reporting that teachers who assigned more work received lower student ratings). *But see*, Cashin, *supra* note 33 (stating that students give higher ratings in difficult courses where they have to work hard).

40. Davis, *supra* note 33.

41. *Id.*

42. Cashin, *supra* note 33 (stating that student ratings may be more influenced by an instructor’s style of presentation than by the substance of the content). *See also*, W. Neil Widmeyer & John W. Loy, *When You’re Hot, You’re Hot! Warm-Cold Effects in First Impressions of Persons and Teaching Effectiveness*, 80 J. EDUC. PSYCHOL. 118, 119 (1988). For a comprehensive review of instructor personality issues, *see* John C. Damron, *Instructor Personality and the Politics of the Classroom*, [ftp://ftp.csd.uwm.edu/pub/Psychology/Behavior Analysis/educational/politics-of-instructor-evaluation-damron](ftp://ftp.csd.uwm.edu/pub/Psychology/Behavior%20Analysis/educational/politics-of-instructor-evaluation-damron).

43. “[S]tudents who expect a course or teacher to be good generally find their expectations confirmed.” Davis, *supra* note 33.

44. “[I]nstructors are more likely to obtain higher ratings in classes where students had a prior interest in the subject matter, or were taking the course as an elective.” Cashin, *supra* note 33.

45. *Id.* (reporting a positive, but low correlation between students’ ratings and expected grades); *see also*, David S. Holmes, *Effects of Grades and Disconfirmed Grade Expectancies on Students’ Evaluations of Their Instructor*, 63 J. EDUC. PSYCHOL. 130 (1972); Richard Gigliotti & Foster Buchtel, *Attributional Bias and Course Evaluations*, 82 J. EDUC. PSYCHOL. 341 (1990).

- (13) Non-anonymous ratings,<sup>46</sup>  
 (14) Instructor present while students complete ratings,<sup>47</sup> and  
 (15) Purpose of the ratings.<sup>48</sup>

Furthermore, while the research shows many examples of biases, it is also clear that administrators are well aware of potential biases.<sup>49</sup> There are examples of bias (due to a faculty member's personal characteristics,<sup>50</sup> personal opinions of students as to what should occur,<sup>51</sup> unexplainable reasons,<sup>52</sup> or affect of the professor,<sup>53</sup>)

46. "[S]igned ratings tend to be higher." Cashin, *supra* note 33.

47. *Id.* These tend to be higher.

48. *Id.* (citations omitted).

49. During a meeting between a faculty member and the dean to review student evaluations the following occurred:

Dean: Well, how did everything go last semester?

Faculty: Not badly, but there was one unpleasant incident.

Dean: Oh?

Faculty: I had three sections of course X and there was a conspicuous instance of cheating in one. It involved five or six students, and I gave those people zeros on that exam.

Dean (perusing the evaluation summaries): That was Section 3, I see.

Larry E. Stanfel, *An Experiment with Student Evaluations of Teaching*, 18 J. OF INSTRUCTIONAL PSYCHOL. 23, 24 (1991). This example demonstrates that administrators really know that making students unhappy creates bias and, therefore, lowers student evaluation scores.

50. "Two students disclosed to me in passing . . . that when a self-identified gay, black instructor of a course on racism left the room for students to evaluate him, two white male students joked about how they were going to 'slam the faggot.'" Heidi J. Nast, 'Sex', 'Race' And *Multiculturalism: Critical Consumption And The Politics Of Course Evaluations*, 23 J. OF GEOGRAPHY IN HIGHER EDUC. 102, 106 (1999). "This study supports other research that suggests personality traits are robust predictors of students' evaluations of teaching effectiveness. However, it is difficult to determine a cause and effect relationship between instructor personality and student evaluations of faculty." Sally A. Radmacher & David J. Martin, *Identifying Significant Predictors of Student Evaluations of Faculty Through Hierarchical Regression Analysis*, 135 J. OF PSYCHOL. 259, 267 (2001).

But a couple of factors are making it harder for professors to 'do the right thing.'

First, the number of students who resent tough course loads and high grading standards seems to be growing as high schools continue to pump them out under-prepared and disengaged. And professors are encountering more and more of these students who resent, and in some cases actively resist, efforts to educate them. Some instructors, after enduring days, months, and years of scowls and pleas, eventually capitulate and make students happy 'consumers' by dumbing down their courses. . . . This increasingly means pleasing those students who don't like to read, write, think, or work hard. Even when in the minority, these disengaged students are feared, because they can drastically lower a professor's numbers. Conversely, professors have little to fear from engaged students, who tend to grade them generously because they're happy to have more study time for really challenging courses.

Paul Trout, *Evaluating the Evaluators*, Christian Science Monitor, Dec. 8, 1998 at 15; *See also*, Obenchain, Abernathy and Wiest, *supra* note 18.

51.

"It is unfair to drop someones (sic) grade because he/she missed too many days." "We were bombarded with information about authors that was boring with fact." "He had a tendency to be critical on objective manners (sic) such as word choice." "It is really hard to come to class when every day the material is being shoved down your throat."

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“The instructor needs to lower her standards.” “I also think 2 novels to read outside of class is (sic) a bit too much. It’s hard enough to get through.” “She should have more concern for her students, their stress levels, and their GPAs!”

Trout, *supra* note 50, at 15.

Taken as a whole, opinions [on student evaluations] were often contradictory, as is often the case. For some, there was too much work; for others, too little. The course was at once too demanding and not challenging enough. I was too tough or too easy, too patient or too impatient. Some praised, others criticized the textbook. . . . The outcome is not simply the result of what the professor plans, but what everyone brings to the class.

Douglas Hilt, *What Students Can Teach Professors: Reading Between The Lines of Evaluations*, CHRON. OF HIGHER EDUC., March 16, 2001, at B5.

Utilising (sic) student evaluations to make course and/or tenure and promotion decisions is institutionally problematic for at least two reasons. First, it assumes that students have not judged what they have consumed based on whether or not they ‘liked’ the topic covered in the course. Liking may have to do with students’ personal predilections or with the degree of emotional comfort they feel in the classroom. Non-majors commonly give lower evaluations to courses they are compelled to take, either as part of general liberal studies series, or as one of the only available elective slots that fits their schedule; for whatever reason, the course charts student anxieties and dislikes about taking something outside the desired or disciplinary field—anxieties over which an instructor has little control but which nevertheless register in teaching evaluations. Similarly, if more systemically, problematic are cases where faculty curricularly address issues of homophobia, racism, classism, misogyny or heterosexism—any or all of which may cause student discomfort. Like the evaluative impulses of non-majors in introductory classes, discomfort may result in negative evaluations, the directness with which difficult issues are broached producing different degrees of resistance.

Nast, *supra* note 50, at 104 (citations omitted).

52. Professor Stanfel conducted research that involved specific questions as to whether or not students had a clear understanding of the grading process. He passed out a memo that bore this request:

Please sign this and return [it] to me if you have read my note on grade computation in QBA 4020 for fall [of] ’87 and if it is perfectly clear to you. [O]therwise, make an appointment with me so that I can explain it to you again. Thanks. signed.” Each student did sign and return that sheet. Thus did the author, confident of straight 1s for item 2, distribute his evaluation forms. The average response of that class to item 2 was 2.2. The departmental average response for item 2 was 1.628 and for full-time faculty there, 1.59.

Stanfel, *supra* note 49, at 36–37. This result demonstrates that after making a very serious effort to inform students about the grade computation process, including a signature that each student understood the process, the professor performed worse than those who made no such effort. Professors Nerger and Viney detailed Viney’s experience.

The second author (Viney) has always included an item on his questionnaire that asks student to rate his availability. As an administrator he continued to teach his course and he made it clear that students could come to his office any time between 8 a.m. and 5 p.m. five days per week. If he could not see the student immediately, a mutually convenient appointment would be worked out immediately by the secretary. Objectively, the instructor was available to students for a very large portion of each day. The students apparently did not see it that way because the mean score on the availability item on the student questionnaire was 3.12. Upon relinquishing administrative duties and assuming full-time professorial duties, the author kept three regular office hours per week. Objectively, the professor was available far less than he had been as an administrator, yet student ratings improved dramatically to a mean of

that measure “popularity of the instructor” rather than “teaching effectiveness,”<sup>54</sup> or a number of other reasons.<sup>55</sup>

Most professors have also sensed the effects of the size of the classroom and how close they can get to students (proxemics) on their effectiveness. The larger lecture halls increase the physical space between the professor and the students, which results in greater psychological space and creates various communication problems. Since some professors teach in rooms that are small or have round

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3.64. . . . Thus availability ratings appear to have been affected by the students’ perceptions of the professor’s approachability [instead of the actual availability]. Student evaluations, in such a case, said nothing about actual availability and were, in that sense, not valid.

Janice L. Nergler and Wayne Viney, *Student Ratings of Teaching Effectiveness: Use and Misuse*, 38 *MIDWEST Q.* 218, 229–30 (Winter 1997). In a similar research project, the researcher provided the students with the information about course evaluation method and then tested them on their knowledge. On the test, they all demonstrated that they fully understood the method for course evaluations. However, even though

all students had proven themselves aware of how they would be evaluated, but again, at course evaluation time, only one decided this continued to be true. Over twenty-eight percent were uncertain about what previously they had shown to be true, and upwards of forty-six percent then disagreed with the evidence they themselves provided earlier.

Larry E. Stanfel, *Measuring The Accuracy of Student Evaluations of Teaching*, 22 *J. OF INSTRUCTIONAL PSYCHOL.* 117, 120 (1995). Another portion of this same research project involved the question on the evaluation document regarding prompt return of all graded material.

Insofar as reasonably prompt return of graded documents was concerned [when all were returned the next class period], only five persons could strongly agree that the earliest possible moment qualifies as reasonably prompt, and over one quarter of the group was either uncertain or in disagreement that this proven policy could be so regarded.

*Id.* at 120. Even though all of the graded documents had been returned with the utmost promptness, very few of the students’ answers reflected the actual facts of the situation.

53. In a research project the researchers had the same professor teach the same class using the same syllabus, same exams and same lectures, etc. The only change between the two semesters was that the professor was trained in how to deliver the lectures more “enthusiastically.” The results on the student evaluations for the two semesters were significant. The professor was rated on such factors as Knowledgeable, Tolerant, Enthusiastic, Accessible, and Organized. The mean scores increased from .69 to .95 after the “enthusiastic” training. Everything, except the style of delivery remained the same, so there was no logical reason for those scores to go up that much. Wendy M. Williams & Stephen J. Ceci, *How’m I Doing?, Problems With Student Rating of Instructors and Courses*, 29 *CHANGE* 13 (1997). These authors went on to say, “our modest study nevertheless shows that student ratings are far from the bias-free indicators of instructor effectiveness that many have touted them to be. Moreover, student ratings can make or break the careers of instructors on grounds unrelated to objective measures of student learning . . . .” *Id.* at 21.

54. See generally, Obenchain, *supra* note 9.

55.

[R]atings are higher if the instructor is present while the forms are being filled out; non-anonymous ratings are higher; and ratings are higher in classes that meet with more intensive time schedules. Ratings are also higher on items custom-designed by the instructor, as compared to items on standardized forms. Again, if instructors are to be compared with each other, these factors must somehow be taken into account.

Nergler and Viney, *supra* note 7, at 220–21 (citations omitted).

tables in them and others teach in the large informal lecture halls, the effects of proxemics are not equally distributed across all professors.<sup>56</sup> Rarely are these biasing factors considered in the use of student evaluations for making the life-changing decisions in regard to faculty members.

Since all these variables could impact ratings, control of all substantially meaningful variables among the multidimensional aspects of teaching must be considered in the student evaluations, rather than being based on mere student comfort and grade satisfaction as typically occurs. Yet, administrator analysis and interpretation of student evaluations makes no meaningful attempt to do that. In practice, little or no attempt is made to use instruments which meaningfully evidence and incorporate the multitude of substantial, yet variable factors, potentially impacting the scores students choose to evaluate professors and/or other college and university teachers, because every teaching situation and every course is treated identically.

Although the standardized questions alone could yield basic information as to whether students liked a particular instructor, his exams, or his grading, they could provide no meaningful information as to why this was the case and, therefore, easily confounded similar results arising from vastly different circumstances . . . . They, therefore, provided the department with inadequate information for any kind of meaningful evaluation and the teachers with inadequate information to help them improve their performances . . . . In short, . . . the computerized answers literally produced academic junk.<sup>57</sup>

## II. THE LEGAL ISSUES

Due to the above issues and unknowns, there are several legal issues regarding student evaluations and their use, which arise when student evaluations are used at either public or some private institutions<sup>58</sup> to make employment, retention, and tenure decisions for tenure-track or probationary faculty and to make employment and retention decisions for other constitutionally protected teaching professionals.<sup>59</sup> These legal issues consist of the constitutional issues of

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56. "Thus, any fair comparison of one instructor with another must factor out the effects of this potentially important variable." *Id.* at 219.

57. Robert Justin Godstein, *Some Thoughts About Standardized Teaching Evaluations*, 22 *PERSP. ON POL. SCI.* 8, 10 (1993).

58. Constitutional rights attach when the private institutions receive enough government funds and/or other governmental aid to allow a court to say that there is enough "state action" to require them to comply with the Constitution. However, see Steven K. Berenson, *What Should Law School Student Conduct Codes Do?* 38 *AKRON L. REV.* 803, 837 (2005) "[A] number of theories have been applied to impose upon private schools similar procedural due process requirements to those that apply to public schools. First, it has been argued that because many private universities receive federal financial assistance, are heavily regulated, and engage in a variety of projects with government entities, such universities are 'state actors' for purposes of due process analysis. However, such arguments have been rejected."

59. For simplicity the term "protected faculty" shall be used in the rest of this article to mean tenured, tenure track, and other faculty who have a protected interest because of their

fundamental rights, substantive due process, and a related issue when students are being treated as *de facto* “experts” in pedagogy.

#### A. Fundamental Right

“[P]eople who seek to challenge governmental action under the due process clause must first demonstrate to the court they have a constitutionally protected liberty or property interest. If they do, and only if they do, does the court then take the next step and determine what process is due them.”<sup>60</sup> Therefore, not all college and university faculty members may be constitutionally protected, but for some faculty members this protected liberty or property interest does exist. In January of 1972, the U.S. Supreme Court heard two cases involving college and university faculty members’ or teaching professionals’ rights in regard to continued employment.<sup>61</sup> In *Roth*, the plaintiff had a contract for a fixed term of one academic year, which was not renewed. He was simply informed he would not be hired for the following academic year. Roth challenged the non-renewal as a denial of his constitutional right to due process. The Court reasoned that because Wisconsin law and regulations do not grant Roth a legal right to an “expectation” of renewal, no due process rights attached to his claim. However, the Court recognized “‘Liberty’ and ‘property’ are broad and majestic terms,”<sup>62</sup> and as such, by definition would include more than the merely common understanding of property. The *Roth* Court recognized there could be a “property” right in the faculty position when there is some expectation created by some “understanding or tacit agreement”<sup>63</sup> the job will continue.

In *Sindermann*, the U.S. Supreme Court affirmed the Court of Appeals, which held “that, despite the respondent’s lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show he had an ‘expectancy’ of re-employment.”<sup>64</sup> The Court agreed in this factual situation there was an evidentiary issue as to whether or not he had a legitimate “expectancy” of continued employment. The college had certain rules and practices that could be construed as giving one the expectancy of continued employment. Thus, if *Sindermann* could prove he had such expectancy, then at least procedural due process would attach to that right.<sup>65</sup> The Court went on to say:

We have made clear in *Roth* that “property” interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, “property” denotes a broad range of interests

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expectation of continued employment for other reasons.

60. William P. Quigley, *Due Process Rights of Grade School Students Subjected to High-Stakes Testing*, 10 B.U. PUB. INT. L. J. 284, 290 (2001).

61. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

62. *Roth*, 408 U.S. at 571.

63. *See id.*

64. *Sindermann*, 408 U.S. at 596.

65. *See id.*

that are secured by “existing rules or understandings.” A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.<sup>66</sup>

The court in *Regents of the University of Michigan v. Ewing* reiterated this by saying, “We recognize, of course, that ‘mutually explicit understandings’ may operate to create property interests.”<sup>67</sup>

At most colleges and universities there is likely a combination of tenured faculty, probationary faculty, and academic teaching staff. Generally, all of these faculty members participate in an annual review to determine whether or not each will receive the next year’s contract, and for those who are tenure-track, whether they are progressing according to the tenure guidelines, so that they may receive tenure at the end of the six-year period. The process that is used for this review and the guidelines will be found either in the system-wide rules at the state level or at the local level. Generally the state level provides the broad outlines for annual reviews of faculty members, while the local (college/university and/or department) rules fill in the details for both retention and, ultimately, for tenure. If the review rules that apply to the various categories of faculty include either an explicit or implicit expectation of employment, then those faculty members are protected by the Due Process Clause of the Fourteenth Amendment, and shall be considered protected faculty. When, for some categories of faculty, there is no expectation of continued employment, either explicit or implicit, those are unprotected faculty and shall not be part of this discussion.

At all colleges and universities the review rules include reviewing an individual’s teaching, research, and service. The value or “weight” given to each of these three categories will vary at each college or university, but all review these three categories to some degree. The faculty members’ property interests and the dimensions that are created depend upon the existing rules and/or understandings that come from an independent source such as state law, college and university rules, or understandings that secure these benefits and then support a claim of entitlement to those benefits.<sup>68</sup> The standards for each of these categories will contain specific criteria for the renewal of the contract. To meet each of the criteria requires highly detailed information. Everyone involved in the process clearly understands if the faculty member provides the requisite information that meets the specified criteria, his/her contract must be renewed. No similar expectation and process routinely applies to teaching professionals whose status may not otherwise be constitutionally protected.

As seen in the U. S. Supreme Court and other courts, decisions have stated that an expectation of continued employment by a faculty member, created by the

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66. *Id.* at 601 (citing *Roth*, 408 U.S. at 571–72, 577).

67. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 n.9 (1985) (citing *Sindermann*, 408 U.S. at 601).

68. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972).

applicable rules, is a fundamental right under the U.S. Constitution,<sup>69</sup> and due process attaches. College and university rules provide some guidelines for the process that must be followed, but,

[o]nce a claimant establishes a right protected by due process, a court must decide what process is “due.” The existence of mandatory procedures may help establish a due process entitlement, but the Constitution neither gives an individual the right to have those procedures followed nor does it restrict an individual’s rights only to those procedures. The constitutional requirements of due process are independent.<sup>70</sup>

### B. Substantive Due Process

The Fourteenth Amendment contains three things in addition to the Equal Protection Clause and procedural due process, “it contains a substantive component, sometimes referred to as ‘substantive due process,’ which bars certain arbitrary government actions regardless of the fairness of the procedures used to implement them.”<sup>71</sup> This means that due process consists of both procedural and substantive due process.

On the substantive side, the law holds that some rights are so profoundly inherent in the American system of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded the individual are fair. Substantive due process challenges strike at the fairness of the state action itself, not the method by which it is achieved.<sup>72</sup>

The substantive due process doctrine turns due process from a mechanism ensuring procedural fairness when the government attempts to deny life, liberty, or property, into a fourth protected entity that determines whether or not fundamental rights exist that are not enumerated within the Constitution. Under the doctrine, due process has some “substantive” quality that forms and then falls under the liberty provision.<sup>73</sup>

[The] Due Process Clause protects “the substantive aspects of liberty against impermissible government restrictions.” Courts have determined that the Due Process Clause requires that the government avoid taking action that is arbitrary, capricious, does not achieve a legitimate state

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69. See *Roth*, 408 U.S. 564, and *Perry v. Sindermann*, 408 U.S. 593 (1972).

70. Tim Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts’ Inverted Analysis*, 95 YALE L.J. 1017, 1023 (1986).

71. *Daniels v. Williams*, 474 U.S. 327, 337 (1986); see also, *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552, 555 (E.D. Tex. 1992).

72. Quigley, *supra* note 60, at 305.

73. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 169 (2003).

interest, or is fundamentally unfair. A substantive due process violation is deemed to occur where such state action “encroaches upon concepts of justice lying at the basis of our civil and political institutions.”<sup>74</sup>

The “fundamental right” of some faculty members has already been established, therefore both procedural and substantive due process attaches to that right when the state is trying to take it away.

*Lochner v. New York*<sup>75</sup> “effectively immortalized the substantive due process mechanism that is still the standard for analyzing claims regarding unenumerated constitutional rights today.”<sup>76</sup>

The “fundamental liberty interest” or “unenumerated right” branch of substantive due process . . . has gained a remarkable degree of at least formal acceptance by the current Supreme Court. The doctrine was put on the most solid doctrinal footing in its history by its explication in the Court’s 1992 decision in *Planned Parenthood v. Casey*.<sup>77</sup>

The Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>78</sup> Therefore, the substantive due process clause has

become [not only the] bulwark . . . against arbitrary legislation; but, [also against other arbitrary action] . . . as it would be incongruous to measure and restrict [it to only process] . . . [as it] . . . must be held to guarantee not [only] particular forms of procedure, but the very substance of individual rights to life, liberty, and property.<sup>79</sup>

Since actions by the government “can be arbitrary in more than one sense[,] . . . the Due Process Clause has been construed to provide protection against more than one type of arbitrary government action.”<sup>80</sup>

The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in

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74. Paul T. O’Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 641 (2003) (citing 16B Am. Jur. 2d Constitutional Law 901 (2002); *Debra P. v. Turlington*, 644 F. 2d 397, 404 (5th Cir. 1981)) (footnotes omitted).

75. 198 U.S. 45 (1905).

76. Schmidt, *supra* note 73 at 172 (footnote omitted).

77. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836 (2003). *See also*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

78. Rubin, *supra* note 77 at 836 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997)).

79. *Hurtado v. California*, 110 U.S. 516, 532 (1884).

80. Rubin, *supra* note 77 at 841; *see also*, Marc C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 144 (2000); Bruce N. Morton, John Locke, & Robert Bork, *Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709 (1992).

[public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”<sup>81</sup>

A substantive due process right deals with the ability of a person to defend/explain, in substance, what is being done—essentially a “fairness” issue. For example, the court in *Debra P. v. Turlington*<sup>82</sup> held that for a test that was required to be taken prior to graduation to be valid, the state must be able to show that the test fairly assessed what was actually taught in the school, because the students had a protected property interest (a fundamental right) in the expectation of receiving a diploma.<sup>83</sup> Another court citing *Debra P.* stated that “fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not taught.”<sup>84</sup> The concept of “fundamental fairness” is part of the substantive due process doctrine. The analogy to the current use of student evaluations should be quite obvious—it is “fundamentally unfair” to use data, the numbers resulting from the student evaluations, that may have little or no relationship to what is actually being “tested”—the quality of teaching.

### III. RELATED LEGAL ISSUES WITH STUDENT EVALUATIONS AS “EVIDENCE”

When a college or university uses student evaluations as the sole or primary criterion for personnel decisions and views these student evaluations in a context similar to that described herein, in effect, the students’ evaluations become “testimony” or evidence relative to the pedagogical ability and the substantive knowledge of the professor. Students thus serve in the de facto role of expert witnesses in this process. Yet presently an institution does not have to show that there is any evidentiary validity to student evaluation “testimony,” nor must it first qualify the students as “experts.”

#### A. Validity

Validity addresses the issue of whether what is supposed to be measured is what is actually measured.<sup>85</sup> Student evaluations are intended to measure students’ objective perception of the teaching process (pedagogy) and teaching effectiveness<sup>86</sup> (substantive knowledge) of the individual professor being assessed.

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81. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (footnotes omitted).

82. 644 F.2d 397 (5th Cir. 1981).

83. *Id.* at 404–05.

84. *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552, 555 (E.D. Tex. 1992).

85. Judith D. Fischer, *The Use and Effects of Student Ratings in Legal Writing Courses: A Plea for Holistic Evaluation of Teaching*, 10 *LEGAL WRITING* 111, 117 (2004) (“Yet there is a continuing lack of consensus among scholars about a number of points, including the important issue of the ratings’ validity, that is, whether they actually do measure teaching quality.”). See also, Philip Abrami, et al., *Validity of Student Ratings of Instruction: What We Know and What We Do Not*, 82 *J. EDUC. PSYCHOL.* 219 (1990).

86. See James A. Kulik, *Student Ratings: Validity, Utility, and Controversy*, 109 *NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH* 9, 10 (2001) (“To say that student ratings are valid

To be valid, teaching effectiveness ought to be correlated to effective course design and effective delivery, ultimately resulting in increased learning of the subject area. “If ratings are valid, students will give good ratings to effective teachers and poor ratings to ineffective ones.”<sup>87</sup> Therefore, if the questions on the student evaluations are intended to measure effective teaching—their claimed purpose—which results in increased learning, then the questions must be valid in regard to measuring the correlations between teaching and learning, with irrelevant factors eliminated and relevant factors controlled. Since, as we saw above, there are innumerable other factors that come into play when students answer the questions on the instrument, there is no certainty that the instrument actually measures what it is purported to measure, and its use for that purpose is therefore invalid,<sup>88</sup> or in legal terms, arbitrary, capricious, or “fundamentally unfair.” Because of this invalidity most student evaluations probably measure affect, instead of effect.

There are four different types of validity—conclusion validity, internal validity, construct validity, and external validity.<sup>89</sup> All of these are problematic in the usage of the typical teaching evaluation.

The conclusion validity is the relationship between the two variables—the questions and what the questions are intended to measure (effective teaching). This means that the questions should be framed so that one can determine whether learning resulted from the classroom experience. However, most questions on the student evaluations actually address how much the students liked the process of learning,<sup>90</sup> instead of how much was actually learned. When invalid evaluations are used to show that a professor is not a good teacher, there is no conclusion validity.

Internal validity addresses whether the relationship is a causal one. Just because a professor does all of the things that a good professor does, are those necessarily the cause of student learning? For example, speaking clearly, knowing the material well, and other such questions are presumed to contribute to learning, but speaking clearly and knowing the material well may have no effect if the student has not prepared, does not study, or does not come to class very often. The underlying presumption as to cause and effect could be invalid. There may have been any number of other causes for either the increased learning or poor learning. Each student brings his or her unique background and work habits to the classroom. Could those factors have been the cause of the increased learning,

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is to say that they reflect teaching effectiveness.”). *See also*, Fischer, *supra* note 85, at 116 (“Student achievement is often proposed as the appropriate indicator of effective teaching, but there is no universally accepted means of measuring it.”) (citations omitted).

87. Kulik, *supra* note 86, at 10.

88. *See* Herbert W. Marsh, *Student Evaluations of University Teaching: Dimensionality, Reliability, Validity, Potential Biases, and Utility*, 76 J. EDUC. PSYCHOL. 707, 749 (1984).

89. William Trochim, Introduction to Validity, <http://trochim.human.cornell.edu/kb/introval.htm> (last visited Oct. 16, 2005).

90. Fischer, *supra* note 85, at 118–19 (“Other scholars have stated that student ratings measure not teaching effectiveness but student *perceptions* of teaching effectiveness or feelings that are not directly related to good teaching and learning.”) (citations omitted).

instead of what the professor did or did not do? The student evaluations do not even consider most of those factors. Therefore, there is little, if any, internal validity.

Construct validity addresses whether or not student evaluations ask the critical questions that would actually measure the outcome we wanted to assess—increased learning.

[The] [s]ubstantive aspects [of construct validity] involve evidence supporting the theoretical and empirical analysis of the processes, strategies, and knowledge proposed to account for respondents' item or task performance on the assessment (or both). Sources of evidence include analysis of individual responses or response processes through think-aloud protocols *or simply asking respondents about their responses.*"<sup>91</sup>

Because those who respond to these items on student evaluations are kept anonymous, they can never be quizzed as to the reasons for their choices on the document. There is no way to establish construct validity.

External validity assesses if there is a causal relationship as to cause and effect that can be generalized to other teaching situations. If this professor taught another group of students, would that new group of students have a similar level of learning? Clearly, the evaluations don't do that either, since there is no evidence that they even measure learning. They probably do measure affect, and in that sense there may be external validity, but that is not what they are used for—they are used as a surrogate for effective teaching. There is no external validity.

Based on the four different types of validity, student evaluations meet none of these standards and are invalid instruments. Yet they are used to make life-changing decisions without any ability by the person against whom they are being used to show that they are invalid and unfair.<sup>92</sup> From the discussion it is clear that there is no validity to student evaluations, because for "any inference or conclusion, there are always possible threats to validity—reasons the conclusions or inference might be wrong. Ideally, one tries to reduce the plausibility of the most likely threats to validity, thereby leaving as most plausible the conclusions reached by the study."<sup>93</sup> In regard to the conclusions drawn from the questions on student evaluations—that these questions provide the conclusion that one who scores high is a good teacher—there are far too many threats to validity that have not been effectively controlled.

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91. John C. Ory & Katherine Ryan, *How Do Student Ratings Measure Up to a New Validity Framework*, 109 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH 27, 29 (2001) (emphasis added).

92. Fischer, *supra* note 85, at 119 ("McKeachie declared that 'for personnel purposes, faculty and administrators rightfully have great concerns about the validity and reliability of evaluation data.' Others have bluntly called the ratings 'risky business,' 'pernicious,' or 'an unqualified failure' with a 'dysfunctional' impact.") (citations omitted).

93. William Trochim, Introduction to Validity, <http://trochim.human.cornell.edu/kb/introval.htm> (last visited Oct. 16, 2005).

### B. Standards for Expert Testimony

Even though the student evaluations aren't being used in a trial, they are being used as evidence in critical life-changing decisions that could result in a right to a hearing and ultimately an appeal. Once that procedural due process right to a hearing is exercised by the faculty member, that faculty member must have the substantive due process right to get at the basis of the evidence used against him/her, because that is what fundamental fairness requires in this situation. Because the student evaluations are supposedly evidence of effective teaching, and that evidence is treated as if an expert provided it, by analogy the same or similar standards that apply to expert witnesses and expert testimony should apply to the right to use this "testimony" when a faculty member exercises his/her due process rights.

In a federal courtroom the Federal Rules of Evidence would apply, and Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the finder of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise."<sup>94</sup> The students' opinions expressed in the evaluations are used by the finder of fact, the faculty committee, and others who use this information to make their recommendations, to help them determine a fact issue—whether or not this faculty member is a good teacher. Rule 702 states that only a "qualified . . . expert . . . may testify . . . in the form of an opinion."<sup>95</sup> Since students can't qualify as experts,<sup>96</sup> their opinion as to the quality of teaching cannot be used because the witness providing his or her opinion must be a person who is an expert on pedagogy. Such a qualified expert would testify as to whether the methods used by the faculty member should be effective, based on the available scientific research in pedagogy. Expert testimony would be necessary to prove causation that poor pedagogy caused the result of not much learning, instead of any number of other variables that are not considered in student evaluations. The problem is not that "opinions" are used, rather that the "witness"—each student—is not an expert whose opinion can help clarify or help the trier of facts to understand a fact issue. Rule 702 clearly states that laypersons' opinions, such as these student opinions, could not be used for the ultimate issue of whether the

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94. FED. R. EVID. 702.

95. *Id.*

96. Neither undergraduate students nor graduate students could qualify as experts in pedagogy, because even graduate students are not taught much about "how to teach." For a discussion of some of the issues with graduate students and their understanding of "how to teach," see, e.g., Colleen Conway, Erin Hansen, Andrew Schulz, Jeff Stimson, & Jill Wozniak-Reese, *Becoming a Teacher: Stories of the First Few Years*, 91 MUSIC EDUCATORS J. 45 (2004); Rose Mary Carroll-Johnson, *Learning to Teach* 32 ONCOLOGY NURSING F. 889 (2005); Carol Anderson Darling & Eileen M. Earhart, *A Model For Preparing Graduate Students As Educators*, 39 FAM. REL. 341 (1990); Stephen F. Davis & Jason P. Kring, *A Model for Training and Evaluating Graduate Teaching Assistants*, 35 C. Student J. 45 (2001); Elizabeth H. Morrison & Janet Palmer Hafner, *Yesterday a Learner, Today a Teacher Too: Residents as Teachers in 2000*, 105 PEDIATRICS 238 (2000); Wayne Wanta, Paul Parsons, Sharon Dunwoody, William C Christ, Richard L. Barton, & Beth Barnes, *Preparing Graduate Students to Teach: Obligation and Practice*, 58 JOURNALISM & MASS COMM. EDUCATOR 209 (2003).

faculty member is a good teacher, since they are not experts at determining what pedagogical elements are necessary to make one a good teacher. These students, as laypersons, are clearly able to “testify” as to their experiences in the classroom—the facts that they are privy to—but not the ultimate issue of whether that makes one a good teacher or not. Furthermore, graduate students, both at the masters and doctoral level, rarely receive any sort of training in teaching techniques or pedagogy, even if they are expected to teach in their respective disciplines once they receive their doctorate, and thus would not qualify as expert witnesses. Additionally, graduate students also experience a severe conflict of interest: even if they were qualified as expert witnesses, which few would be, they are also far less likely to be honest because critical rewards beyond merely receiving grades (e.g., theses, preliminary exams, progress-towards-degree assessments, dissertation defenses) are highly contingent upon rating their professors highly, a small number of faculty teach the same graduate students over and over, especially at the doctoral level, and class sizes are so small as to make anonymity unlikely. Yet, student evaluations are, in fact, used to help make the determination of whether someone is a good teacher, and in some colleges and universities, they are the most critical piece of “evidence” in that process.

### C. Recent Supreme Court Cases on the Use of Expert Witnesses

The Supreme Court has created a “gate keeping”<sup>97</sup> function in regard to what an expert witness could testify about. Four foundation levels are relevant to the admissibility of testimony by an expert witness: competency, theory, technique, and application. The first level, competency, establishes the expertise of the witness and the “competency” of that person’s testimony based on Rule 702. In the first step a judge’s “gate keeping” function is to determine whether the witness is an expert—in this situation the student who is offering the opinion on the professor’s ability to teach him or her. “In exercising the trial judge’s gate keeping responsibility under Rule 702, the trial court has broad discretion in not only determining the general competency issue, but also whether a particular subject matter is beyond the scope of the expert’s expertise.”<sup>98</sup> However, even with that broad discretion, none of the students whose “expert” testimony is used are qualified by any knowledge, skill, experience, training or education as to the subject matter their testimony is used for—pedagogy. Such testimony is clearly beyond the scope of any “expertise” students may have. Therefore, students could not be used to testify as to the faculty members’ professional teaching skills, since they lack any knowledge of pedagogy and have no expertise in the faculty members’ subject matter knowledge.

Even if a judge, based on the above factors, could determine that students are experts, the next step is for the judge to function as the gatekeeper as to the

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97. See *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 597 (1993).

98. Richard Collin Mangrum, *Interpreting Nebraska Rule of Evidence 702 After the Nebraska Supreme Court Adopted the Federal Daubert Standard for the Admissibility of Expert Testimony in Schafersman v. Agland Corp.*, 35 CREIGHTON L. REV. 31, 81 (2001) (citations omitted).

reliability<sup>99</sup> of expert testimony.<sup>100</sup> This process must follow Supreme Court standards for admitting scientific and non-scientific testimony.

[The] United States Supreme Court embarked on a journey to create standards for admitting both scientific and nonscientific expert testimony. The evolution of this journey, as demonstrated by *Daubert v. Merrell Dow Pharmaceuticals Inc.*, *General Electric Co. v. Joiner*, and *Kumho Tire Co., Ltd. v. Carmichael*, illustrated the Court's recognition that all admissible expert testimony must achieve a certain level of reliability and relevance.<sup>101</sup>

In *Daubert*,<sup>102</sup>

the Court identified four non-exclusive factors to aid in determining the admissibility of scientific evidence: (1) whether the theory or scientific technique has been tested; (2) whether it has been subjected to peer review or publication; (3) the known or potential rate of error; and (4) whether the principle was generally accepted in the relevant scientific community.<sup>103</sup>

These factors are non-exclusive, and others may be considered as to the reliability of the proffered testimony.<sup>104</sup> Regardless of which, or how many, factors, are used, the testimony by the expert cannot be "couched in terms of mere possibility, as compared with probability or certainty, [because that] provides an insufficient basis for admitting expert testimony."<sup>105</sup>

Until *Kumho Tire*,<sup>106</sup> these were some of the factors to be considered as to reliability of scientific evidence. *Kumho Tire* expanded these factors to the use of nonscientific evidence.<sup>107</sup> These two cases made it clear that the judge is the gatekeeper as to expert testimony in both scientific and nonscientific testimony as to the reliability of the testimony by considering several factors. "Therefore, the proper application of the 'gate keeping' function encompasses scientific, technical,

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99. The courts use the term "reliability" as a synonym for validity.

100. See, e.g., Major Victor Hansen, *Rule of Evidence 702: The Supreme Court Provides a Framework for Reliability Determinations*, 162 MIL. L. REV. 1 (1999); Mangrum, *supra* note 98; Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert*, 34 AKRON L. REV. 689 (2001).

101. Morsek, *supra* note 100, at 693 (citations omitted).

102. *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993).

103. Morsek, *supra* note 100, at 707-09 (citations omitted).

104. See, e.g., Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911-12 (1982) (identifying eleven factors that could be considered); see also, UNIFORM R. OF EVID., R. 702 (1974) (Tentative Draft No. 1, 1997), available at: <http://www.law.upenn.edu/bll/ulc/ure/ev702.pdf>. See also The National Conference of Commissioners on Uniform State Laws recommendations as to the factors and other elements of Rule 702 available at [www.law.upenn.edu/bbl/ulc/ure/ev702htm](http://www.law.upenn.edu/bbl/ulc/ure/ev702htm).

105. Mangrum, *supra* note 100, at 39 (citations omitted).

106. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

107. *Id.* at 147.

and other specialized knowledge.”<sup>108</sup> The determination as to whether a professor is good at helping students learn by using proper pedagogy is certainly “specialized knowledge,” at a minimum.

These cases create a “gate keeping” function in regard to what an expert witness could testify about. Four foundation levels are relevant to the admissibility of testimony by an expert witness: competency, theory, technique, and application.<sup>109</sup> As already discussed, the first level, competency, establishes the expertise of the witness and the “competency” of that person’s testimony based on Rule 702.<sup>110</sup>

The second level of inquiry in the “gate keeping” function is to inquire whether the theory is reliable. If the theory is new this may be shown by the expertise of the witness. The theory in student evaluations is that the student evaluations measure the ability to teach well, which results in increased learning by the students. That theory, as discussed above, has not been shown to be valid and reliable. Evidence of its reliability might include whether it has been subject to recent peer review and/or publication, whether it has an established rate of error, and whether the relevant professional community still generally accepts this theory. None of these can be shown to exist, since there is no valid evidence to show the student evaluations measure the teaching ability of faculty, nor that teaching ability actually results in higher levels of learning.

The third level of inquiry that the “gatekeeper” must determine is whether the technique or procedure was properly used. To show this the “expert” (each student) may testify that he/she is qualified to use the technique or procedure properly based on knowledge, skill, experience, training, or education. No student could testify that he/she is qualified to properly use the theory that teaching ability will increase the amount of learning. In addition, there must be evidence that the technique or procedure used is reliable because the technique or procedure has been reliably tested, has been subject to peer review and/or publication, has an established rate of error, and the technique is generally accepted in that profession, whether there are safeguards in the characteristics of the technique, whether there are existing standards governing its use, whether there is some continuing maintenance/update of the standards governing the theory, to what extent the basic data that is being used by the fact finder is verifiable, whether there are other experts available to test and evaluate the theory, and questions to establish the degree of care taken by the expert to prepare the information. Clearly, none of these standards can be met.

In addition to testifying that the formula—the use of the medians to establish effective teaching—was properly used, the expert must also explain the technique

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108. Morsek, *supra* note 100, at 723 (citation omitted).

109. Mangrum, *supra* note 100, at 34. In addition, some of the questions come from factors for reliability that come from an article by Mark McCormick. See McCormick, *supra* note 104.

110. See FED. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

or procedure itself to the fact finder and explain how the information developed by the use of the formula (the medians) relates to his or her testimony regarding the theory that teaching ability increases learning. This last step is the application function—the fourth level of inquiry by the gatekeeper. In regard to the specific application the expert must be qualified based on knowledge, skill, experience, training, or education to be able to apply the principle and to be able to interpret the results. The expert must testify as to the proper use of the statistical methods employed to arrive at the results that he or she is testifying to. The expert must also testify as to why he or she is capable of interpreting and/or explaining the application of the method to the case, and is able to explain the application of the result to the opinion that arises therefrom.<sup>111</sup> There are several problems with this requirement. First, the evaluations are anonymous, so no student could be called to “testify” to any of this. Second, even if they could be called, they have virtually no expertise to testify to any of this. They know nothing about whether the use of the medians to establish effective teaching is a proper application of this information—nor does anyone else for that matter. Even though the cases and the Federal Rules of Evidence have expanded the concept of who qualifies as an expert, this is not broad enough by any stretch of the imagination to include anonymous students as experts in pedagogy.<sup>112</sup>

#### D. Discussion

As the opening quote by Justice Marshall said,

[B]efore the decision is made to terminate an employee’s wages [and in our scenario, an employee’s position and his/her future reputation], the employee is entitled to an opportunity to test the strength of the evidence “by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence.”<sup>113</sup>

The above discussion has shown that currently in the faculty review process, the situation is that in many faculty positions there is a “legislatively” created right to an expectation of continued employment, which based on U.S. Supreme Court decisions, becomes a fundamental right subject to due process.

Even though procedural due process exists, by using student evaluations as the primary source of information as to the faculty member’s teaching ability, the right to substantive due process is taken away in an arbitrary manner by the use of the raw numbers that the student evaluations provide. If the faculty member is denied renewal of the contract and/or tenure, the faculty member is, ultimately, entitled to a hearing. At these retention hearings there is generally no shortage of procedural due process. Therefore, the focus is not on procedural due process; instead the focus is on substantive due process. As we have seen, substantive due process and

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111. Based on the principles in the Mangrum law review article. *See* Mangrum, *supra* note 100, at 34–36.

112. *See generally* Morsek, *supra* note 100.

113. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 548 (1985) (Marshall, J., concurring) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting)).

the use of student evaluations has yet to be adequately addressed relative to the content, drafting, completion, and use of student evaluations.

We have shown that student evaluations do not measure what they are intended to measure—effective teaching. They may measure any number of other things, to some degree, including whether the students liked the process. We have also shown that there are numerous factors which may bias the input from the students as they rate the professor. None of those factors are considered in the final use of the student ratings. The final use of these ratings is to reduce them to some statistical medium and use that median score to determine whether the professor is an effective teacher (by ranking above the median) or an ineffective teacher (by ranking below the median.) This number is used by administrators to make life-changing decisions such as pay raises, retention, promotion, and tenure. These decisions are critical in the professional life of faculty members, yet the main piece of information used to make those decisions is seriously flawed and cannot be challenged by the professor in any substantive way.

One of the most critical flaws is that the student evaluations may not be valid. For example, Stapleton and Murkison demonstrated the limits of the term “valid” as applied to student ratings.<sup>114</sup> The data, from this study, revealed that some instructors confounded the general trend: of the twenty-nine instructors studied, four who produced learning in the top half received ratings in the bottom half, while four who produced learning in the bottom half received ratings in the top half.<sup>115</sup>

Had personnel decisions been made on the basis of these data, with a cutoff at the median, four of the more effective professors would have been punished or dismissed, while four of the less effective ones would have been rewarded. This study highlights an important point about statistical data: an overall correlation between two variables does not mean that one variable is always correlated with the other in particular instances.<sup>116</sup>

Another study showed that, at best, there is a 50/50 chance that how high the professor was rated was correlated to how much the students learned.<sup>117</sup>

If the outcome of the classroom experience is supposed to be increased learning by the students, as claimed by the way the student evaluations are used, and student evaluations supposedly measure learning by the students, then using such invalid data certainly creates a “fundamental fairness” issue in these situations. Most of the scientific literature considers any correlation below .70 as unreliable,

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114. Richard John Stapleton & Gene Murkison, *Optimizing the Fairness of Student Evaluations: A Study of Correlations between Instructor Excellence, Study Production, Learning Production, and Expected Grades*, 25 J. MGMT. EDUC. 269 (2001).

115. *Id.* at 279.

116. Fischer, *supra* note 85, at 125 (citations omitted).

117. In a study that used the students' grades on an external exam on the subject matter (one the professor did not prepare) as a basis for how much was learned, and correlating that with the various student rating items on the evaluation, the best result was a .50 correlation. See Cashin, *supra* note 33. See also P.A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-Analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281 (1981).

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and often even higher correlations are required or expected for legitimate conclusions. Instead of teaching effectiveness, did the student evaluations instead measure student happiness with the process, the affect of the professor,<sup>118</sup> or something else? What was really measured? There is no reliable research that shows that the evaluations actually measure how much the students have learned from a particular professor. Yet, the assumption is that they measure the professor's teaching effectiveness even though none of the questions on the evaluation document actually determine how much learning took place. These studies and the related issues with validity show that these life-changing decisions are made in an arbitrary and fundamentally unfair manner, in violation of substantive due process.

In addition, the discussion relevant to the use of experts and their expert testimony clearly shows that under the Supreme Court standards for both of these, the students, and what they are "testifying" to, could not qualify as experts or as expert testimony. Therefore, the use of students as experts and the use of the medians as expert testimony as to effective teaching is also arbitrary, fundamentally unfair, and a violation of substantive due process.

The Due Process Clause requires that when the government takes away a fundamental right, it is done in a fair manner. What is currently done, by using these medians, is unfair both from a validity viewpoint and from the viewpoint of the expert testimony not meeting any of the requisite standards for such testimony. Due process and other legal issues arise when student questionnaires ask students to anonymously reflect upon "ill-informed expectations and comparisons with some hidden benchmark which differs from one student to the next . . . . [Proper use of evaluations must reflect the] individuality of our students [and] we need to acknowledge diversity and lack of homogeneity within a student group in terms of teaching."<sup>119</sup> The current use of student evaluations must be changed to make their use constitutional and provide appropriate protection for faculty members with a constitutionally protected interest.

#### E. Recommendations

Ultimately, what is necessary is a well-conceived assessment program, which will require considerable time, energy, and resources. It is essential that this drive for reform come from within the academy itself.<sup>120</sup> Higher education needs to take the lead in overall assessment reform, which includes defining, evaluating, and rewarding valid teaching behaviors linked to teaching effectiveness.

Teaching effectiveness can be adequately assessed only when multiple indicators of effectiveness are utilized. A direct-observation peer evaluation component performed by an expert evaluator skilled in pedagogical assessment, (which could include videotaping) is critical, as are additional multiple direct and indirect assessment measures. Additional measures of teaching effectiveness

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118. Cashin, *supra* note 33, at 3–4.

119. Clouder, *supra* note 22, at 192.

120. Hersch, *supra* note 14.

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should include the development of a teaching portfolio by the faculty member that permits an examination of class materials such as syllabi, assignments and examinations, handouts, and assorted deliverables produced by students in the class, as well as a statement of teaching philosophy.<sup>121</sup> Pedagogical and technological innovations utilized in the course that are proposed to enhance learning should be examined. Finally, and perhaps most importantly, the student teaching evaluations, if utilized at all, must be redesigned to reliably and validly assess specific teaching behaviors considered desirable by the institution and peer experts as much as possible, with an awareness that teaching evaluations are to be used only as one of a number of measures of an assessment triangulation process because they are subject to substantial biases and most likely measure the faculty members' ability to generate positive affect in the classroom. Future use of student evaluations ought to be constrained by the institution's ability to develop truly valid and reliable instruments.

As stated above, one component of a better and more constitutionally valid evaluation would be the proper use of peer evaluations. Peer evaluators would be known, rather than anonymous, would be expected to be experts in pedagogy, and could be asked the reasons for their scoring and calculation decisions. Peer evaluations may also be professionally valid if those completing the evaluations are teaching professionals with proper credentials and maturity, instead of eighteen to twenty-two year olds without such credentials or maturity to make constitutionally valid decisions as to the quality of the teaching received or the qualifications of their teachers. Of course, utilizing peer evaluations also requires meeting the same rigorous standards student evaluations are currently not meeting, and assumes that faculty, administrators, and peers must truly want fair, valid, reliable assessment of both teaching and learning.

#### CONCLUSION

Since many faculty members have a constitutionally protected interest in their teaching positions, in order to protect that interest there has to be both a proper process and a fair process, including procedural and substantive due process, in regard to a review of whether or not their contract will be renewed. Therefore, given that the current uses of the anonymous summative evaluations are invalid because they do not reflect the complexity of the teaching/learning experience and the "evidence" that they provide is not challengeable, the evaluations themselves and their use violate the substantive due process rights of those faculty who are constitutionally protected. Substantive due process rights are violated precisely because such evaluations cannot and do not measure what they purport to measure (quality teaching and teacher qualifications), are without meaningful statistically valid standards, and because the scoring and numerical comparisons of such evaluations cannot be challenged by accurately discovering which factors each anonymous student considered important when scoring each particular evaluation question.

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121. B.W. Kemp & G.S. Kumar, *Student Evaluations: Are We Using Them Correctly?* 66 J. EDUC. BUS. 106 (1990).

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Ambiguous and anonymous information thus collected is not considered factual evidence in other legal proceedings affecting fundamental constitutional rights. Likewise, it should not be allowed for use in the decision-making process when a professor's and/or other constitutionally protected university teacher's fundamental rights of life, liberty, and reputation are at stake. In addition, students are put into the role of being "experts" as to proper pedagogy, without actually being experts on pedagogy.

The entire use of student evaluations needs to be re-assessed in light of the substantive due process issues raised by their current use. They may have some appropriate use in making decisions about faculty performance, especially in terms of a faculty members' ability to generate positive affect, but they are not appropriate for their current use of assessing faculty performance, especially when such use results in life-changing decisions for a faculty member. Such re-assessment of their use is now even more important as we face an era of increased accountability, where heightened demands on faculty teaching performance are advocated, including raising the bar for measurable student performance and learning. Faculty and teaching professional often run amok of student evaluations by creating more challenging courses and insisting students increase their level of learning far beyond rote memorization. Student evaluations that do little to measure desirable teaching and learning outcomes are likely only to become even more problematic for colleges and universities in the future. With reliance on them unfounded, continued usage will result in more unjustifiable attacks on faculty members' teaching performance. Even though no specific lawsuits challenging their usage exist as of yet, as more faculty become affected by their unfair use, universities and administrators will increasingly find themselves in court, unless they make essential changes to the teaching evaluation process.



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# AN ANALYSIS OF THE NEW CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY REGARDING PART THREE OF THE THREE- PART TEST FOR COMPLIANCE WITH THE EFFECTIVE ACCOMMODATION GUIDELINES OF TITLE IX

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## INTRODUCTION

In 1972, when Congress enacted Title IX of the Education Amendments of 1972,<sup>1</sup> proponents of the law had various aims in mind with regard to achieving gender equity in educational institutions that receive federal financial assistance. While some had hoped that the law would “open[] the doors of our education system so that girls, young women, faculty members and administrators could fully utilize their God-given talents in the academic arena,”<sup>2</sup> others had the more pragmatic goal of filling a gap in coverage that existed between other civil-rights laws, such as Title VI and Title VII of the Education Amendments of 1964.<sup>3</sup> Few could have predicted that the law—which has a fairly straightforward goal of ensuring that, in educational programs and activities that receive federal financial assistance, girls and women receive the same treatment as boys and men—would have spawned an entirely new field of legal specialization: gender equity in

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1. 20 U.S.C. §§ 1681–1688 (2000).

2. *Title IX and Science: Hearing on SR-253 Before the S. Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 2 (2002) (statement of Birch Bayh, Attorney and Partner, Venable, Baetjer, Howard, and Civiletti, LLP), available at <http://commerce.senate.gov/hearings/100302bayh.pdf>.

3. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1 to -7 (2000), prohibits discrimination on the basis of race, ethnicity, and national origin both in employment and in educational programs and activities that receive federal financial assistance. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (2000), prohibits discrimination on the basis of gender in employment. Together, the two laws left a gap, and failed to prohibit discrimination on the basis of gender in educational programs and activities that receive federal financial assistance. See WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 32–34 (2005).

intercollegiate athletic programs. Yet, more than three decades after Congress enacted the law, questions and controversies remain about what, exactly, an educational institution must do to provide an athletics program that, while accommodating men and women separately, complies with the dictates of equity.

In 1975, when the Department of Health, Education, and Welfare (HEW) issued its Title IX implementing regulations,<sup>4</sup> it left the regulations intentionally vague, thus preserving institutional autonomy and allowing educational institutions “to decide for [themselves] the best means to comply with the law.”<sup>5</sup> But because educational institutions really cannot determine for themselves whether their programs comply with the law,<sup>6</sup> this vagueness immediately proved problematic, as educational institutions struggled to find ways to prove to the government that they operated their programs in a manner that satisfied the gender-equity aims of Title IX. Thus, almost immediately, a seemingly never-ending quest began for more definiteness in the application of the law.

In 1979, HEW issued the first clarification of Title IX as applied to intercollegiate athletics<sup>7</sup>—a clarification that actually has created more controversy than it has resolved. This 1979 Policy Interpretation established two separate lines of inquiry regarding gender equity in athletic programs:<sup>8</sup> “effective accommodation” of student interests and abilities, which assesses whether an educational institution has provided a sufficient number of athletic opportunities for women;<sup>9</sup> and “equal treatment” of female student-athletes in terms of both athletic-related financial assistance<sup>10</sup> and the other incidents of athletic

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4. See 34 C.F.R. pt. 106 (2005).

In 1979, the U.S. Congress transferred Department of Health, Education, and Welfare (HEW) responsibilities for Title IX to the Department of Education (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 Establishment of Title 34, 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 collectively as its successor agency, DED.

5. SUGGS, *supra* note 3, at 75.

6. See *id.*

7. Title IX of the Educational Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

8. Throughout this article, it is assumed that women constitute the under-represented gender in athletics participation. In 2003–04, women comprised 55% of all college and university students, but only 41% of the 494,000 college and university student-athletes. Welch Suggs, *Gender Quotas? Not in College Sports*, CHRON. HIGHER EDUC., July 1, 2005, at A24.

The National Center for Education Statistics has predicted that by 2013 women will comprise 57 to 58% of all college and university students. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2013, NCES 2004-013 57 (2003), available at <http://nces.ed.gov/pubs2004/2004013.pdf>. Thus, unless women's participation in intercollegiate athletics grows substantially—that is, by 25% or more—over the next decade, women will continue to be the under-represented gender in athletics participation.

9. See 1979 Policy Interpretation, *supra* note 7, at 71,417–18 (explaining the regulation at 34 C.F.R. § 106.41(c)(1) (2005)).

10. See *id.* at 71,415 (explaining the regulation at 34 C.F.R. § 106.37(c) (2005)).

participation, such as coaching, equipment, and facilities.<sup>11</sup> Most discussion of this policy interpretation has focused on the first of these two lines of inquiry—that is, how to determine “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”<sup>12</sup>—because a student-athlete must have an opportunity to play a sport before she can challenge whether her educational institution has treated her properly in its athletic program. Key to this discussion is the meaning of the three-part test for evaluating effective accommodation as described in the 1979 Policy Interpretation:

Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a *history and continuing practice of program expansion* which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been *fully and effectively accommodated* by the present program.<sup>13</sup>

These three criteria provide alternate means of complying with the effective accommodation requirement of the Title IX regulations. Educational institutions may select which of the three criteria to satisfy,<sup>14</sup> and that choice may change over time as an athletic program evolves in response to changing student and institutional needs.<sup>15</sup>

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11. *See id.* at 71,415–17 (explaining the regulations at 34 C.F.R. § 106.41(c)(2)–(10) (2005)).

12. 34 C.F.R. § 106.41(c)(1) (2005).

13. 1979 Policy Interpretation, *supra* note 7, at 71,418 (emphasis added).

14. According to the U.S. Department of Education’s Office of Civil Rights (DED-OCR), an educational institution “can choose which part of the [three-part] test it plans to meet.” Dep’t of Educ., *Clarification of Intercollegiate Athletics Policy Guidance* (1996), available at <http://www.ed.gov/ocr/docs/clarific.html> [hereinafter *1996 Clarification*].

Moreover, DED-OCR also “encourages schools to take advantage of [the] flexibility [of the three-part test], and to consider which of the three prongs best suits their individual situations.” Dep’t of Educ., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidance/Final.html> [hereinafter *2003 Further Clarification*].

15. For example, an athletic program may satisfy Title IX under the second prong, the “history of continuing program expansion” test, for a number of years while the educational institution regularly adds women’s teams according to some plan. When the number of teams provides participation opportunities for women proportional to the undergraduate enrollment of women, the educational institution then would comply with Title IX under the first criterion, the

Over the years, the first of the three criteria, the “substantial proportionality” test, has received significant attention for a number of reasons. First, it provides an objective means of proving Title IX compliance. If an educational institution has a male-to-female undergraduate enrollment ratio that parallels its male-to-female student-athlete ratio, the educational institution satisfies the effective accommodation requirement of Title IX. Second, it provides a clear stopping point for actions aimed at Title IX compliance under either of the other two criteria—that is, an educational institution needs to expand its opportunities for female student-athletes only until it achieves proportionality, and the interests and abilities of its female student-athletes are presumptively satisfied when they have proportionate athletic participation opportunities. Third, it has become a controversial means of complying with Title IX. It allows (some say encourages) educational institutions to cut men’s programs, rather than to add women’s programs, to achieve numerical proportionality. Thus, even though the U.S. Department of Education’s Office of Civil Rights (DED-OCR) has stated that the three-part test “furnishes an [educational] institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics,”<sup>16</sup> many believe that the three-part test, in reality, collapses into only one test—that is, proportionality.<sup>17</sup>

In 1996, after the first round of Title IX litigation relevant to athletic programs had concluded,<sup>18</sup> DED-OCR issued a *Clarification of Intercollegiate Athletics Policy Guidance* (1996 Clarification) to “provide[] specific factors that guide an analysis of each part of the three-part test.”<sup>19</sup> With regard to the substantial proportionality test, the 1996 Clarification makes clear that, while exact proportionality satisfies the first criterion, “in some circumstances it may be unreasonable to expect an institution to achieve *exact* proportionality”<sup>20</sup> and, thus, the clarification discusses what the regulations mean by “substantial

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“substantial proportionality” test. Or, if after a period of program expansion the educational institution has not achieved substantial proportionality but can demonstrate that it has satisfied the interests and abilities of its female students, it then would comply with Title IX under the third criterion, the “full and effective accommodations of interests and abilities” test.

16. *1996 Clarification*, *supra* note 14.

17. *See, e.g.*, SUGGS, *supra* note 3, at 130 (noting that “the [1996] clarification simply makes explicit what was implicit before”—that the “substantial proportionality” test “is the one prong that really counts”); and JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* 38 (2002) (“In fact, say critics of the law, the three-part test of Title IX compliance is actually a one-part test: statistical proportionality.”).

18. Cases litigated in the early 1990s included a series of cases challenging cuts to women’s programs in the absence of proportionality: *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) (trial on the merits), *cert. denied*, 520 U.S. 1186 (1997); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); and *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993). Additionally, at least one case in that time-frame challenged Title IX compliance efforts that involved cuts to men’s programs: *Kelley v. Bd. of Trs. of the Univ. of Ill.*, 35 F.3d 265, 268 (7th Cir. 1994).

19. *1996 Clarification*, *supra* note 14.

20. *Id.* (emphasis added).

proportionality.” It explains that a determination of substantial proportionality “depends on the institution’s specific circumstances and the size of its athletic program,”<sup>21</sup> and indicates that DED-OCR makes a determination of substantial proportionality “on a case-by-case basis, rather than through [the] use of a statistical test.”<sup>22</sup> The 1996 Clarification also provides arithmetic examples of circumstances in which an educational institution might be required to add a women’s team to achieve proportionality, along with examples of when it might not.<sup>23</sup>

The 1996 Clarification becomes less and less practically useful as it moves into the discussions of the second and third criteria of the effective accommodation test. In explaining the “history and continuing practice of program expansion” criterion, the 1996 Clarification lists factors that DED-OCR will consider when evaluating a program for compliance under this criterion, and provides examples of practices that would and would not comport with Title IX’s gender-equity mandate.<sup>24</sup> It does not, however, present any exacting formulae or objective standards against which to evaluate compliance. Consequently, the clarification leaves the determination of compliance on the basis of this criterion totally (and understandably uncomfortably) outside the realm of institutional control. The discussion of the “interests and abilities” criterion leaves even more to be desired because it merely presents the factors to examine in determining compliance, and does not provide either any objective means of complying with this criterion or any examples of practices that do and do not satisfy the effective accommodation requirements of the law.<sup>25</sup>

In 2002, coincident with the thirtieth anniversary of the passage of Title IX, Secretary of Education Rod Paige convened the Secretary of Education’s Commission on Opportunity in Athletics to study the state of Title IX compliance and enforcement in athletic programs. In February of 2003, the commission issued its report, *Open to All: Title IX at Thirty*, which presented a number of recommendations to improve the application of Title IX to athletics programs.<sup>26</sup> Secretary Paige announced that DED-OCR would “‘move forward’ on only the 15 [of the twenty-four] recommendations that received unanimous approval from the commissioners.”<sup>27</sup> In response to the report, on July 11, 2003, DED-OCR issued yet another clarification, entitled *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (2003 Further Clarification).<sup>28</sup>

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21. *Id.*

22. *Id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. U.S. DEP’T OF EDUC., SECRETARY’S COMM’N ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY (2003) [hereinafter 2003 COMMISSION REPORT]. For an analysis of the commission’s work, see Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003).

27. Welch Suggs, *Cheers and Condemnation Greet Report on Gender Equity*, CHRON. HIGHER EDUC., March 7, 2003, at A40.

28. 2003 Further Clarification, *supra* note 14.

Rather than presenting a broad policy statement that adopted all of the commission's unanimous recommendations, this short document focused on the concerns surrounding the quest for substantial proportionality and directly addressed only six of the fifteen recommendations approved unanimously by the commissioners.<sup>29</sup> Particularly, the 2003 Further Clarification reiterated that the three-part test remains the standard for determining whether an educational institution has effectively accommodated the interests and abilities of its under-represented student-athletes, and explained that an educational institution may choose which of the three criteria it intends to pursue to achieve compliance. It also explained that the transmittal letter that accompanied the 1996 Clarification had erroneously deemed only the "substantial proportionality" criterion a "safe harbor."<sup>30</sup> This represented a slight, almost imperceptible, and, in the absence of any other objective method of proving Title IX compliance, ultimately meaningless shift in the stated policy of President George W. Bush's administration from that of President Bill Clinton's.

One of the unanimously approved recommendations not addressed in the 2003 Further Clarification, Recommendation 19, stated the following:

[DED-OCR] should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.<sup>31</sup>

As explained in the 2003 Commission Report, "[t]his recommendation provides another way for schools to *quantify compliance* with the three-part test"<sup>32</sup>—a statement that clearly expressed a common need for further guidance on how to satisfy the interests and abilities criterion of the three-part test for effective accommodation.

Additionally, Recommendation 18, which passed by a vote of only ten to five,<sup>33</sup> stated:

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29. *Id.* The 2003 Further Clarification directly addressed: Recommendation 1, which calls for DED-OCR to reaffirm its strong commitment to equal opportunity; Recommendation 3, which calls for clearer guidelines and a national education effort on the subject of Title IX compliance; Recommendation 4, which asks DED-OCR not to change current compliance and enforcement policies in ways that would undermine the progress that has been made for women in athletics; Recommendation 5, which calls on DED-OCR to make clear that cutting teams is not a preferred method of complying with the law; Recommendation 6, which calls for DED-OCR to enforce the law aggressively but also pursue ways of encouraging compliance; and Recommendation 21, which calls for DED-OCR to abandon the "safe harbor" designation of the first prong of the benchmark test for effective accommodation. *2003 Commission Report, supra* note 26, at 33–34, 39. *See* Pieronek, *supra* note 26, at 168–72.

30. *2003 Further Clarification, supra* note 14.

31. 2003 COMMISSION REPORT, *supra* note 26, at 39.

32. *Id.* (emphasis added).

33. *Id.* at 65.

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[DED-OCR] should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. [DED-OCR] should *specify the criteria* necessary for conducting such a survey in a way that is clear and understandable.<sup>34</sup>

The report explains that those who voted in favor of this recommendation “wanted to preserve for [DED-OCR] the opportunity to determine whether the use of interest surveys might be feasible in allowing schools to demonstrate compliance with the three-part test,”<sup>35</sup> while those who voted against it “believed that since interest levels change, interest surveys could never adequately capture student interest in athletics.”<sup>36</sup>

In these two recommendations, the commission identified one of the key problems with the 1975 regulations, as well as with the 1979 Policy Interpretation and the 1996 Clarification—specifically, that these sources do not provide sufficient guidance that gives educational institutions a clear, objective, and straightforward way of determining compliance with the effective accommodation requirements of the law under the “interests and abilities” criterion of the three-part test. The 2003 Commission Report explains this concern:

With regard to the third part of the test, some [educational] administrators express confusion about the possibility of using interest surveys to periodically determine levels of student interest in athletics, which then must be met with matching levels of athletic opportunity. In addition, schools expressed some concern about whether they must approve every request for recognition of a new women's team regardless of financial limitations to accommodate student interests. Thus, some witnesses have argued that if an educational institution is involved with litigation for dropping or failing to add a women's team, that fact alone would preclude a finding that they had accommodated student interest.<sup>37</sup>

Educational administrators had good reason to express concern over how to comply with the “interests and abilities” criterion, particularly in light of some of the early Title IX lawsuits in which courts determined that, in the absence of substantial proportionality, when a college or university dropped a viable women's team (typically in those cases for financial reasons), it could not claim Title IX compliance under the “interests and abilities” criterion.<sup>38</sup> The commission's

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34. *Id.* at 38 (emphasis added).

35. *Id.* at 65.

36. *Id.*

37. *Id.* at 26.

38. *See, e.g.,* Cohen v. Brown Univ., 991 F.2d 888, 904 (1st Cir. 1993) (“Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly underrepresented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, there is unlikely to be any comparably turbid question as to interest and

recommendations acknowledge these concerns. Consequently, the report asks DED-OCR for further guidance on complying with the “interests and abilities” criterion of the three-part test.

Finally, on March 17, 2005, DED-OCR answered the commission’s request with yet another clarification, the *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three*.<sup>39</sup> At a total of 177 pages, this 2005 *Additional Clarification* looks daunting and seems unreadable. Actually, however, it comprises four documents: a prefatory three-page transmittal letter (Transmittal Letter); a readable, thirteen-page statement of the clarification (2005 Additional Clarification); a *User’s Guide to Developing Student Interest Surveys Under Title IX* (User’s Guide), which also presents and explains a Model Survey to assess student athletic interest;<sup>40</sup> and a background document entitled *Title IX Data Collection: Technical Manual for Developing the User’s Guide* (Technical Manual).<sup>41</sup> The Transmittal Letter and the thirteen-page clarification summarize the concepts relevant to conducting the survey detailed in the User’s Guide, while the Technical Manual provides a detailed explanation of the statistical methods behind the survey development.

This article examines the 2005 Further Clarification and what the Model Survey means for educational institutions attempting to comply with the effective accommodation requirements of Title IX by satisfying the athletic interests and abilities of students of the underrepresented gender. Part I summarizes the information contained in the Transmittal Letter and the 2005 Additional Clarification, and discusses what these documents say about using a survey—in particular, the Model Survey—to comply with the “interests and abilities” criterion. Part II looks at the User’s Guide, which explains the development and use of the Model Survey instrument. Both parts bring in information from the Technical Manual where necessary to explain how to administer the survey

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ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.”) (internal citation omitted). See also *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff’d*, 7 F.3d 332 (3d Cir. 1993) (discussing how the defendant university failed to satisfy the requirements of the third criterion when it dropped two viable women’s teams because of financial considerations); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1517 (D. Colo. 1993), *aff’d in part, rev’d in part sub nom. Roberts v. Colo. State Bd. Of Agric.*, 998 F.2d 824 (10th Cir. 1993) (discussing how “the demonstrable interest in the varsity opportunities being eliminated” forecloses the defendant university’s ability to satisfy the “interests and abilities” criterion).

39. U.S. Dep’t of Educ., *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test – Part Three* (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *Transmittal Letter* and *2005 Additional Clarification*]. One wonders whether DED-OCR will someday soon run out of synonyms for “yet another.”

40. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *USER’S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX*, NCES 2005-173 (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *USER’S GUIDE*].

41. ALAN F. KARR & ASHISH P. SANIL, NATIONAL INSTITUTE OF STATISTICAL SCIENCES, *TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER’S GUIDE*, Technical Report No. 150 (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *TECHNICAL MANUAL*].

properly and how to interpret the results.<sup>42</sup> Part III explores the public criticisms of the clarification and raises some questions that educational institutions should ask themselves before deciding whether to use the Model Survey on their campuses. The discussion also attempts to discern whether the new policy clarifications will help or hurt colleges and universities in their quest for Title IX compliance.

#### I. TRANSMITTAL LETTER AND 2005 ADDITIONAL CLARIFICATION

The Transmittal Letter accompanying the 2005 Additional Clarification provides a top-level summary of the information presented in more detail in the clarification itself.<sup>43</sup> It sets out the general framework of the 2005 Additional Clarification and presents the highlights of this new policy statement.<sup>44</sup> As with the 1996 and 2003 clarifications, the Transmittal Letter carefully points out “that each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities.”<sup>45</sup> But the letter also presents two new concepts, perhaps implicitly understood but never before explicitly stated elsewhere. First, it points out the “flexibility” of the “interests and abilities” test,<sup>46</sup> meaning both that the Model Survey (or, in fact, *any* survey) does not represent the only way of complying with the effective accommodation requirements of Title IX under this criterion, and that professional judgment will inform the survey results. Second, it states clearly that “*each part* of the three-part test is a safe harbor”<sup>47</sup>—reiterating more directly the 2003 Further Clarification’s correction of the 1996 Clarification, which had given the “safe harbor” designation to only the “substantial proportionality” criterion.<sup>48</sup>

The Transmittal Letter points out that the 2005 Additional Clarification “outlines specific factors that guide [DED-OCR’s] analysis of the third option for compliance with the ‘three-part test’”<sup>49</sup> and “provide[s] further guidance on

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42. This article does not delve too deeply into the Technical Manual, because that lengthy document provides a great deal of background information that the User’s Guide summarizes in a more useful format. Additionally, in some cases, the Technical Manual makes recommendations not adopted in the User’s Guide. Exploring the Technical Manual in those instances would only confuse any discussion about the requirements for using the Model Survey. Should an educational institution decide to develop its own survey or to continue to use a survey that it has used in the past, however, the information in the Technical Manual should prove useful for identifying and correcting any common, identifiable flaws in these other types of surveys.

43. *Transmittal Letter*, supra note 39.

44. *Id.*

45. *Id.* at 3.

46. *Id.* at 1.

47. *Id.* at 3 (emphasis added).

48. See, e.g., *1996 Clarification*, supra note 14. The transmittal letter accompanying this clarification states: “The first part of the test—substantial proportionality—focuses on the participation rates of men and women at an institution and affords an institution a ‘safe harbor’ for establishing that it provides nondiscriminatory participation opportunities.” *Id.* Interestingly, however, the clarification itself does not contain this or similar language.

49. *Transmittal Letter*, supra note 39, at 1.

recipients' obligations under the three-part test, which was described only in very general terms in the [1979] Policy Interpretation, and . . . further help[s] institutions appreciate the flexibility of the test."<sup>50</sup> The 2005 Additional Clarification itself "explain[s] some of the factors that [DED-OCR] will consider when investigating a recipient's program in order to make a Title IX compliance determination under the third part of the three-part test."<sup>51</sup> Specifically, in the absence of substantial proportionality, an educational institution

*will be found in compliance with part three unless* there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.<sup>52</sup>

Thus, the 2005 Additional Clarification clearly states a *presumption of compliance* with Title IX under the "interests and abilities" criterion, *unless* all three of the above conditions exist. It further characterizes these three conditions as "essential prerequisite[s] for determining a school's Title IX obligation to create a new intercollegiate varsity team or elevate an existing club team to varsity status."<sup>53</sup> It also explicitly states that, "[w]hen one or more of these conditions is *absent*, a school is in compliance with part three."<sup>54</sup>

Much of the 2005 Additional Clarification and accompanying documents discuss the use of surveys—specifically, the Model Survey included in the User's Guide—to assess students' athletic interests and abilities.<sup>55</sup> It is important to note, however, that the Model Survey does not *prove* compliance with the "interests and abilities" criterion. Rather, the survey enables an educational institution to identify whether unmet interest in particular sports or teams exists on campus. And, in fact, in terms of *proving* anything relevant to the "interests and abilities" criterion, the clarification actually places the burden of rebutting the stated presumption of compliance "on [DED-OCR] (in the case of a [DED-OCR] investigation or compliance review), or on students (in the case of a complaint filed with the

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50. *Id.*

51. *Id.* at 2.

52. *Id.* This language echoes similar language in the 1996 Clarification. *See 1996 Clarification, supra* note 14. *See also 2005 Additional Clarification, supra* note 39, at 4.

53. *2005 Additional Clarification, supra* note 39, at 4.

54. *Id.* (emphasis added).

55. The Technical Manual also discusses the rise in the use of surveys to prove compliance, and notes that the use of surveys has become increasingly common over time. For example, from 1990 to 1996, of the educational institutions in the DED-OCR group that complied with Title IX under the "interests and abilities" criterion, the percentage that used surveys ranged from a low of 38% in 1994 (three of eight) to a high of 75% in 1991 and 1995 (three of four in each of those years). From 1997 to 2001, however, that percentage ranged from a low of 80% in 2000 (four of five) to a high of 100% in 1997, 1998, and 2001 (three, seven, and three, respectively). TECHNICAL MANUAL, *supra* note 41, at 19–21.

institution under its Title IX grievance procedures).<sup>56</sup> By placing the burden of proving noncompliance on the challenger,<sup>57</sup> this new clarification may help to clear up a split in the federal courts, which have variously allocated the burden of proof for the “interests and abilities” test either to the defendant-institution<sup>58</sup> or to

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56. *Transmittal Letter*, *supra* note 39, at 2. *See also 2005 Additional Clarification*, *supra* note 39, at 4 (“There must be *actual evidence* of unmet interests and abilities among the underrepresented sex.” (emphasis added)).

57. Note, however, that Arthur L. Coleman, deputy assistant secretary for civil rights at DED during the Clinton Administration, believes that the burden of proof has always rested with DED-OCR in investigations conducted by that office: “‘Broadly speaking, this tracks precisely with what [DED-OCR] put out in [the 1996 Clarification],’ said Mr. Coleman . . . ‘The material shift here is less one about substantive legal standards than issues of evidence, and how [DED-OCR] will address issues in the middle of an investigation.’” Welch Suggs, *New Policy Clarifies Title IX Rules for Colleges: Women’s Group Objects*, CHRON. HIGHER EDUC., Apr. 1, 2005, at A47. *See also 1996 Clarification*, *supra* note 14.

But this belief does not, in fact, reflect the standards that DED-OCR had set out in its own manual on Title IX investigations, which explains to DED-OCR investigators how to evaluate whether an educational institution complies with the effective accommodation requirements of Title IX under the “interests and abilities” test: “If the [educational] institution has not conducted a survey or used another method for determining interests and abilities[,] and cannot *demonstrate* that the current [athletic] program equally effectively accommodates interests and abilities, then [DED-OCR] must determine to what degree the current program accommodates interests and abilities.” DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 25 (Valerie M. Bonnette & Lamar Daniel eds., 1990) (emphasis added) [hereinafter 1990 INVESTIGATOR’S MANUAL]. This somewhat tautological procedure first places the burden on the educational institution to demonstrate compliance, and then explains that, if the educational institution cannot show compliance, a DED-OCR investigator must evaluate particular aspects of the educational institution’s athletic program to determine compliance. Thus, if the educational institution cannot prove compliance, DED-OCR must evaluate compliance.

Furthermore, as explained *infra* notes 58–59, courts that decided Title IX cases in the early 1990s variously allocated the burden of proof to the defendant educational institution or to the student-plaintiffs, depending on the circumstances of the case. Thus, it is not clear whether courts, in evaluating compliance in cases brought after DED-OCR issued the 2005 Additional Clarification, will allocate the burden of proof based on precedent within the relevant federal circuit, or will give *Chevron* deference to DED-OCR’s interpretation of its own policies. For example, in *Cohen*, the First Circuit decided to give “controlling weight” to the 1975 Implementing Regulations and “substantial deference” to the 1979 Policy Interpretation, stating that, “where . . . Congress has expressly delegated to an agency the power to ‘elucidate a specific provision of a statute by regulation,’ the resulting regulations should be accorded ‘controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.’” *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Although the 1990 Investigator’s Manual, 1996 Clarification, 2003 Further Clarification, or 2005 Additional Clarification might not fit the definition of a “regulation” for the purposes of applying *Chevron*, “[i]t is [also] well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’” *Id.* (quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1984)). Thus, the question remains whether the courts will rely on their own relevant precedents or whether the courts will look at DED-OCR pronouncements on the subject and, if the latter, which of these pronouncements will control.

58. The Third, Fifth, and Seventh Circuits allocate this burden to the defendant institution. *See Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993), *aff’d*, 7 F.3d 332 (3d Cir. 1993) (“Defendants bear the burden of proof with respect to the second and third prongs.”);

the student-plaintiffs.<sup>59</sup> It also, however, appears to represent a departure from prior DED-OCR interpretations of the use of surveys, because surveys have been used to do more than merely assess interest and ability—they have been used to prove compliance with Title IX in DED-OCR investigations. As the Technical Manual explains, of the 130 Title IX investigations conducted by DED-OCR between 1992 and 2002 (ninety-five of which arose from complaints filed with DED-OCR and thirty-five of which arose from DED-OCR compliance-monitoring efforts), eighty-six (66.2%) complied with the effective accommodation requirements by satisfying the “full and effective accommodation of interests and abilities” criterion, and fifty-seven of those eighty-six (66.3%) used surveys to demonstrate compliance.<sup>60</sup>

The 2005 Additional Clarification also sets out the standard that the challenger must meet to rebut the presumption of compliance. Specifically, the challenger must present “*direct and very persuasive evidence* of unmet interest sufficient to sustain a varsity team, such as the recent elimination of a viable team for the underrepresented sex or a recent, broad-based petition from an existing club team for elevation to varsity status.”<sup>61</sup>

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Pederson v. La. State Univ., 213 F.3d 858, 878–79 (5th Cir. 2000) (finding that “the district court correctly found that LSU . . . had not presented credible evidence regarding the interests and abilities of its student body”); Kelley v. Bd. of Trs. of the Univ. of Ill., 35 F.3d 265, 268 (7th Cir. 1994) (“If substantial proportionality has not been achieved, a school must demonstrate . . . that its existing programs effectively accommodate the interests of that sex . . .”).

59. The First, Sixth, Ninth, and Tenth Circuits allocate this burden to the party challenging the defendant-institution’s actions. See Cohen v. Brown Univ., 991 F.2d 888, 901–02 (1st Cir. 1993) (citing 1979 Policy Interpretation, *supra* note 7, at 71,418) (“[T]he plaintiff must prove that the underrepresented gender has not been fully and effectively accommodated by the present program.”); Horner v. Ky. High Sch. Athletic Ass’n, 206 F.3d 685, 696 (6th Cir. 2000) (indicating that the plaintiffs bear the burden of proof on the “interests and abilities” criterion); Neal v. Bd. of Trs. of the Cal. State Univ., No. CV-F-97-5009RECSMS, 1997 WL 1524813, at \*13 (E.D. Cal. Dec. 26, 1997) (“The Policy Interpretation presents ways in which plaintiffs may show that a school has violated Title IX; it does not speak to ways by which an institution can show compliance with Title IX.”); Roberts v. Col. State Bd. of Agric., 998 F.2d 824, 831 (10th Cir. 1993) (“[W]e hold that the district court improperly placed the burden of proof on [the] defendant [institution].”).

60. TECHNICAL MANUAL, *supra* note 41, at 6.

Note that a data discrepancy exists between the User’s Guide, which indicates that nineteen educational institutions did not conduct a survey, USER’S GUIDE, *supra* note 40, at 3, and the Technical Manual, which indicates that twenty-nine did not conduct a survey, TECHNICAL MANUAL, *supra* note 41, at 5–6.

61. *Transmittal Letter*, *supra* note 39, at 2–3 (emphasis added). See also *2005 Additional Clarification*, *supra* note 39, at 6 (“[DED-OCR] will presume that the Model Survey is an accurate measure of student interest, absent other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team.”).

The terms “very persuasive evidence” and “broad-based petition” may seem somewhat vague—language perfect for clever lawyers to exploit. To interpret these terms, however, DED-OCR and the courts can turn to precedents in long-standing Title IX cases. In *Cohen*, for example, the district court found that Brown University had failed the “interests and abilities” test by downgrading two viable university-funded varsity women’s teams to unfunded varsity status as a budget-saving measure. Cohen v. Brown Univ., 809 F. Supp. 978, 992 (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*

The 2005 Additional Clarification explains that “[d]irect evidence is actual evidence that is not circumstantial.”<sup>62</sup> For example:

A recent broad-based petition from an existing club team for elevation to varsity status is *direct evidence* of interest in that sport by students on the club team. On the other hand, evidence that feeder high schools for the institution offer a particular interscholastic sport is *circumstantial, not direct, evidence* of interest by students at the institution.<sup>63</sup>

Despite the fact that educational institutions enjoy a presumption of compliance with the Title IX effective accommodation requirements under the “interests and abilities” criterion and, consequently, need not engage in any action to prove compliance, educational institutions interested in assuring themselves that their athletic programs comply with Title IX may find such a survey useful. More importantly, such a survey may also point out that an educational institution has *not yet satisfied* the athletic interests and abilities of its female students, and could provide guidance regarding the types of teams or sports or other athletic opportunities to add.

To assist those educational institutions that, whatever their motivation, choose

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*in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996) (trial on the merits), *cert. denied*, 520 U.S. 1186 (1997). In 1992, the *Cohen* district court found persuasive evidence of the existing interests and abilities of the female student-athletes on the two downgraded teams:

Both the women's gymnastics and volleyball teams have competed as varsity intercollegiate teams since 1974. More importantly, . . . these two teams were viable varsity squads when they were demoted in May 1991. The women's gymnastics team, for example, won the Ivy League championship in 1990. That same year, [one Brown student] was the individual “all-around” Ivy League gymnastics champion, and was named rookie of the year in the East Coast Athletic Conference. Many of the individual plaintiffs who testified described in detail their dedication to sports and their years of training prior to matriculating at Brown.

*Id.* See also *Cohen v. Brown Univ.*, 180 F.3d 155, 180 (1st Cir. 1996) (“[W]hile the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed at the varsity level, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.”).

The *Cohen* district court also explained when an educational institution might have to add a team in response to a petition from student-athletes:

[S]ome evidence was suggested that other women's teams besides gymnastics and volleyball have been, and continue to be, qualified to compete at the varsity level. At this preliminary stage [of the proceedings], I am not in a position to rule definitively on the varsity capabilities of other teams. Nor do I believe that Brown's violation of the three-part test requires it to simply create new women's varsity teams at the request of any students. Rather, Brown may consider the *expressed interests* of the students, whether there are *sufficient numbers of athletes* to form a team, and whether there is a *reasonable expectation of intercollegiate competition* for that team.

*Cohen*, 809 F. Supp. at 992 (emphasis added). Thus, while a broad-based petition from students might encourage an educational institution to consider adding a particular team, many other factors should also inform that decision.

62. 2005 Additional Clarification, *supra* note 39, at 6 n.10.

63. *Id.* (emphasis added).

to conduct a survey to assess interests and abilities, the 2005 Additional Clarification and accompanying documents also provide detailed guidelines on the use of “questionnaires or surveys to measure student athletic interest as part of their assessment” process.<sup>64</sup> Any well-constructed and properly administered survey might provide the necessary information. However, the Transmittal Letter also states that, if an educational institution uses the Model Survey provided in the User’s Guide, and if the educational institution administers the survey in a manner consistent with the recommendations in the User’s Guide, “institutions *can rely on* [this Model Survey] as an acceptable method to measure students’ interests in participating sports.”<sup>65</sup> More explicitly, “[when Model Survey] results . . . show *insufficient interest to support an additional varsity team* for the underrepresented sex[, this] will create a *presumption of compliance* with part three of the three-part test and the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities.”<sup>66</sup>

To address presumptively any complaints that educational institutions could use the survey results to justify curtailing athletic participation opportunities for women,<sup>67</sup> the 2005 Additional Clarification states that the survey has relevance only in determining whether to *add* a new team for students of the underrepresented gender. It specifically states that educational institutions

cannot use the failure to express interest during a census or survey to eliminate a current and viable intercollegiate team for the underrepresented sex. Students participating on a viable intercollegiate team have [already] expressed interest in intercollegiate participation by active participation, and census or survey results, including those of the Model Survey, may not be used to contradict that expressed interest.<sup>68</sup>

The Model Survey provides a clear method for an educational institution to determine with reasonable certainty whether evidence exists to rebut the first of the three essential prerequisites for rebutting the presumption of compliance with the “interests and abilities” criterion—that is, whether sufficient student interest exists to warrant the consideration of adding a new team.<sup>69</sup> Students who express interest in a particular sport are counted among students with interest, while those who do not express interest or who do not respond to the survey at all evidence an “actual

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64. *Transmittal Letter*, *supra* note 39, at 2.

65. *Id.* (emphasis added).

66. *Id.* (emphasis added).

67. See, e.g., National Women’s Law Center, *The Department of Education’s “Clarification” of Title IX Policy Undermines the Law and Threatens the Gains Women and Girls Have Made in Sports* (2005), available at [http://www.nwlc.org/pdf/FactSheet\\_Prong\\_3\\_1.pdf](http://www.nwlc.org/pdf/FactSheet_Prong_3_1.pdf) [hereinafter *NWLC April 2005 Statement*]. Among other charges leveled against the 2005 Additional Clarification in this and similar press releases from other organizations, critics fear that it “threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX and to perpetuate further discrimination against them.” *Id.* at 3. This simply does not reflect an accurate interpretation of the clarification.

68. *2005 Additional Clarification*, *supra* note 39, at 8.

69. *Id.* at 5–9.

lack of interest”<sup>70</sup> as long as “all students have been given an easy opportunity to respond to the survey, the purpose of the survey has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest.”<sup>71</sup> The 2005 Additional Clarification also explains how to satisfy these three survey administration criteria. First, it recommends that any survey be administered to the entire undergraduate student body, rather than to a random sampling of students,<sup>72</sup> although it does permit an educational institution to administer the survey only to students of the underrepresented gender.<sup>73</sup> Second, it suggests some ways to “generate high response rates,”<sup>74</sup> including by administering the survey during the registration process or by e-mailing a Web link to the survey to the entire survey target population.<sup>75</sup> It also states that “students must . . . be advised of the purpose of the Model Survey and that a nonresponse to the Model Survey will indicate to the school that the student is not interested in additional varsity athletic opportunities.”<sup>76</sup>

Thus, the Model Survey gives an educational institution a way to determine the *number* of students interested in varsity athletic opportunities. And with its list of “all varsity sports, including ‘emerging sports,’ currently recognized by the three national athletic associations to which most schools belong,”<sup>77</sup> the Model Survey gives students the opportunity to identify which sports interest them.

Interpreting the results of the Model Survey does require some professional judgment, though, in determining whether the number of students interested in a sport is sufficient to sustain a competitive team in that sport. For this, DED-OCR will “*defer[]* to the decisions of the athletic directors and coaches,”<sup>78</sup> who “generally have the experience with the mechanics and realities of operating a team to . . . decide the number of students needed to establish teams by sport.”<sup>79</sup> Factors to consider in this regard include “the average size of teams in a particular sport, . . . rate of substitutions, . . . variety of skill sets required for competition[,]

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70. *Id.* at 7.

71. *Id.* at 6 (citing USER’S GUIDE, *supra* note 40, at 12). Interestingly, however, the User’s Guide points out:

While it is a reasonable conjecture that most student nonresponse is due to the lack of interest in athletics on the part of those students, there is no evidence that any institution sought to test this view or, alternatively, that they informed students that nonresponse would be interpreted as lack of interest.

USER’S GUIDE, *supra* note 40, at 8.

72. 2005 Additional Clarification, *supra* note 39, at 5 (“[A] census is superior to a sample in almost every respect for purposes of assessing student interest under part three of the three-part test.”).

73. *Id.* at 6 (“[A]n institution properly administers the Model Survey if it conducts a census whereby the Model Survey is provided to all full-time undergraduates, or to all such students of the underrepresented sex.”).

74. *Id.* at 7.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 11 (emphasis added).

79. *Id.*

and effective practices for skill development.”<sup>80</sup> As an example, a basketball team may have only five players on the floor during a game, but “[t]o have effective practice to simulate regulation play, . . . [the team] may need twice the number of participants than are permitted on the court.”<sup>81</sup> Competitive pressures in the region may add to this baseline number, while athletic-organization regulations may impose some limitations. Thus, if only five women with appropriate skills desire a varsity basketball team, an educational institution would not have to add that team if the norm in the competitive region required ten to fifteen players on a team.<sup>82</sup>

If the number of students who indicate interest in a particular sport is not enough to sustain a new varsity team in that sport, the inquiry ends there. If, however, it appears that a sufficient number of students does have interest, the inquiry then moves on to whether the students have the ability to compete in that sport. At this point, the analysis becomes less straightforward, as professional judgments begin to play a bigger role.<sup>83</sup> The need to exercise professional judgment does render this test less precise than the numerically straightforward substantial proportionality test, but the 2005 Additional Clarification does give some reassurances in this regard. In assessing the existence of sufficient student ability, DED-OCR will presume valid the assessments of athletic directors and coaches, “provided the methods used to assess ability are adequate and evaluate whether the students have sufficient ability to sustain an intercollegiate varsity team.”<sup>84</sup> Moreover, DED-OCR “will presume that a student’s self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability.”<sup>85</sup> Thus, a student who self-assesses no ability to play lacrosse is presumed not to have the ability to play lacrosse, regardless of any expressed interest in playing on a lacrosse team.

With regard to whether there exists a reasonable expectation of intercollegiate competition for the team, DED-OCR “will look at available competitive opportunities in the geographic area in which the institution’s athletes primarily compete”<sup>86</sup>—an analysis that an educational institution also can undertake for itself, based on the competitive region for its existing teams and certain other

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80. *Id.*

81. *Id.* at 11–12.

82. See USER’S GUIDE, *supra* note 40, at 9.

83. 2005 Additional Clarification, *supra* note 39, at 9–11.

A further complicating factor in such an analysis occurs because, “confidentiality is essential to obtaining high quality data and to achieving acceptable response rates.” USER’S GUIDE, *supra* note 40, at 11. With a confidential survey, how can an educational institution identify the students who have expressed interest to determine whether they have the ability to compete on a particular team? The Model Survey does provide one solution, by asking students who have expressed an interest *in a particular sport* to provide name and contact information for further follow-up from the relevant coach or other athletic department administrator. *Id.* at 14. Or, after identifying a sport for which a sufficient number of students have expressed interest, an educational institution may simply put an advertisement in the school newspaper or send out an e-mail notifying students of a meeting they can attend to get more information.

84. 2005 Additional Clarification, *supra* note 39, at 9.

85. *Id.* at 10.

86. *Id.* at 12.

practicalities. An educational institution need not create a team “absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution’s normal competitive region,”<sup>87</sup> but might “be required . . . to encourage the development of such competition as part of a resolution agreement or remedy.”<sup>88</sup> A university in Miami, Florida, for example, need not offer a downhill snow-skiing team, even when survey respondents have expressed sufficient interest and demonstrate appropriate ability, because of the obvious difficulties in finding suitable competition and practice areas nearby. A college located in Lincoln, Nebraska, whose normal competitive region includes the Rocky Mountains and whose students have expressed sufficient interest in and ability to compete in snow skiing, also need not field that team if doing so would require that students travel an unreasonable distance to the Rocky Mountains simply to practice.<sup>89</sup> However, an educational institution in northern Michigan that does not have a snow-skiing team and has not satisfied the interests and abilities of its female students, who have expressed sufficient interest in and ability to compete in snow skiing, may have to try to create an appropriate competitive environment within its geographic region in order to develop a team to satisfy the expressed interests and abilities of these students. The 2005 Additional Clarification points out that such professional judgments must be reasonable.<sup>90</sup>

The 2005 Additional Clarification states, in a clear and direct manner, several key points about the “interests and abilities” criterion:

- First, absent substantial proportionality, an educational institution will be found in compliance with the “interests and abilities” criterion *unless* all three essential prerequisite conditions exist.<sup>91</sup> The party challenging the educational institution’s athletic programs—whether DED-OCR in response to a complaint or in a compliance audit, or student-plaintiffs in a complaint proceeding or lawsuit—must prove the existence of these conditions.<sup>92</sup> It is important to note, however, that the recent elimination of a viable team or a broad-based petition for elevation of an existing club team to varsity status, may overcome this presumption of compliance.<sup>93</sup> Thus, an educational institution should weigh decisions on such actions very carefully.<sup>94</sup>
- Second, again in the absence of substantial proportionality, DED-OCR will presume that an educational institution that properly administers the Model Survey provided with the 2005 Additional Clarification, and finds insufficient interest to sustain a varsity team

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2.

92. *Id.* at 3–4.

93. *Id.* at 2–3.

94. *Id.* at 7.

for the underrepresented gender, complies with the effective accommodation requirements of Title IX, absent other clear and direct evidence of such unmet interest.<sup>95</sup>

- Third, an educational institution need not take affirmative steps to generate interest in athletics among women,<sup>96</sup> presumably in order to find ways to add teams ultimately to achieve proportionality.<sup>97</sup> If, however, interest and ability in a sport exist, and if creating a team in that sport appears reasonable given all of the conditions of competition in the region, the educational institution may have an affirmative duty to try to create an appropriate competitive environment that fosters the successful development of that particular team.<sup>98</sup>
- Finally, and most interestingly, the 2005 Additional Clarification revives the “safe harbor” language first presented explicitly in the 1996 Clarification<sup>99</sup> and later refuted explicitly in the 2003 Further Clarification.<sup>100</sup> Unable, apparently, to dissuade educational institutions and the public from the notion that a “safe harbor” for Title IX compliance must exist, the Transmittal Letter states that “each part of the three-part test is a safe harbor,”<sup>101</sup> and explains that “each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities,”<sup>102</sup> while the clarification itself states that “each part of the three-part test is a safe harbor, and no part is favored by OCR.”<sup>103</sup> It remains to be seen, however, whether these assurances will change public thinking on what constitutes a true “safe harbor.”

Through the 2005 Additional Clarification, DED-OCR has established the “interests and abilities” criterion as yet another “safe harbor” in Title IX compliance, with a presumption of compliance that favors the educational institution. And although an educational institution need not conduct any survey to prove compliance with the “interests and abilities” criterion, DED-OCR evidently hopes that this approved survey instrument will inspire educational institutions

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95. *Id.*

96. *Id.* at 5.

97. Interestingly, this runs counter to the unanimously approved Recommendation 7 of the Secretary of Education’s 2003 Commission Report, which calls on DED to “encourage educational and sports leaders to promote male and female student interest in athletics at the elementary and secondary levels to encourage participation in physical education and explore ways of encouraging women to walk on to teams.” 2003 COMMISSION REPORT, *supra* note 26, at 34–35.

98. 2005 Additional Clarification, *supra* note 40, at 12.

99. See *supra* note 48 and accompanying text.

100. See *supra* text accompanying note 30.

101. Transmittal Letter, *supra* note 39, at 3.

102. *Id.*

103. Additional Clarification, *supra* note 39, at 1.

both to engage in a self-assessment process to assure themselves that they have, in fact, complied with the law and the regulatory scheme, and to have confidence in the results of that survey process.

## II. THE MODEL SURVEY, THE USER'S GUIDE AND THE TECHNICAL MANUAL

At the request of DED-OCR, the National Center for Education Statistics (NCES) produced the Model Survey and the User's Guide that accompany the 2005 Additional Clarification "to provide guidance on conducting a survey of student interest" relevant to the "interests and abilities criterion" of the three-part test for effective accommodation.<sup>104</sup> Using data gathered by the National Institute of Statistical Sciences (NISS) and presented in the Technical Manual, NCES developed a Web-based Model Survey that DED-OCR has determined meets the requirements of the law, as explained in the 2005 Additional Clarification.<sup>105</sup> The User's Guide presents the Model Survey in detail sufficient to facilitate proper administration of the survey instrument, while the Technical Manual provides more detailed background information on the concepts described in the User's Guide and on the statistical theories underlying the development of the Model Survey.

The User's Guide presents a Web-based Model Survey consisting of eight screens that gather information on student interests and abilities in varsity athletics, as follows:

- Screen 1 introduces the survey, informs students of its purpose, provides an explicit confidentiality statement and explains the structure of the survey.<sup>106</sup>
- Screen 2 requests four demographic facts: student age, year in school, gender, and full- or part-time status.<sup>107</sup>
- Screen 3 explains the questions on athletic experience, participation, and ability, and allows students with no athletic interest to complete the survey by exiting without having to answer any other questions.<sup>108</sup>
- Screen 4 provides some definitions and an explanation of the survey to follow on the subsequent screens.<sup>109</sup>
- Screen 5 asks the students to select those sports for which the student wishes to provide more information on subsequent screens, to allow the survey to "reduce the size and complexity of screen 6, on which the information is actually entered."<sup>110</sup> In other words, rather than asking

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104. USER'S GUIDE, *supra* note 40, at 2.

105. *Id.*

106. *Id.* at 13, 15. *See also* TECHNICAL MANUAL, *supra* note 41, at 54, 57.

107. USER'S GUIDE, *supra* note 40, at 13, 16. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 58.

108. USER'S GUIDE, *supra* note 40, at 13, 17. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 59.

109. USER'S GUIDE, *supra* note 40, at 13, 18. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 60.

110. USER'S GUIDE, *supra* note 40, at 13.

a student questions about all of the National Collegiate Athletic Association's (NCAA) twenty-three championship sports and seven emerging sports, the information entered on screen 5 will customize screen 6 to the student's particular interests, listing only those sports in which that student has expressed an interest.<sup>111</sup>

- Screen 6 gathers "actual information regarding experience, current participation, interest in future participation, and self-assessed ability."<sup>112</sup>
- Screen 7 gives students an opportunity for comments or other feedback in narrative form.<sup>113</sup>
- Screen 8 "is a pop-up screen that appears only for full-time students of the underrepresented sex who have expressed an interest and ability to participate at a higher level."<sup>114</sup> On this screen, the student receives a message asking whether the student would like further contact with the athletic department regarding participation opportunities in this particular sport.<sup>115</sup>

As the User's Guide explains, this Model Survey has the following benefits:

- it is simple;
- it explicitly explains the reasons behind the survey;
- it explicitly presents a confidentiality statement;
- it allows a student with no athletic interest or ability the opportunity to complete the study without answering pages of questions irrelevant to the student's interests;
- it allows the construction of a detailed survey only for those sports for which the respondent expresses interest;
- it is "nonprejudicial" in its wording of items;
- it includes all of a student's athletic experience, including current activities, interest in future participation, and ability; and
- it provides fixed-form responses in the way of drop-down boxes or radio buttons for response selection.<sup>116</sup>

These survey properties respond to the flaws that NISS identified in the surveys used by those fifty-seven educational institutions that demonstrated compliance with Title IX under the "interests and abilities" test.<sup>117</sup> NISS's "historical analysis

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111. *Id.* at 13, 19. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 61.

112. USER'S GUIDE, *supra* note 40, at 13, 20. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 62.

113. USER'S GUIDE, *supra* note 40, at 14, 21. *See also* TECHNICAL MANUAL, *supra* note 41, at 56, 63.

114. USER'S GUIDE, *supra* note 40, at 14.

115. *Id.* at 14, 22. *See also* TECHNICAL MANUAL, *supra* note 41, at 56, 64.

116. USER'S GUIDE, *supra* note 40, at 14. *See also* TECHNICAL MANUAL, *supra* note 41, at 57.

117. *See* TECHNICAL MANUAL, *supra* note 41, at 22–45.

Chapter 3 of the Technical Manual focuses on the survey instruments themselves, explaining in great detail the four aspects of the surveys analyzed, as summarized briefly in the

of the use of surveys . . . provide[d] a context for identifying good existing practices as well as desirable improvements[,]”<sup>118</sup> and for “ascertain[ing] the unique needs of institutions attempting to demonstrate Title IX compliance using [the “interests and abilities” criterion].”<sup>119</sup> As a foundation for this analysis, NISS reviewed over 130 files provided by DED-OCR involving Title IX investigations conducted between 1992 and 2002.<sup>120</sup> NISS focused its survey analysis on two broad areas: first, “the degree to which the institutions in the [DED-OCR] Title IX compliance case files, and the subset of those institutions that used [the “interests and abilities” criterion], were similar to the universe of postsecondary institutions that offer intercollegiate sports programs”;<sup>121</sup> and second, “the specific survey practices that were used by those institutions that employed a survey.”<sup>122</sup> Ultimately, NISS attempted to understand “the technical challenges to conducting a survey that will be both easy to implement and adequate [for] ascertaining whether the interests and abilities of the underrepresented sex have been effectively accommodated.”<sup>123</sup> The Model Survey thus derives from a statistical analysis of prior survey instruments, giving DED-OCR—as well as educational institutions that choose to use the survey instrument—the confidence that the survey instrument will provide accurate information on whether and how an educational institution has satisfied Title IX by fully and effectively meeting the athletic interests and abilities of its female students.

The User’s Guide explains in some detail—but not nearly as much detail as the Technical Manual—some of the considerations that informed the development of the Model Survey. With regard to the first area of inquiry, NISS evaluated the

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User’s Guide. For a social scientist or statistician who wants more information on the survey instrument, perhaps to understand it better for academic purposes or to understand the concerns identified by NISS in developing a survey other than the Model Survey, this chapter contains some interesting information. For educational institutions that choose simply to use the Model Survey, however, the information contained in this chapter is more detailed than necessary to properly administer that survey instrument. *Id.* at 22–38.

Chapter 4 looks at five data-collection instruments identified other than those provided in the DED-OCR files, including four Web-based surveys, and presents an analysis parallel to that performed in Chapter 3 for the surveys in the DED-OCR files. This chapter also points out some of the problems with these Web-based surveys, including the fact that the surveys did not exploit the interactive nature of the Web by, for example, creating a survey that allowed students to identify specific sports of interest and to answer questions only about those sports, along with the fact that the surveys did not provide access to “metadata” by use of a mouse-over to provide definitions of terms. These surveys also had some problems with confidentiality due to the fact that respondents were e-mailed the survey links and were asked for identifying information on the survey response to ensure that the respondent would not be e-mailed again about completing the survey. *Id.* at 40–45.

118. USER’S GUIDE, *supra* note 40, at 2.

119. *Id.*

120. *Id.*

121. *Id.* See also TECHNICAL MANUAL, *supra* note 41, at 5–19. As the User’s Guide explains, “[t]o the extent that the institutions in the . . . case files are similar to the larger universe of institutions, it is easier to generalize from their history.” USER’S GUIDE, *supra* note 40, at 2–3.

122. USER’S GUIDE, *supra* note 40, at 3. See also TECHNICAL MANUAL, *supra* note 41, at 22–38.

123. USER’S GUIDE, *supra* note 40, at 3.

similarities and differences between the 130 DED-OCR institutions and the “base population of 1,723 institutions that include every institution that is a member of at least one of the intercollegiate athletic organizations: The National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA).”<sup>124</sup> Although NISS found some statistically significant differences between the 130 DED-OCR educational institutions and the base population,<sup>125</sup> NCES concluded that no reason exists, “from a statistical and measurement perspective, for student interest surveys to be more appropriate for one type of institution than another.”<sup>126</sup>

With regard to the second area of inquiry, NISS sought to understand specific survey practices. The User’s Guide summarizes the information gathered by NISS from the DED-OCR files and presented in more detail in the Technical Manual. NISS divided its analysis into four broad categories, and discussed how the surveys it analyzed compared with each other and with good survey practices:

- First, NISS examined the general properties of the surveys.<sup>127</sup> In looking at whether the educational institution conducted the survey for its own reasons, because of a complaint filed against the educational institution or because of a compliance audit initiated by DED-OCR, NISS determined that two-thirds of all of the surveys analyzed occurred in response to a complaint filed against the educational institution.<sup>128</sup> NISS also looked at the survey target population (whether the entire student body or some subset, such as female

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124. *Id.* at 3–4. *See also* TECHNICAL MANUAL, *supra* note 41, at 5–19 (discussing the differences in more detail and providing the statistical measures used to identify these differences).

125. In Chapter 2, the Technical Manual presents this information in great detail. TECHNICAL MANUAL, *supra* note 41, at 5–19. NISS looked at fourteen characteristics and found statistically significant differences between the two populations in nine of these characteristics: sector (type of institution), region, Carnegie class (classification based on degree-granting activities), in-state cost, enrollment (size), percent female, athletic association membership, the presence of football, and the number of sports offered. *See id.* at 7–9. No significant differences existed in urbanicity, selectivity, out-of-state cost, percent Black, or percent out-of-state. *See id.*

In summary, the educational institutions involved in the DED-OCR cases tended to be “large state colleges and universities (including doctoral universities) that are highly involved in intercollegiate sports.” USER’S GUIDE, *supra* note 40, at 4. *See also* TECHNICAL MANUAL, *supra* note 41, at 10, 12–13. These colleges and universities more likely participate in “all four major conference sports (i.e., baseball, football, basketball, and track),” and more likely belong to the NCAA than to the NAIA or NJCAA. USER’S GUIDE, *supra* note 41, at 4. *See also* TECHNICAL MANUAL, *supra* note 41, at 12–13. Although a higher proportion of the 130 DED-OCR institutions are in the Southeast and Far West regions of the country, the Technical Manual points out that the region category was “strongly influenced by the ‘cluster’ of 10 . . . cases involving community colleges in North Carolina.” TECHNICAL MANUAL, *supra* note 41, at 13.

126. USER’S GUIDE, *supra* note 40, at 5.

127. *Id.* *See also* TECHNICAL MANUAL, *supra* note 41, at 22.

128. USER’S GUIDE, *supra* note 40, at 6. This fact does raise an interesting question about the aim of the analyzed surveys themselves. Since NCES developed the Model Survey based on the findings of the NISS analysis, and since NISS analyzed surveys that educational institutions had developed to gather evidence to respond to a charge of Title IX noncompliance, could the Model Survey be biased toward proving compliance rather than simply assessing interest?

students only) and the sampling mechanism (whether random sampling, non-random sampling, or complete census), and found that a majority of the surveys targeted the entire undergraduate student body rather than some subgroup, such as only women.<sup>129</sup> However, NISS also found that most educational institutions did not proactively attempt to solicit a reasonable response from the target population. Rather, most educational institutions typically distributed the questionnaires in a central place and did not engage in any follow-up, although a few did offer incentives for completing the survey.<sup>130</sup> The User's Guide reports that response rates varied from 8 to 70%,<sup>131</sup> leading to extensive discussions in the Technical Manual about the problem of non-respondents and nonresponse bias.<sup>132</sup>

- Second, NISS examined the characteristics of the survey instruments themselves.<sup>133</sup> NISS looked for the presence or absence of specific kinds of questions, mainly demographic information, and found that most surveys did ask questions about student age, class year, and gender, but did not ask for any information that could identify the student.<sup>134</sup> Although not asking for identifying information does protect student confidentiality, which NCES deems essential for

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129. *Id.*

130. *Id.*

131. *Id.* at 8. Note, though, that the Technical Manual reports response rates that “range from less than 1 percent to 70 percent,” well below the rates required to satisfy NCES statistical standards. TECHNICAL MANUAL, *supra* note 41, at 37. It appears, however, that the User's Guide contains an error and, perhaps, the response rates should have been given as 0.8 to 70% instead of 8 to 70%. Nevertheless, the rates were low enough—regardless of how low they actually were—to cause some concerns.

132. USER'S GUIDE, *supra* note 40, at 8. See also TECHNICAL MANUAL, *supra* note 41, at 37, 47, 48, 52–54, 68–73. As the Technical Manual explains, “[t]he problem posed by low response rates is that non-respondents may systematically differ from respondents, producing biased results.” *Id.* at 37. In the case of a survey to determine student interests, a low response rate may “work[] to the detriment of the institutions conducting surveys because those who are dissatisfied with the athletic programs at an institution are probably more likely to respond than those that are satisfied,” leading to a lower reported level of satisfaction than the “true” level of satisfaction. *Id.* Both the 2005 Additional Clarification and the User's Guide, however, deal with this problem in a straightforward manner by declaring that nonresponse equals noninterest and, thus, the educational institution may presume that those students who do not respond to the survey are satisfied with existing athletic opportunities. 2005 Additional Clarification, *supra* note 39, at 6 (“[N]onresponse to the census indicates an actual lack of interest if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest”); USER'S GUIDE, *supra* note 40, at 12 (using essentially the same language to indicate that nonresponse to the survey equates to lack of interest).

The decision by DED-OCR to equate no response to lack of interest has, however, generated a significant amount of controversy. See *infra* text accompanying notes 202–40 for a discussion of this and other controversial aspects of the 2005 Additional Clarification.

133. USER'S GUIDE, *supra* note 40, at 5–6. See also TECHNICAL MANUAL, *supra* note 41, at 22.

134. USER'S GUIDE, *supra* note 40, at 5–6.

conducting a proper survey,<sup>135</sup> in the event that a student did express interest in a particular team, the educational institution would have no way of contacting her to pursue follow-up questions about ability. NISS also looked at whether the surveys explicitly solicited student opinions on the educational institution's athletic programs and on the respondent's interest in and ability to participate in athletics, and found that most did not ask about student attitudes toward intercollegiate athletics or their interest as spectators, and less than half asked a general question about satisfaction with the institution's athletic program.<sup>136</sup> NISS also examined whether the surveys explicitly solicited information from respondents on their athletic abilities, and found that less than one-third included such questions, although many did ask questions about previous athletic experience and whether the student had been recruited—questions that likely served as proxies for directly gathered information on student athletic abilities.<sup>137</sup>

- Third, NISS examined some global characteristics of the survey instruments.<sup>138</sup> Around one-quarter of the surveys contained a statement of the drawbacks and benefits associated with participation in intercollegiate athletics,<sup>139</sup> less than one-third of the surveys told the students the purpose of the survey,<sup>140</sup> and less than 20% promised confidentiality.<sup>141</sup>
- Finally, NISS looked at how the survey measured athletic interest, experience, and ability.<sup>142</sup> It examined the sports included in the surveys and the ways in which respondents could express interest and ability,<sup>143</sup> and found that less than one-third of the surveys explicitly asked about a respondent's athletic abilities but instead asked questions about previous high school or college experiences.<sup>144</sup> The surveys also differed significantly in how students identified the sports in which they were interested: some provided a fixed list of entries from which

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135. *Id.* at 11.

136. *Id.* at 5–6.

137. *Id.* at 5–7.

138. *Id.* at 6. *See also* TECHNICAL MANUAL, *supra* note 41, at 23.

139. USER'S GUIDE, *supra* note 40, at 7–8. NISS noted that one statement in particular appeared in several of the survey instruments analyzed:

“Intercollegiate athletics usually requires athletes to devote 20 hours of practice each week during the season. The athlete is expected to follow an individual regimen of training during the off-season. Many intercollegiate athletes receive financial awards that cover all or a portion of school expenses. Athletes are required to travel and occasionally miss classes. They are given access to academic services, including tutoring, counseling and study tables.”

*Id.* at 33–34.

140. *Id.* at 7.

141. *Id.*

142. *Id.* at 6. *See also* TECHNICAL MANUAL, *supra* note 41, at 23–24.

143. USER'S GUIDE, *supra* note 40, at 6.

144. *Id.* at 7.

respondents could select particular sports, while others provided blank lines on which a student could write the name of a sport or code a numerical entry that corresponded to a particular sport of interest from a list provided with the survey.<sup>145</sup> The surveys also differed in the way that they ascertained interest and ability, ranging from a question with a simple “yes/no” response to providing a scale that allowed a student to select from up to ten levels of increasing interest or ability.<sup>146</sup>

The User’s Guide concludes that the surveys examined by NISS “exhibit a mixture of strengths and weaknesses.”<sup>147</sup> Strengths include “[I]ack of explicit bias” in the wording of survey questions and an increasing use of the Web to collect data.<sup>148</sup> Weaknesses include unnecessary complexity and the inclusion of irrelevant information, with the most serious weakness being “the inattention to low response rates.”<sup>149</sup>

The User’s Guide then explains how to conduct a survey of student interest to capitalize on the identified strengths and remedy the identified weaknesses. It cautions that “certain choices will make it easier to conform to legal requirements as well as the technical requirements of surveys”<sup>150</sup> and directs the user to the Technical Manual for specific criteria.<sup>151</sup> It then summarizes information relevant to seven aspects of the survey process: problem formulation, target population, census versus sample, periodicity, excluding students, confidentiality, and nonresponse.<sup>152</sup> In this section, the User’s Guide makes some choices regarding the recommendations presented in the Technical Manual. Reading the Technical Manual before understanding the recommendations chosen for the survey in the User’s Guide proves unnecessarily complicating, however, because the Technical Manual really provides detailed background information on the development of the survey. But the Technical Manual can provide insights into how to conduct an institution-specific survey different from the Model Survey.<sup>153</sup>

For “problem formulation,” the User’s Guide explains that an educational institution should be able to identify the minimum number of women required to field a team in a particular sport—a number that “depends on the sport and possibly contextual factors.”<sup>154</sup> A basketball team cannot play with fewer than

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145. *Id.*

146. *Id.*

147. *Id.* at 9.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* In Section 5, the Technical Manual describes: the proper process for conducting a survey, TECHNICAL MANUAL, *supra* note 41, at 48–52; the proper process for collecting data, *id.* at 52–54; the proper process for Web-based data collection, including a discussion of the Model Survey itself, *id.* at 54–66; and the proper data analysis process, *id.* at 66–74.

152. USER’S GUIDE, *supra* note 40, at 9–12.

153. For example, as described *supra* note 132, the Technical Manual presents a long discussion of how to deal with non-respondents, while in the 2005 Additional Clarification and the User’s Guide, on the other hand, DED-OCR simply chooses to equate nonresponse with noninterest.

154. USER’S GUIDE, *supra* note 40, at 9.

five members, for example, but a competitive team probably requires ten to fifteen members.<sup>155</sup> Then, if the number of women with interest and ability equals or exceeds this minimum number, the educational institution must take further steps toward determining whether to add a varsity team in the identified sport, including assessing the athletic ability and interested students and evaluating competitive opportunities within the educational institution's normal competition area.<sup>156</sup> Otherwise, it need not proceed any further.<sup>157</sup> Determining this minimum number with some certainty does present a challenge in this aspect of the survey,<sup>158</sup> but the Technical Manual reinforces the idea that the goal of the survey is to estimate "the number of students in the data analysis population interested [in] and able to participate at the intercollegiate level in [a] given sport."<sup>159</sup> It points out that the survey data should separate respondents into two categories on a sport-by-sport basis: "interested *and* able" or "either not interested or not able," and clarifies that a student must be both interested in and able to participate in a sport in order to qualify as a student with interests and abilities under this criterion.<sup>160</sup>

For the "target population," the User's Guide recommends surveying the "entire undergraduate student body."<sup>161</sup> Even though educational institutions would use such surveys to ascertain the interests and abilities of full-time undergraduate students of the underrepresented gender, "a survey of the entire undergraduate population can provide institutions with evidence related to the degree to which unmet demand differs for males versus females and full-time versus part-time students."<sup>162</sup> Moreover, "it avoids the suggestion that the institution is concerned only with the needs of the underrepresented sex and eliminates the need to restrict access to the survey to only a subset of the undergraduate body."<sup>163</sup> The User's Guide also gives an alternative survey target population consisting of the current undergraduate population and potential applicants, but recommends against this approach, explaining how such a "catchment" population creates problems in, for example identifying an appropriate population to survey. Moreover, since this population is "almost surely unreachable in any meaningful way,"<sup>164</sup> the User's Guide recommends against extending the survey beyond the existing undergraduate student population.<sup>165</sup>

With regard to a census or sample survey, the User's Guide clearly favors a census approach, as "it is superior in almost every respect" for establishing interest

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155. *Id.* See also *supra* text accompanying notes 78–82.

156. USER'S GUIDE, *supra* note 40, at 9.

157. *Id.* at 10.

158. *Id.*

159. TECHNICAL MANUAL, *supra* note 41, at 66.

160. *Id.* at 67–68.

161. USER'S GUIDE, *supra* note 40, at 10. See also TECHNICAL MANUAL, *supra* note 41, at 48–49.

162. USER'S GUIDE, *supra* note 40, at 10.

163. *Id.*

164. *Id.*

165. *Id.* This aspect of the survey has also generated some controversy, as explored *infra* text accompanying notes 210–11.

and ability and avoids several difficulties with sample surveys, such as the selection of the sampling mechanism (for example random versus non-random) and sample size (which must be large enough to enable a precise estimate of students interested in particular teams), and the calculation of sampling error (which can complicate understanding whether a sufficient number of students with appropriate interest and ability exists).<sup>166</sup> With regard to sampling error, in particular, the User's Guide points out that a sample survey raises the question of how an educational institution should "handle the margin of error in a sample survey that generates an estimate of 15 interested and able women (with a margin of error of  $\pm 3$ ) in a sport that requires at least 18 people to form a team."<sup>167</sup> Should the educational institution assume it must create the team (because fifteen plus three equals eighteen), or that it need not create the team (because fifteen minus three equals twelve)? A census survey eliminates this uncertainty, because fifteen interested respondents probably would not be sufficient to form a team.<sup>168</sup>

For "periodicity," the User's Guide states that a census survey of the undergraduate population with a high response rate that indicates that the educational institution has satisfied the athletic interests and abilities of its female students may "serve for several years if the demographics of the undergraduate population at the institution are stable and if there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities."<sup>169</sup> Otherwise, the educational institution should survey students more frequently.<sup>170</sup>

With regard to "excluding students," the User's Guide indicates that, for determining interest in varsity sports, part-time students may be excluded from calculations.<sup>171</sup> It does, however, recommend including graduating seniors in the calculations, even if it is too late in their academic careers for them to participate in intercollegiate sports, as this "provides the best estimate for future years of the number of students in the underrepresented sex who have the interest and ability, and acknowledges the reality that creating a new sports team at the intercollegiate level may be a multiyear process."<sup>172</sup>

With regard to "confidentiality," the User's Guide states that "confidentiality is

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166. USER'S GUIDE, *supra* note 40, at 10. *See also* TECHNICAL MANUAL, *supra* note 41, at 50–52.

167. USER'S GUIDE, *supra* note 40, at 11.

168. *Id.* Note, however, that, when confronted with this level of interest, an educational institution should nevertheless consider whether it should plan to add the particular team in the coming years.

169. *Id.*

170. *Id.*

171. *Id.* *See also* TECHNICAL MANUAL, *supra* note 41, at 49, 52.

172. USER'S GUIDE, *supra* note 40, at 10. The Technical Manual recommends against including graduating seniors, instead recommending a survey that includes "the entire student population eligible for intercollegiate athletic participation." TECHNICAL MANUAL, *supra* note 41, at 49. The 2005 Additional Clarification and the User's Guide, however, set the target as the entire undergraduate student population, noting that students ineligible for varsity competition due to age or class year may be eliminated from subsequent analysis on the basis of the demographic questions in the survey. *See 2005 Additional Clarification, supra* note 39, at 6; USER'S GUIDE, *supra* note 40, at 10.

essential to obtaining high quality data and to achieving acceptable response rates.”<sup>173</sup> Although e-mailed surveys may lose some of the confidentiality of paper-and-pencil surveys with no identifying information, the User’s Guide also points out that today’s newer Web-based technologies can help to protect respondent confidentiality.<sup>174</sup> Note, too, that the Model Survey does provide a student who has expressed an interest in and ability to play a particular sport the option to have identifying information forwarded to the appropriate college or university office for follow-up.<sup>175</sup>

Finally, with regard to “nonresponse,” the User’s Guide points out that none of the surveys studied by NISS “explicitly considered any kind of nonresponse bias analysis to determine whether those students who did not respond to the survey differed in interests and abilities from those who responded.”<sup>176</sup> Instead, those educational institutions “treated nonresponse as indicating no interest in future sports participation.”<sup>177</sup> The User’s Guide characterizes this as a defensible assumption “if all students have been given an easy opportunity to respond to the survey, the purpose of the survey has been made clear, and students have been informed that the institution will take nonresponse as an indication of lack of interest.”<sup>178</sup> Thus, although the Technical Manual discusses in great detail how to handle non-respondents and the resulting nonresponse bias,<sup>179</sup> both the User’s Guide and the 2005 Additional Clarification deal with nonresponse bias in a very simple manner,<sup>180</sup> by assuming that nonresponse equates to lack of interest, as long as the survey instrument clearly explains this assumption.<sup>181</sup> The User’s Guide also recommends a Web-based survey as the best method for giving students an easy way to respond.<sup>182</sup>

The User’s Guide concludes with two pages of technical details for implementing the survey in a Web-based format at an individual educational

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173. USER’S GUIDE, *supra* note 40, at 11.

174. *Id.* at 11–12.

175. *Id.* at 21.

176. *Id.* at 12.

177. *Id.*

178. *Id.* The User’s Guide does, however, state a preference for a survey approach that “generate[s] high enough response rates that nonresponse can safely be ignored for the purposes of Title IX compliance.” *Id.* Note, though, that at least one criticism of this view points out that, “in these days of excessive e-mail spam,” this assumption may not be defensible. See *NWLC April 2005 Statement*, *supra* note 67, at 1, 3 (“Given the notoriously low response rates to surveys in general, let alone to anything sent via email, this authorization will allow schools to avoid adding new opportunities for women even where interest does in fact exist on campus.”).

179. TECHNICAL MANUAL, *supra* note 41, at 37, 47, 48, 52–54, 68–73.

180. USER’S GUIDE, *supra* note 40, at 12. The User’s Guide justifies this simplification by stating that “conducting an analysis of nonresponse bias and generating statistically valid adjustments to the original data based on such an analysis are complicated and beyond the capacity of some institutions.” *Id.*

181. *Id.* For example, if the educational institution chooses to send an e-mail to students with a Web link to the survey, the e-mail can “include[] a disclaimer that states that if a student does not respond to the survey, the institution will understand that the student is not interested in additional athletic participation.” *Id.*

182. *Id.*

institution,<sup>183</sup> and with a summary of the additional steps an educational institution should take after conducting the survey and analyzing the data.<sup>184</sup> The concluding paragraph notes that the “purpose of this guide is limited to providing guidance on conducting and interpreting an interest survey.”<sup>185</sup> It then discusses “what an institution might do next with survey results,” particularly if those results indicate that unmet interests exist among a sufficient number of students with the ability to participate in a new sport.<sup>186</sup> It then directs the user back to the 2005 Additional Clarification for more guidance on how to proceed.<sup>187</sup>

The information contained in the User’s Guide expands on the summary information provided in the 2005 Additional Clarification and explains the reasoning behind some of the survey requirements. The Technical Manual adds further details, but those details will interest primarily social scientists and statisticians, and will have little practical application for administering the survey and interpreting the resulting data—although the details might prove relevant to an educational institution that already has a survey and needs to understand how its survey compares to the Model Survey. Moreover, the 2005 Additional Clarification and the User’s Guide may have, in some cases, adopted a statistically less sound, but ultimately more practical, approach than recommended in the Technical Manual. Overall, the requirements for a proper survey as described in the 2005 Additional Clarification eliminate some of the problems found in the surveys studied by NISS and ensure that any survey used will produce accurate and useable results in response to the limited survey goal of determining whether unsatisfied athletic interest exists among female undergraduates at a level sufficient to justify considering whether to add another team. The Model Survey itself satisfies all of these criteria and has the added benefit of a DED-OCR imprimatur. Nevertheless, an educational institution remains free to develop its own survey, consistent with these requirements.

### III. CRITICISMS AND QUESTIONS

The 2005 Additional Clarification and accompanying documents provide a much-needed clarification on how an educational institution can ascertain the athletic interests of female students. The documents present valuable data to help educational institutions to structure a sound plan to grow an athletic program for women, and also give an educational institution some level of assurance that its athletic programs comply with the Title IX effective accommodation requirements under the “interests and abilities” criterion as spelled out in the 1979 Policy Interpretation.<sup>188</sup> It provides yet another “safe harbor” for educational institutions attempting to comply with Title IX<sup>189</sup> by explicitly stating that, regardless of

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183. *Id.* at 23–24. *See also* TECHNICAL MANUAL, *supra* note 41, at 65–66.

184. USER’S GUIDE, *supra* note 40, at 24.

185. *Id.*

186. *Id.*

187. *Id.*

188. 1979 Policy Interpretation, *supra* note 7, at 71,418.

189. 2005 Additional Clarification, *supra* note 39, at 1 (“[E]ach part of the three-part test is a

whether an educational institution conducts a survey, it enjoys a rebuttable presumption of compliance with the “interests and abilities” criterion.<sup>190</sup> The clarification also squarely places the burden of proving noncompliance on the party challenging the educational institution’s existing programs, and sets out clear guidelines as to the evidence required to rebut this presumption of compliance: a sufficient number of interested and able students, and a reasonable expectation of competition within the educational institution’s normal competitive region.<sup>191</sup> It also points out that a recently disbanded and competitive varsity team, or a broad-based petition from an existing club sport for elevation to varsity status, will satisfy this evidentiary requirement, and makes clear that survey results cannot form the basis for eliminating a current and viable intercollegiate team.<sup>192</sup> In these aspects alone the 2005 Additional Clarification has provided new and clear guidance on compliance with Title IX under the “interests and abilities” test and fills in some of the gaps in understanding the 1996 Clarification<sup>193</sup> and the 2003 Further Clarification.<sup>194</sup>

The clarification does, however, go a step further. Although an educational institution need not conduct any survey of student interests and abilities—because the burden of proof of noncompliance with the “interests and abilities” criterion rests with the challenger—an educational institution that would like to assure itself of compliance *may* conduct a survey and can have faith in the results of a properly administered survey that satisfies certain survey construction criteria. The 2005 Additional Clarification and the User’s Guide then present a recommended Model Survey<sup>195</sup> that addresses the problems identified in an analysis of several dozen interest-and-ability surveys conducted during the 1990’s.<sup>196</sup> If an educational institution administers the Model Survey in accordance with the requirements presented in the User’s Guide and finds insufficient interest and ability among existing students to field an additional team for students of the underrepresented gender, the 2005 Additional Clarification provides the assurance that the educational institution’s athletic programs satisfy the effective accommodation requirements of Title IX.<sup>197</sup> The clarification also clearly absolves the educational institution from any obligation to generate interest in athletics among students of the underrepresented gender.<sup>198</sup> If, on the other hand, an educational institution administers the survey and finds sufficient interest and, upon further investigation, also ability in a particular sport, it may have to field a team or may have to help to

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safe harbor, and no part is favored by [DED-OCR.]”).

190. *Transmittal Letter*, *supra* note 39, at 2–3; *2005 Additional Clarification*, *supra* note 39, at 3–4.

191. *2005 Additional Clarification*, *supra* note 39, at 4.

192. *Id.* at 7.

193. *See 1996 Clarification*, *supra* note 14.

194. *See 2003 Further Clarification*, *supra* note 14.

195. *Id.* at 5–9.

196. *See generally* TECHNICAL MANUAL, *supra* note 41.

197. *2005 Additional Clarification*, *supra* note 39, at 7.

198. *Id.* at 5. This is yet another point of controversy, as explained *infra* text accompanying note 209.

develop interest in that particular sport in its normal competitive region “within a reasonable period of time.”<sup>199</sup> DED-OCR has indicated that, for those portions of the data analysis that require professional judgment, it will defer to the judgment of athletic administrators, coaches, and educators.<sup>200</sup> DED-OCR will employ a reasonableness standard in those areas beyond the strict purview of experts in a particular field.<sup>201</sup>

This all seems relatively straightforward and should give educational institutions a good way to survey their student populations to ascertain athletic interests and then follow up to determine the existence of the necessary athletic abilities. Yet, the 2005 Additional Clarification has already fomented some predictable controversy, and also raises some questions both about the process by which DED-OCR issued the clarification and about whether educational institutions should adopt the Model Survey as part of their Title IX compliance and monitoring efforts. The rest of this section considers some of these issues.

- A. Does the 2005 Additional Clarification represent a rollback of three decades’ worth of reforms to intercollegiate athletic programs for women?

Groups that have a political stake in the enforcement of Title IX reacted strongly to the 2005 Additional Clarification upon its release in March 2005. Most of these criticisms charge the Bush Administration with enabling a rollback of reforms to intercollegiate athletic programs and a change in DED policy from that of the Clinton Administration. A careful reading of the clarification, coupled with a decent understanding of prior policies, however, leads to the inescapable conclusion that these initial criticisms do not have any basis in fact.

For example, a document prepared by the National Women’s Law Center (NWLC) in April 2005 contains the most common criticisms about the 2005 Additional Clarification.<sup>202</sup> The NWLC position paper claims that the clarification “is inconsistent with long-standing [DED-OCR] policies and with fundamental principles of equity under Title IX.”<sup>203</sup> In reality, however, the clarification merely addresses one technical aspect of the “interests and abilities” criterion of the three-part test for effective accommodation (which dates back to 1979 and the first Title IX policy interpretation)—that is, how to measure student athletic interest. The substance of the “interests and abilities” criterion remains unchanged. The 1979 Policy Interpretation explains that DED-OCR “will assess compliance with the interests and abilities section of the regulation by examining the following factors:

- a. The determination of athletic interests and abilities of students;

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199. *2005 Additional Clarification*, *supra* note 39, at 12. Factors to consider when evaluating the reasonableness of the time to establish a new team include “obtaining necessary approval and funding to establish the team, building or upgrading facilities, obtaining varsity level coach(es), and acquiring necessary equipment and supplies.” *Id.* at 13.

200. *Id.* at 9–12.

201. *Id.* at 11–12.

202. *See NWLC April 2005 Statement*, *supra* note 67.

203. *Id.* at 1.

- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.”<sup>204</sup>

This policy interpretation then explains the factors to consider when evaluating each of these three factors.

For determining athletic interests and abilities, the 1979 Policy Interpretation states that educational institutions

may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women’s interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the *expressed interests* of students capable of intercollegiate competition who are members of an underrepresented sex.<sup>205</sup>

In selecting sports and in determining the level of competition for men’s and women’s teams, educational institutions enjoy a similar level of flexibility.<sup>206</sup>

Furthermore, in the 1996 Clarification issued during the Clinton Administration, DED-OCR indicated that, when determining compliance under the “interests and abilities” criterion of the three-part test for effective accommodation, the department

will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If *all three* conditions are present, OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.<sup>207</sup>

The 2005 Additional Clarification, as discussed above, uses almost exactly this language in explaining the type of evidence necessary to rebut the presumption of compliance with the “interests and abilities” criterion:

[An educational institution] will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which *all three* of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school’s

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204. 1979 Policy Interpretation, *supra* note 7, at 71,417.

205. *Id.* (emphasis added).

206. *See id.* at 71,417–18.

207. *See 1996 Clarification, supra* note 14, at 1.

normal competitive region.<sup>208</sup>

The 1996 Clarification also spells out the sort of evidence required to determine the existence of these three conditions. For example, “if an institution has recently eliminated a viable team from the intercollegiate program, [DED-OCR] will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.”<sup>209</sup> Similarly, in the 2005 Additional Clarification, evidence of a recently disbanded varsity team rebuts the presumption of compliance with the “interests and abilities” criterion.<sup>210</sup>

Furthermore, the 1996 Clarification and the 2005 Additional Clarification present similar lists of factors to consider when determining interest, ability, and available competition. In the 1996 Clarification, DED-OCR states that it “will look for interest by the underrepresented sex as expressed through the following indicators, among others: . . . results of questionnaires of students and admitted students regarding interests in particular sports.”<sup>211</sup> Thus, dating at least as far back as 1996, DED-OCR indicated that surveys could provide a valid way to determine interest. In 2005, DED-OCR has merely provided educational institutions with a way to conduct a survey and have confidence in the results.

It is difficult to understand how the 2005 Additional Clarification, in these respects, represents any departure from prior DED-OCR policy. Yet, the NWLC has offered several specific examples of the ways in which the organization believes that the clarification does not support the aims of Title IX. All of the complaints raised by NWLC can, however, be resolved by a clear-headed reading of the entire document.

- NWLC complains that the clarification “allows schools to use surveys alone to demonstrate compliance with the law.”<sup>212</sup> In fact, all that the clarification does is give educational institutions a straightforward and unbiased way to determine whether there is unmet interest that athletic program administrators should consider accommodating.<sup>213</sup> Given that the 2005 Additional Clarification states a clear presumption of compliance with the “interests and abilities” criterion in the absence of evidence to the contrary,<sup>214</sup> educational institutions need never “demonstrate compliance.” Moreover, since administering a survey may actually provide evidence to counter the presumption of

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208. *Transmittal Letter*, *supra* note 39, at 2. *See also 2005 Additional Clarification*, *supra* note 39, at 4.

209. *1996 Clarification*, *supra* note 14, at 6.

210. *Transmittal Letter*, *supra* note 39, at 2–3. *See also 2005 Additional Clarification*, *supra* note 39, at 7.

211. *1996 Clarification*, *supra* note 14.

212. *NWLC April 2005 Statement*, *supra* note 67, at 2.

213. Although, as discussed briefly *supra* note 128, the fact that NCES derived the survey from instruments studied by NISS, which educational institutions had developed in response to a DED-OCR investigation, raises the question of whether the Model Survey only gathers information on interests and abilities or whether it can actually prove compliance.

214. *See Transmittal Letter*, *supra* note 39, at 2–3.

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compliance by bringing some unmet interest to the attention of the educational institution, it is not clear that administering a survey actually provides an educational institution with any particular assurances in advance, or with any way actually to avoid adding athletic opportunities for women.

- NWLC complains that “[s]urveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls,”<sup>215</sup> and explains that “basing women’s future opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination.”<sup>216</sup> Nevertheless, the 1979 Policy Interpretation and the 1996 Clarification only require full and effective accommodation of the *expressed* athletic interests and abilities of female students—that is, their actual interests and abilities, not some undefined and indescribable utopian ideal of women’s participation in athletics.<sup>217</sup>
- NWLC claims that the clarification “conflicts with a key purpose of Title IX—to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating.”<sup>218</sup> But neither the statute itself, nor the 1975 Implementing Regulations, requires anything other than simply not discriminating against women. Nowhere does the law require the active encouragement of athletic interest and ability among girls and women, no matter how much certain advocacy groups wish that it would.
- NWLC criticizes DED-OCR’s decision to restrict the survey to enrolled and admitted students, because it “permit[s] schools to evade their legal obligation to measure interest broadly.”<sup>219</sup> Nowhere, however, does the law impose a “legal obligation to measure interest broadly”—this is again another element of the perfect society such advocacy groups aim to create through social legislation. In this criticism, though, the NWLC does make an interesting point when it states that “students interested in a sport not offered by a school are unlikely to attend that school.”<sup>220</sup> But the flaw in this reasoning is that it presumes that students interested in a particular sport will select their academic institutions on that basis alone and not on other bases such as location, academic programs, cost, or perhaps some intangible factor. An educational institution will not and cannot know what untapped

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215. *NWLC April 2005 Statement*, *supra* note 67, at 2.

216. *Id.*

217. 1979 Policy Interpretation, *supra* note 7, at 71,417 (stating that any method of determining student interest must be “responsive to the *expressed* interests of students capable of intercollegiate competition who are members of an underrepresented sex”) (emphasis added); *see also* 1996 Clarification, *supra* note 14 (“OCR will look for interest by the underrepresented sex as *expressed* through the following indicators . . . .”) (emphasis added).

218. *NWLC April 2005 Statement*, *supra* note 67, at 2.

219. *Id.*

220. *Id.*

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interest exists on its campus unless and until it asks. Again, the survey only asks what interest exists on campus, which is all that every prior policy statements has required.<sup>221</sup>

- The NWLC claims that the survey methodology, particularly in its treatment of nonresponse bias and student self-assessment of ability, “is flawed and inconsistent with the requirements of prior [DED-OCR] policy.”<sup>222</sup> Given that no prior DED-OCR policy statement ever addressed the use of surveys to measure interest and ability in any thorough, meaningful way, this criticism has no basis in fact. Moreover, NCES does not make the choice of how to treat nonresponse bias without considering all of the ramifications of one approach or another, as discussed in the Technical Manual.<sup>223</sup> Rather, the approach presented in the User’s Guide merely attempts to effect a practical and workable solution to a difficult and intractable statistical problem.
- The NWLC objects to the way in which the clarification “*shifts* the burden to female students to show that they are *entitled to equal opportunity*.”<sup>224</sup> In fact, the burden of proof on the “interests and abilities” criterion has never been clear, although DED-OCR officials from in the Clinton Administration indicate that the challenger has always had the burden of proving that the educational institution did not satisfy the athletic interests and abilities of female students.<sup>225</sup> Moreover, the clarification does not weaken the requirement to provide women with equal athletic opportunity; it merely sets out another way to determine whether the athletic participation opportunities provided are equal, in a system set up to be “separate but equal” by gender.
- Finally, the NWLC does correctly point out that the 2005 Additional Clarification “makes no provision for [DED-OCR] to monitor [the] implementation of the model survey or its results.”<sup>226</sup> Consistent with its other obligations under the law, however, DED-OCR must broadly monitor Title IX compliance at educational institutions,<sup>227</sup> and the clarification does nothing to diminish this legal requirement.

Other groups and organizations have raised concerns similar to those expressed by the NWLC. The NCAA, in particular, has issued a number of press releases and articles cataloging the perceived flaws in the 2005 Additional Clarification. The NCAA Division I, II, and III governance structures also unanimously endorsed a resolution that “urged the Department of Education to honor its 2003 commitment to strongly enforce the standards of long-standing Title IX athletics

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221. See *supra* text accompanying notes 163–65. See also *supra* note 217.

222. *NWLC April 2005 Statement, supra* note 67, at 3.

223. See TECHNICAL MANUAL, *supra* note 41, at 68–72.

224. *NWLC April 2005 Statement, supra* note 67, at 3 (emphasis added).

225. See *supra* notes 57–59.

226. *NWLC April 2005 Statement, supra* note 67, at 3.

227. 20 U.S.C. § 1682 (2000).

policies, including the 1996 Clarification,”<sup>228</sup> and “urged NCAA members to decline use of the procedures set forth in the [2005] Additional Clarification.”<sup>229</sup> The six criticisms spelled out in the NCAA press release parrot the NWLC’s position paper directly:

[T]he Additional Clarification is inconsistent with the 1996 Clarification and with basic principles of equity under Title IX because it, among other problems (a) permits schools to use surveys alone, rather than the factors set forth in the 1996 Clarification, as a means to assess female students’ interest in sports; (b) conflicts with a key purpose of Title IX – to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating; (c) allows schools to restrict surveys to enrolled and admitted students, thereby permitting them to evade their legal obligation to measure interest broadly; (d) authorizes a flawed survey methodology; (e) shifts the burden to female students to show that they are entitled to equal opportunity; and (f) makes no provision for the Department of Education to monitor schools’ implementation of the survey or its results . . . .<sup>230</sup>

The similarity of language between the NWLC position paper and the NCAA statements raises the question of whether parroting talking points often enough, and from a high enough perch, turns those points into unassailable facts. Nevertheless, NCAA statements on the issue do add one other telling—but ultimately just as irrelevant—criticism of the 2005 Additional Clarification, by claiming that it “will elevate the third prong of the [effective accommodation] test by providing a standardized measure of interest.”<sup>231</sup> In the NCAA’s view, such a change “could *reduce pressure* on institutions that traditionally have relied on creating participation levels proportionate to undergraduate enrollment.”<sup>232</sup> Throughout the documents that comprise the clarification, however, DED-OCR frequently “reiterates that each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities.”<sup>233</sup> Those who criticize the clarification in this way have thus revealed themselves for the quota-mongers they actually are. Far from merely seeking to ensure that women continue to have equal opportunity by whatever measure an educational institution deems appropriate to its circumstances, those who have criticized the 2005 Additional Clarification really object to the document because it provides a

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228. Press Release, NCAA, In Honor of Title IX Anniversary, NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law (June 22, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/june/20050622\\_titleixanniv.html](http://www2.ncaa.org/media_and_events/press_room/2005/june/20050622_titleixanniv.html).

229. *Id.*

230. *Id.*

231. Michelle Brutlag Hosick, *Title IX Advocates Rally Communication Effort to Rethink Clarification*, NCAA NEWS ONLINE, Apr. 25, 2005, [http://www2.ncaa.org/media\\_and\\_events/association\\_news/ncaa\\_news\\_online/2005/04\\_25\\_05/index.html](http://www2.ncaa.org/media_and_events/association_news/ncaa_news_online/2005/04_25_05/index.html).

232. *Id.* (emphasis added).

233. *Transmittal Letter*, *supra* note 39, at 3.

workable alternative to their desired goal of proportional representation of women among student-athletes.

In June 2005, “more than 140 Democrats in the U.S. House of Representatives sent a letter to President [George W.] Bush, urging him to withdraw the guideline,”<sup>234</sup> claiming that the 2005 Additional Clarification “creates a major loophole and lowers the standard for Title IX compliance, jeopardizing the number of athletic opportunities available to women and girls in schools across the country.”<sup>235</sup> The letter claims that the clarification now makes it unnecessary for educational institutions “to look at other factors, such as input from coaches and administrators and interest in the surrounding schools and community sports leagues, which together provide a more comprehensive and accurate reflection of student interest.”<sup>236</sup> This letter then, actually criticizes the 2005 Additional Clarification for discounting the value of circumstantial evidence of *possible* interest in favor of focusing on direct evidence of *actual* interest.<sup>237</sup>

A similar criticism by the U.S. Senate Appropriations Committee, issued in a report accompanying the 2006 DED funding bill, also asks DED “to require colleges to make reasonable good-faith efforts to gather other evidence of women’s interest in sports.”<sup>238</sup> The report states that the Senate Appropriations Committee “believes survey results are not sufficient to demonstrate compliance if other evidence exists, such as requests for athletic teams, that contradicts the conclusions drawn from the survey.”<sup>239</sup> This criticism, too, misreads the 2005 Additional Clarification, which actually states that other evidence such as “[a] recent broad-based petition from an existing club team for elevation to varsity status” does help to defeat the presumption of compliance.<sup>240</sup> And, as the clarification indicates, requests for athletic teams, if “direct and very persuasive,” also overcome this presumption of compliance.<sup>241</sup>

These specific, identifiable errors in understanding aside, it bears repeating that these criticisms also entirely miss the point of the 2005 Additional Clarification. The documents together merely “provid[e] guidance on conducting and interpreting an interest survey,”<sup>242</sup> and offer the survey as a way to establish the athletic interests and abilities of female undergraduate students.<sup>243</sup>

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234. Jamie Schuman, *Senate Panel Says More Proof Needed for Colleges’ Compliance with Title IX*, CHRON. HIGHER EDUC., July 29, 2005, at A38.

235. Letter from Nancy Pelosi, U.S. House of Representatives Minority Leader, to President George W. Bush, (June 22, 2005), available at <http://democraticleader.house.gov/press/releases.cfm?pressReleaseID=1052>.

236. *Id.*

237. See 2005 Additional Clarification, *supra* note 39, at 6. See also *supra* text accompanying notes 61–63.

238. Schuman, *supra* note 234, at A38 (internal quotation marks omitted).

239. *Id.*

240. See 2005 Additional Clarification, *supra* note 39, at 6 n.10. See also *supra* text accompanying notes 61–63.

241. *Transmittal Letter*, *supra* note 39, at 2–3.

242. USER’S GUIDE, *supra* note 40, at 24.

243. *Transmittal Letter*, *supra* note 39, at 2–3.

It should be apparent that these and other public criticisms of the 2005 Additional Clarification and Model Survey stem more from an ideological problem than from any problem with the survey itself. The survey's creators had no agenda to pursue, other than to craft an unbiased survey that would allow educational institutions to gauge student interest in athletic participation opportunities on campus.<sup>244</sup> A careful review of criticisms of the survey reveals that the core of the criticism is that the survey might yield a result that some find unpalatable—perhaps proof that, at an individual educational institution, women simply do not have the same level of interest in athletics as men, for whatever reason any such disparity might exist. Widespread use of such a survey could, therefore, impair the ability of social engineers to progress toward some utopian goal apart from simply ensuring equal athletic opportunity, whether it is an increase in the number of women participating in athletics, a decrease in the number of men participating in athletics, cuts to men's football teams, or the elimination of intercollegiate athletics in their present form altogether. The key to understanding the criticisms of the clarification, then, lies more in understanding the political motivations of the critics rather than understanding the drawbacks, from a statistical and social-sciences perspective, of using surveys to prove or disprove any hypothesis.

B. Should DED-OCR have issued the 2005 Additional Clarification through the normal federal rulemaking process?

Recently, members of the President's Commission on Opportunity in Athletics drafted a letter to send to athletic directors across the country, urging a widespread effort among athletic department officials to request that DED-OCR withdraw the 2005 Additional Clarification.<sup>245</sup> This letter offers additional criticisms of the clarification, most particularly that DED-OCR did not develop the clarification "through the normal federal rulemaking process."<sup>246</sup> If it had, the clarification would have been "subject to public notice and comment,"<sup>247</sup> as unanimously recommended by commission members in Recommendation 2 of the 2003 Commission Report. That recommendation requests

[a]ny clarification or policy interpretation should consider the recommendations that are approved by this Commission, and substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process.<sup>248</sup>

In explaining this recommendation, the commission members stated the following:

The Commission heard criticism that the [pre-2003] interpretation of Title IX was implemented through non-regulatory processes. The

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244. User's Guide, *supra* note 40, at 2 ("The intent of this report is to provide guidance on conducting a survey of student interest with respect to Part 3 of the Three-Part Test.").

245. Letter from members of the President's Commission on Opportunity in Athletics to athletics directors (Sept. 19, 2005) (copy on file with author). See also Erik Brady, *Ex-members of Title IX Panel Urge Against Use of Surveys*, USA TODAY, Oct. 17, 2005.

246. *Id.*

247. *Id.*

248. 2003 Commission Report, *supra* note 26, at 33.

Commission strongly recommends that any new Title IX policies or procedures be subject to public notice and comment, and that the Administrative Procedures Act be strictly adhered to. When the public is given an opportunity to comment on proposed rules, the new rules can be improved by those comments. Moreover, the new rules are given legitimacy when this process is followed.<sup>249</sup>

The commissioners' letter does make a good point: the new clarification might have received more widespread acceptance if DED-OCR had given the public an opportunity to weigh in on the clarification prior to its issuing the documents. However, as one federal court pointed out in another recent Title IX case, *National Wrestling Coaches Association v. U.S. Department of Education*,<sup>250</sup> the Administrative Procedure Act does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."<sup>251</sup> That court also characterized the 1979 Policy Interpretation and 1996 Clarification as "interpretive rules"<sup>252</sup>—a designation almost assuredly applicable to the 2005 Additional Clarification as well. Thus, although providing an opportunity for public comment might have been good from a public-relations standpoint and would have shown some respect for the commission's work, DED-OCR did not violate any law in issuing the clarification as it did.<sup>253</sup>

C. What concerns do the 2005 Additional Clarification and Model Survey present for educational institutions themselves?

The 2005 Additional Clarification and the Model Survey raise some unanswered questions regarding the use of surveys. Importantly, the documents fail to address some broader public policy issues, particularly with regard to whether educational institutions have, in asking for more guidance on the "interests and abilities" criterion, traded off institutional autonomy and flexibility for security and (unfortunately) rigidity. In a number of places, the Transmittal Letter and the 2005 Additional Clarification explain how the "interests and abilities" test is a "flexible" test,<sup>254</sup> and also explain that educational institutions need not conduct any survey or, if they choose to conduct a survey, need not use the Model Survey.<sup>255</sup> But, with the detailed developmental information provided in the

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249. *Id.*

250. 263 F. Supp. 2d 82 (D.D.C. 2003).

251. *Id.* at 128.

252. *Id.*

253. Regardless of any legal requirements imposed on these clarifications, though, given that Secretary Paige had pledged to act on recommendations unanimously passed by commission members, however, *see Suggs, supra* note 27, it might have made more sense to offer the public some sort of opportunity to comment on the 2005 Additional Clarification before issuing the document.

254. *Transmittal Letter, supra* note 39, at 1, 3; *2005 Additional Clarification, supra* note 39, at 1, 2, 3, 5, 8, 13.

255. The 2005 Additional Clarification notes that if an educational institution chooses to use a survey different from the Model Survey, DED-OCR will evaluate the survey for "reliability and compliance" by examining the contents of the survey, the target population of the survey, the

User's Guide and Technical Manual, could an educational institution still rely on the appropriateness of its own survey unless that survey addressed every concern identified in these documents? It would, of course, simply make more sense to use the Model Survey, with the assurances that DED-OCR has provided regarding its acceptance of the survey, given proper survey administration and results analysis. On the other hand, prior to the existence of the Model Survey, as the User's Guide points, out, "about three-fourths of the [eighty-six] institutions that achieved compliance using [the "interests and abilities" criterion] did so by means of a student interest survey."<sup>256</sup> These surveys did contain some identifiable flaws,<sup>257</sup> but they also proved sufficient for their purposes at that time. How will the existence of the Model Survey, with its emphasis on addressing the flaws in these existing surveys, change expectations regarding surveys developed by educational institutions themselves?

Will this new clarification lead to an expectation of surveys? The 2005 Additional Clarification states that an educational institution has "discretion and flexibility in choosing the nondiscriminatory methods [it uses] to determine the athletic interests and abilities of the underrepresented sex."<sup>258</sup> But if a student-plaintiff brings an educational institution into court to challenge whether its athletic programs satisfy Title IX under the "interests and abilities" criterion, will the lack of a survey now, given the availability of the Model Survey, somehow hurt the educational institution's defense? Although the 2005 Additional Clarification gives educational institutions a presumption of compliance with the "interests and abilities" criterion in the absence of other direct and very persuasive evidence to the contrary, it is not inconceivable that some court, employing a burden-shifting scheme common to civil-rights protection laws such as Title VII of the Equal Rights Act of 1964,<sup>259</sup> would initially impose the burden of proof on the student-plaintiff to prove unmet interest and ability, and then shift the burden to the educational institution to prove compliance with the law, and further, require disclosure of any survey results as part of that proof. Might a court then interpret the absence of a survey as evidence that the educational institution was noncompliant with the law?

On the positive side, a widespread use of the Model Survey within an athletic conference or within a particular geographic region may provide sufficient information to allow a group of educational institutions to target the development of their sports programs toward the teams that have the best chances of attracting

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response rates of the target population, and the frequency with which the educational institution conducts the survey. *2005 Additional Clarification*, *supra* note 39, at 8.

256. USER'S GUIDE, *supra* note 40, at 3. Thus, prior to the existence of the Model Survey, at least sixty-seven educational institutions complied with Title IX using their own surveys, even though those surveys contained some identifiable flaws. *Id.*

257. See generally TECHNICAL MANUAL, *supra* note 41, at 22-45.

258. *2005 Additional Clarification*, *supra* note 39, at 5.

259. 42 U.S.C. §§ 2000e-1 to -17 (2000). For a discussion of burden shifting in Title VII cases, see *McDonnell Douglas v. Green*, 411 U.S. 792 (1972). For an example of the use of the Title VII burden-shifting scheme in Title IX cases, see *Arceneaux v. Vanderbilt Univ.*, 25 F. App'x 345 (6th Cir. 2001).

female student-athletes. The data may also allow an educational institution, in the absence of proportionality, to add a men's team without fear of litigation, once it has proven that female undergraduates are satisfied with the existing athletic program.<sup>260</sup>

On the negative side, particularly for public institutions subject to various state open-records laws, would the publication of survey data merely serve as evidence in a lawsuit or as fodder for some other campaign against a particular educational institution? Would the lack of survey data make the taxpayers believe that the institution has something to hide?

#### CONCLUSION

The 2005 Additional Clarification provides clear guidance on how an educational institution can, through the use of a survey, gauge the athletic interest of female undergraduate students on its campus. Although it has generated widespread public criticism, the clarification fundamentally represents a benign effort by statisticians to examine the best and worst features of existing survey instruments and to craft a sound instrument from a statistical and social-sciences perspective that gives educational institutions the assurance that they have conducted a proper survey and that they can rely on the results of that survey in making informed decisions about their athletic programs.

Public criticisms of the 2005 Additional Clarification by the NWLC, the NCAA, both houses of Congress, the presidential Title IX commission, and others merely evidence a gross, and perhaps purposeful, misunderstanding of the clarification's aims. Far from providing a survey that will allow educational institutions to avoid their legal obligations to provide equal athletic opportunities to women, when used as intended, the survey actually can help educational institutions to make prudent decisions about which teams to add and when. This goal, however, has been lost in the hyper-political rhetoric publicly accepted as enlightened commentary on an emotionally charged issue.

These knee-jerk reactions from predictable players have also taken attention away from more serious concerns over the use of such surveys. In 2002, while testifying before a federal commission reviewing Title IX, Brown University's general counsel "argue[d] that the government ought to revise the 1979 policy interpretation . . . to preserve institutional autonomy."<sup>261</sup> Presumably, this would have returned the originally intended flexibility to the interpretation of the law and the 1975 Implementing Regulations.<sup>262</sup> Instead of taking that action, however, in subsequent years, DED-OCR has issued one policy clarification after another, each of which, as it defines compliance with the law more and more clearly, also incrementally narrows the possible interpretations of the statute and the 1975 Implementing Regulations. The deeper and deeper DED-OCR goes into defining

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260. See Suggs, *supra* note 57, at A47 ("If a college could show that a demand existed for a men's sport, and it could prove that women's interests were being fully and effectively accommodated, then it would be free to add the men's sport.")

261. SUGGS, *supra* note 3, at 123.

262. *Id.* at 75. See also *supra* text accompanying note 5.

the specific requirements for complying with the various parts of the effective accommodation and equal treatment aspects of Title IX, the more and more its actions erode institutional autonomy. So while the 2005 Additional Clarification provides some security, does it also erode institutional autonomy? Educational institutions that choose to tread down the path toward the Model Survey and all of its assurances should weigh carefully the trade-offs.



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# LESSONS FOR ACADEMIC FREEDOM LAW: THE CALIFORNIA APPROACH TO UNIVERSITY AUTONOMY AND ACCOUNTABILITY

KAREN PETROSKI\*

## INTRODUCTION

In June 2003, the United States Supreme Court issued its opinion in *Grutter v. Bollinger*,<sup>1</sup> finally settling a question that had remained open for decades: are college and university admissions committees allowed to consider applicants' race without violating the Equal Protection Clause? The Supreme Court, in an opinion written by Justice O'Connor, held that under certain conditions, consideration of applicants' racial identities was constitutionally permissible. Justice O'Connor's analysis supporting this conclusion draws not only on equal protection doctrine but also in part on the concept of academic freedom, loosely presented as an institutional prerogative linked to the guarantees of the First Amendment.<sup>2</sup> As

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1. 539 U.S. 306 (2003).

2. *Id.* at 324–33, 339–40. Justice O'Connor uses the concept of academic freedom to support deference to the conclusions of college or university decisionmakers in the context of equal protection strict scrutiny analysis. Specifically, in the *Grutter* opinion, respect for academic freedom justifies (1) deference to the admission committee's identification of diversity as a compelling educational goal and therefore a compelling state interest, *id.* at 327–33; and (2) some deference to the committee's expertise and choice of specific admissions practices as a means of securing that interest, *id.* at 339–41. Justice O'Connor's opinion involves some slippage between the notion of academic freedom as a positive autonomy right and the notion of academic freedom as a principle of deference. For commentary addressing these issues and arguing that the concept of academic freedom was essential to the *Grutter* holding, see, e.g., Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT 133, 135–36, 155–68 (2004) (noting centrality of deference to the Court's holding and describing in detail the Court's application of the concept of academic freedom); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 464–65, 495–97 (2005); Marisa Lopez, Case Comment, *Constitutional Law: Lowering the Standard of Strict Scrutiny*, 56 FLA. L. REV. 841, 846 (2004) (describing the Court's deference as diluting strict scrutiny analysis); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2108–12 (2004) (describing the Court's use of the concept of academic freedom as resulting in a lowered level of scrutiny). *But see* Mark Tushnet, *United States Supreme Court Rules on Affirmative Action*, 2 INT'L J. CONST. L. 158, 163 (2004) (arguing that the Court's deference to the institution was not a dispositive aspect of its analysis or decision).

Justice Thomas points out in his *Grutter* dissent, however, the concept Justice O'Connor invokes is only roughly articulated in previous statements by the Court and individual Justices.<sup>3</sup> Neither Justice O'Connor's reliance on this notion in *Grutter* nor Justice Thomas's critique of it is particularly novel; the concept has been present in Supreme Court opinions for decades, and its constitutional foundations and scope have been unclear for just as long.<sup>4</sup> But the centrality of this disagreement to the high-profile *Grutter* opinions indicates that the need to clarify the role of the concept in constitutional analysis remains pressing.

This article seeks to clarify that role in a new way. It compares the professional and federal constitutional concepts of academic freedom with a related but distinct area of state law: California constitutional provisions, statutes, and judicial decisions pertaining to the University of California, its autonomy, and accountability in public institutions of higher education. This focus on California law is not arbitrary. The legal framework of California's public system of higher education is, if not unique in all respects, at least distinctive. The University of California is one of a number of public universities deriving their legal authorization and definition from the constitutions of the states they serve, rather than from legislative enactments.<sup>5</sup> Because of this constitutional foundation, the Regents of the University of California enjoy significant freedom from legislative control.<sup>6</sup> Moreover, the constitutional recognition of the Regents' powers arguably

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3. *Id.* at 362–67. Justice Thomas's critique of the majority's reliance on academic freedom makes up a significant part of his dissent. See generally Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15 (2004); Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Dissenting Opinions in Grutter: Has the Majority Created a Nation Divided Against Itself?*, 180 ED. LAW REP. 417 (2003). See also Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 840–42 (2004) (describing as "unstable" the connection between the Court's deference to the academy and its equal protection analysis).

4. See, e.g., Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531, 544–68 (2004); Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 563 (2003) (noting confusion in academic freedom precedent).

5. As Professor J. Peter Byrne notes, it can be "difficult to identify all the state universities that have constitutional status, because courts have been willing to interpret often ambiguous constitutional language as imposing limitations on the legislature." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 327 n.303 (1990). Byrne lists only nine institutions with confirmed constitutional status, but twenty institutions other than the University of California might be able to claim some sort of constitutional status. See ALA. CONST. art. XIV, § 264; ALASKA CONST. art. VII, § 2; ARIZ. CONST. art. XI, § 5; COL. CONST. art. VIII, § 5; CONN. CONST. art. VIII, § 2; GA. CONST. art. VIII, § 4; HAW. CONST. art. X, § 5; ID. CONST. art. VIII, § 3; LA. CONST. art. VIII, § 5; MICH. CONST. art. VIII, § 5; MINN. CONST. art. XIII, § 3; MO. CONST. art. IX, § 9(a); MONT. CONST. art. X, § 9; NEB. CONST. art. VII, § 10; N.M. CONST. art. XII, § 11; N.Y. CONST. art. XI, § 2; N.D. CONST. art. VIII, § 6; OKLA. CONST. art. XIII-A, § 2; TEX. CONST. art. VII, § 10; and WYO. CONST. art. VII, § 5.

6. See generally Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. REV. 23 (1977).

gives those powers legal weight comparable to that of the civil liberties guaranteed by the state constitution. California legal sources addressing challenges to Regental action against this backdrop outline a contrasting approach to many of the same concerns that drove the development of the professional and legal notions of academic freedom, without sharing the much-lamented terminological confusions of the federal case law addressing academic freedom.<sup>7</sup> Despite parallels between the federal and state law and doctrinal difficulties in both areas, however, there has been little cross-pollination between the two areas of law. California courts have only rarely drawn on the concept of academic freedom in addressing challenges to the autonomy of the state's research university system.<sup>8</sup> The reluctance of federal courts to acknowledge state law-based autonomy doctrine is more understandable but may be equally unfortunate.<sup>9</sup>

In describing the lessons each area of law may hold for the other, this article focuses in particular on tensions within and among principles of professional expertise, institutional pluralism, and participatory governance and the relation of

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7. See, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 79 (2004); Byrne, *supra* note 5, at 255; Hiers, *supra* note 4, at 565; Richard H. Hiers, *Institutional Academic Freedom vs. Individual Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 106 (2002); Matthew T. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 818 (1983).

8. *Scharf v. Regents of the University of California* is an exception. 286 Cal. Rptr. 227 (Cal. Ct. App. 1991). See *infra* Part III.C. California courts have been more willing to call on the doctrine of academic freedom in cases involving institutions other than the University of California. See *Lindos v. Governing Bd. of the Torrance Unified Sch. Dist.*, 510 P.2d 361, 372 (Cal. 1972) (refusing to confine operation of academic freedom rights to "conventional teachers" in case involving fired probationary teacher); *Monroe v. Trs. of the Cal. State Colls.*, 491 P.2d 1105, 1113 (Cal. 1971) (citing Supreme Court academic freedom cases in case involving loyalty oath); *California Faculty Ass'n v. Superior Court*, 75 Cal. Rptr. 2d 1, 8–9 (Cal. Ct. App. 1998) (recognizing institutional academic freedom right of San Jose State University to decide "who may teach"); *Dibona v. Matthews*, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990) (holding school administrators' cancellation of community college class involving performance of controversial play to be violation of First Amendment); *Wexner v. Anderson Union High Sch. Dist. Bd. of Trs.*, 258 Cal. Rptr. 26 (Cal. Ct. App. 1989) (depublished) (limiting First Amendment academic freedom right in high school context); *Kahn v. Superior Court*, 233 Cal. Rptr. 662 (Cal. Ct. App. 1987) (discussing academic freedom doctrine in connection with former Stanford faculty member's request for tenure review records); *Dong v. Bd. of Trs.*, 236 Cal. Rptr. 912, 923–24 (Cal. Ct. App. 1987) (citing Supreme Court academic freedom precedent in case involving disciplinary dismissal of faculty member from Stanford University); *Schmid v. Lovette*, 201 Cal. Rptr. 424, 430–31 (Cal. Ct. App. 1984) (noting cases holding that loyalty oaths are a threat to academic freedom in case involving public school teacher); *Bd. of Trs. v. County of Santa Clara*, 150 Cal. Rptr. 109, 112 (Cal. Ct. App. 1978) (holding that purpose of educational tax exemption is academic freedom, described as keeping schools "free from direct governmental control to enable them to fulfill their role as independent critics of government action"); *Oakland Unified Sch. Dist. v. Olicker*, 102 Cal. Rptr. 421, 430 (Cal. Ct. App. 1978) (holding that "there is no violation of academic freedom involved in an inquiry into whether or not the teacher's conduct is such as to constitute evident unfitness to teach").

9. Although federal courts sometimes use the term "autonomy" to refer to institutional academic freedom, they seldom have occasion to address the state law doctrine. See, e.g., *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (noting, in suit against San Francisco State University, lower degree of autonomy that California law confers on nonconstitutional California state universities).

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all three sets of values to the professional norm of academic freedom, the quasi-constitutional concept of academic freedom, and the state law doctrine of university autonomy. In particular, the article considers how courts have approached these tensions in two areas: faculty politics and participation in institutional governance, and the application of principles of public accountability to the University of California. As the discussion below explains, these are among the central issues plaguing both areas of law. Their analysis can help to clarify both the implications of existing federal judicial statements on academic freedom and the problems with California university autonomy doctrine.

Part I addresses the history of the concepts that divided Justices O'Connor and Thomas in *Grutter*. It first describes nineteenth-century shifts in American educators' and lawmakers' attitudes toward higher education and the eventual solidification of a complex professional norm of academic freedom. Part I then reviews twentieth-century statements on the subject by Supreme Court Justices and proposes a way of reconciling the apparent conflicts they present. It concludes that academic freedom is, and should be, understood as an institutional as well as an individual concern, but that the beneficiary of any institutional prerogative should be understood to be the faculty acting collectively, not non-faculty administrators. To complete the survey of the concept, Part I closes with a brief review of some of the major positions taken in academic commentary on the subject of institutional academic freedom.

Parts II and III turn to an examination of how California law has approached similar concerns in a different way. Part II opens with a description of the legal status and governance structure of the University of California, first addressing the history of its constitutional status. The California Constitution implicitly equates the university as an institution with its Board of Regents, in contrast to the approach to academic freedom suggested in Part I. Despite this constitutional recognition, the Regents' autonomy is not and should not be unconstrained. It has been limited in various ways by statutory enactments and by informal traditions and practices, which Part II also describes. California courts, too, have recognized some constraints on the Regents, but in general the courts have given the Regents plenary authority over faculty decision-makers in conflicts between Regents and faculty. A discussion and critique of the courts' understanding of university autonomy in conflicts over professorial political affiliation closes Part II.

Part III addresses other constraints on nonacademic administrators of public colleges and universities, specifically open-government laws and constitutional provisions. This part opens with a description of the relationship between the purposes of open-government laws and the ideas of academic freedom and university autonomy. It then discusses California case law addressing the application of state open-meetings and open-records laws to the University of California. This area of case law exhibits a pattern of interpretive avoidance that has contributed to an impoverished judicial doctrine with regard to university autonomy. Part III ends with a discussion of the implications for university autonomy doctrine of a recent sunshine amendment to the California Constitution. The amendment could force California courts to address the relationships among autonomy, academic freedom, and accountability more directly than has previously

been necessary, clarifying university autonomy law in the process.

The article concludes, in Part IV, with a review of the issues uniting and dividing these areas of law, a summary of the conflicting and overlapping imperatives that have made them so problematic, and a recapitulation of the lessons each area has to offer the other. Viewed from the perspective offered here, Supreme Court Justices' major statements on constitutional academic freedom need not be considered inconsistent. Placing those statements within a systematic framework that takes into account the full variety of legal purposes and roles that American culture and law have assigned to institutions of higher education offers a new way of thinking about academic freedom law.

## I. HISTORY AND CURRENT STATE OF THE CONCEPT OF ACADEMIC FREEDOM

### A. Overview of the issues

The perplexities surrounding the federal constitutional concept of academic freedom derive from two sources: confusion over the precedential authority of statements on the subject by various Supreme Court Justices and confusion over the doctrinal substance of, and relationships among, those statements. Few of the leading Supreme Court opinions on the issue have been majority opinions.<sup>10</sup> And to the extent that the opinions addressing the issue identify academic freedom as some kind of constitutionally protected right, they usually do so in language that can plausibly be construed as dicta.<sup>11</sup> Finally, while these statements “ground” academic freedom in the First Amendment,<sup>12</sup> they never fully clarify the nature of its relationship to other First Amendment rights.<sup>13</sup>

Substantive confusions regarding the meaning of academic freedom may be partly to blame for the latter problem. These ambiguities cluster mostly in three overlapping areas. First, existing Supreme Court case law presents support for conflicting conclusions about the holder of any such right; some opinions indicate that it is held by individual professors,<sup>14</sup> others that it is also a right held by

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10. See Hiers, *supra* note 4, at 531–32; Hiers, *supra* note 7, at 36, 44.

11. See generally Michael Abramowicz & Marshall Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 962–97, 1092–93 (2005) (discussing the difficulties of distinguishing holdings from dicta in the *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Grutter* contexts); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

12. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

13. See Hiers, *supra* note 4, at 556–68; David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990). See also *infra* Part IV.

14. Richard Hiers argues that the Supreme Court case law supports only this conclusion, and that lower courts' identification of an institutional academic freedom right is doctrinally incoherent and unsupported by legal authority. See Hiers, *supra* note 4 (relying mainly on *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)); Hiers, *supra* note 7 (relying on *Sweezy* and *Keyishian*). Others disagree. See, e.g., Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 ED. LAW REP. 1, 17 (2002) (“What clarity that has been provided by the High Court, points to academic freedom as [a] right of the institution and not a right of the

students,<sup>15</sup> and still others that it is a prerogative of the institution itself.<sup>16</sup> Opinions that may be read as having implicitly identified academic freedom as an institutional right nevertheless largely leave it unclear whether the institution holding the right is to be identified with faculty decision-making bodies<sup>17</sup> or with the administration.<sup>18</sup> Second, whether the right is held by individuals or institutions or both, it is unclear how uniformly it applies across the spectrum of private and public institutions of higher learning. This ambiguity is connected to, and must be discussed together with, a third: against what actions does the right protect its holders? In a private college or university, either individual professors or the institution itself might be able to claim that the right has been invaded by extra-institutional statutory or other governmental action.<sup>19</sup> Indeed, to the extent that private institutions may claim such a right, the right they may claim is arguably stronger than the one at issue in the public-institution context. Public colleges and universities are invariably subject at least to the fiscal control of their state legislatures<sup>20</sup> and often to many other legislative controls as well.<sup>21</sup> Moreover, as public employers and state actors, public institutions are themselves

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individual.”); Rabban, *supra* note 13, at 280 (“The accurate perception that the Supreme Court has identified institutional academic freedom as a first amendment [sic] right does not support the additional conclusion that the Court has rejected a constitutional right of individual professors . . .”). See also *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 1998) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (“Our review of the law . . . 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 . . .”).

15. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students.”). Recent calls in various states, including California, for the enactment of “student bills of rights” use the term “academic freedom” in this sense. See Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005); Students for Academic Freedom Mission and Strategy Statement, <http://www.studentsforacademicfreedom.org/essays/pamphlet.html> (last visited Oct. 29, 2005). Generally, the question of student academic freedom rights lies beyond the scope of the present discussion.

16. See, e.g., *Ewing*, 474 U.S. at 226 n.12; *Grutter*, 539 U.S. at 324–33.

17. While *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271, 287–88 (1984), appears to deny any collective faculty right of academic freedom, the admissions policy decisions identified with academic freedom in both *Regents of University of California v. Bakke*, 438 U.S. 265, 272 (1978), and *Grutter*, 539 U.S. at 314, were made by faculty committees. See discussion *infra* notes 82, 101–103, 139–152 and accompanying text.

18. To the extent that *Knight* rejects a collective faculty right of governance, harmonizing it with opinions such as *Grutter* that clearly recognize an institutional right of academic freedom would seem to require that the right be identified with the non-faculty lay administration of the institution. For a critique of this type of resolution, see Finkin, *supra* note 7; discussion *infra* Parts I.D–E.

19. See *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *cf.* *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (involving a claim by Princeton University to a right of university autonomy); Rabban, *supra* note 13, at 258–62 (discussing *Schmid*); Finkin, *supra* note 7, at 817–21, 854–57 (discussing *Schmid*).

20. See Rabban, *supra* note 13, at 271; *infra* notes 177–178 and accompanying text.

21. See, e.g., discussion *infra* Part III.A.

constrained by constitutional guarantees.<sup>22</sup> On the other hand, in the public university context, individual professors or students may be able to claim the right against the institution's administration as a state actor<sup>23</sup> as well as against other arms of the state government.<sup>24</sup> To complicate the picture further, it is difficult to see how a public institution, in contrast to a private one, might claim that its constitutional rights have been violated by another state actor.<sup>25</sup> But if the institutional right were to be understood as a collective right of faculty, it is at least arguable, as is discussed in more detail below, that such a group should be able to claim that the right entitles their decision-making to a presumption of validity. The question whether academic freedom means all or merely some of these things has never been squarely addressed by the Supreme Court.<sup>26</sup>

A closer look at these complexities is necessary in order to understand where the California approach may provide enlightenment and caution. To that end, this section next discusses the history and roots of the concept of academic freedom before presenting some initial conclusions about the shape of federal constitutional academic freedom law.

#### B. Nineteenth-century backdrop and the professional norm of academic freedom

The late nineteenth century was a pivotal period in American higher education. Three developments during this period are relevant to issues of academic freedom and university autonomy. Discussions of academic freedom commonly begin with the first of these developments: the importation into American higher education of the German institutional model of research-oriented higher education and the related institutional norm of *akademische Freiheit*.<sup>27</sup> As Matthew W. Finkin

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22. See Rabban, *supra* note 13, at 267 (noting that some Supreme Court decisions “suggest first amendment [sic] constraints on the institutional academic freedom of public universities that may not apply to their private counterparts”); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

23. See, e.g., *Cooper v. Ross*, 472 F. Supp. 802 (N.D. Ark. 1982) (involving claim of infringement of constitutional rights brought by assistant professor denied tenure against public university chancellor, department head, and trustees).

24. See, e.g., *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967).

25. See Hiers, *supra* note 4, at 556 (noting that “governmental speech” usually does not receive First Amendment protection).

26. See, e.g., Byrne, *supra* note 7, at 79 (“The interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical. . . . Confusion reigns.”). The Supreme Court denied certiorari in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001), in which the Fourth Circuit categorically rejected the concept of a doctrine of individual academic freedom. See discussion *infra* notes 97–99 and accompanying text. But it is difficult to sustain the extreme argument advanced in the *Urofsky* opinion. See also Rabban, *supra* note 13, at 280; see generally Hiers, *supra* note 7.

27. See *Urofsky*, 216 F.3d at 410 (quoting Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269 (1988)); Byrne, *supra* note 5; Finkin, *supra* note 7; see also THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE 1876-1915* 249-50 (1991) (discussing explosion in

explains in his history of the concept of institutional academic freedom, the latter notion “contained three ingredients[:]. . . *Lehrfreiheit* [“teaching freedom,”] . . . *Lernfreiheit* [“learning freedom,” and] . . . the right of the academic institution, under the direction of its senior faculty (the *Ordinarien*, or roughly, the full professors) and its academic officers elected of the faculty to manage its immediate affairs.”<sup>28</sup> Professors in nineteenth-century American colleges and universities were attracted to this model for both intellectual and pragmatic reasons. Intellectually, across the disciplines professors were increasingly committed to a research-scientific vocational paradigm, in part borrowed from the German model, according to which they assumed the role of experts engaged in a collective search for truth that involved the critical testing of one another’s ideas.<sup>29</sup> Because of its stress on expertise, this research-scientific model made some degree of professional autonomy seem an institutional prerequisite for the attainment of its goals.<sup>30</sup> Pragmatically, in a system of higher education consisting primarily of institutions governed by boards of lay trustees, rather than academics, the German model of freedom and self-governance offered an example of success to which American professors could point in support of demands for professional self-determination and even autonomy.<sup>31</sup> These two attractions of the research-scientific idea are related but distinct. Professors’ self-interest could support a claim for complete professorial autonomy, but the peer-review system envisioned by the rising vocational paradigm suggests significant disciplinary and ethical constraints on individual professors’ autonomy.<sup>32</sup> Also, the intellectual justification, far more than the pragmatic one, stresses the virtues of a competitive search for truth in a way parallel to the then-developing notion that the First Amendment exists at least in part to ensure a free “marketplace of ideas.”<sup>33</sup> But the two purposes served by professorial self-determination are also easily conflated, and their conceptual merging may explain some later doctrinal confusion.<sup>34</sup>

These nineteenth-century trends in thinking about higher education, part of a broader social and cultural trend toward professionalization, were significant influences on the 1915 formation of the American Association of University

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research-oriented institutions of higher education in late nineteenth-century United States).

28. Finkin, *supra* note 7, at 822–23.

29. See Byrne, *supra* note 5, at 270–77.

30. See *id.*

31. See *id.* at 273; see also Finkin, *supra* note 7, at 828.

32. See Rabban, *supra* note 13, at 234; David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988).

33. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”); Rabban, *supra* note 13, at 240–41. Of course, at this time, First Amendment doctrine did not permit college or university professors to claim First Amendment rights against actions by the states. My comment is meant only to indicate the parallels between the professional norm and Justice Holmes’s contemporary articulation of one purpose of the First Amendment’s speech clause.

34. See Finkin, *supra* note 7, at 851–57.

Professors (AAUP).<sup>35</sup> In the year of its formation, the AAUP issued a General Declaration of Principles as a statement of its mission. The Declaration opened by citing the concepts of *Lehrfreiheit* and *Lernfreiheit* and went on to address the proper role of lay boards of trustees, the “nature of the academic calling,” and “the function of the academic institution.”<sup>36</sup> The Declaration noted the necessity of maintaining the dignity of the profession in order to attract gifted candidates to its ranks. It described professors’ function as

deal[ing] at first hand, after prolonged and specialized technical training, with the sources of knowledge; and . . . impart[ing] the results . . . both to students and to the general public, without fear or favor. . . . [T]he proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside of their ranks.<sup>37</sup>

The Declaration accordingly asserted that the faculty “are the appointees, but not in any proper sense the employees, of” lay boards of trustees.<sup>38</sup> It identified academic freedom, defined in terms of noninterference with the work of faculty, as crucial to the university’s role of “intellectual experiment station”: “the university cannot perform its . . . function without accepting and enforcing to the fullest extent the principle of academic freedom.”<sup>39</sup> Thus, the 1915 Declaration identifies the “freedom” at issue as both individual and collective faculty freedom from the

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35. See Byrne, *supra* note 5, at 276–79. See also Thomas Haskell, *Justifying the Right of Academic Freedom in the Era of “Power/Knowledge,”* in *THE FUTURE OF ACADEMIC FREEDOM* 43, 48–60 (Louis Menand ed., 1996). The AAUP’s current mission, as stated on its website, is to “advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education’s contribution to the common good.” See AAUP website, <http://www.aaup.org> (last visited Oct. 27, 2005).

36. AAUP, *1915 AAUP General Declaration of Principles* (1915), reprinted in NEIL W. HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* 180–82 (2002), available at <http://www.aaup.org> [hereinafter *1915 General Declaration*].

37. *1915 General Declaration*, *supra* note 36, at 181.

38. *Id.* at 182. The 1915 Declaration also notes the different but in some ways analogous interference that state universities might experience from state legislatures:

Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations; and where there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical. The essential point, however, is not so much that the opinion is of one or another shade, as that it differs from the views entertained by authorities. The question resolves itself into one of departure from accepted standards; whether the departure is in the one direction or the other is immaterial.

*Id.* at 185.

39. *Id.* at 184, 186.

interference of governing boards in academic affairs.

In 1940, a Statement of Principles on Academic Freedom and Tenure superseded the 1915 Declaration.<sup>40</sup> As its name suggests, the 1940 Statement formalized the tenure system that had developed as an institutional mechanism for the attainment of academic freedom as described in the 1915 Statement.<sup>41</sup> Then, in 1966, the AAUP issued a Statement on Governance of Colleges and Universities, identifying a system of shared governance in which faculty have significant authority over academic policy-setting and decision-making as a necessary counterweight to a political and economic context of decreased university autonomy.<sup>42</sup> None of these statements has legal force, although the AAUP does investigate and censure affiliated institutions according to the statements' precepts and the AAUP's interpretation of their meaning. As will be discussed at more length below, however, many of the concepts cited in these documents find parallels in the concept of constitutional academic freedom that Supreme Court Justices began to articulate around the middle of the twentieth century.

The second major nineteenth-century development in American higher education, in contrast, did find immediate legal realization, perhaps in part because it appealed to the interests of the general electorate rather than primarily to the

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40. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001), available at <http://www.aaup.org> [hereinafter *1940 Statement*].

41. See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 79–82 (1990) (discussing the *1940 Statement* in relation to constitutional academic freedom law).

42. AAUP, *Statement on Government of Colleges and Universities*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/Govern.htm> [hereinafter *Statement on Colleges and Universities*]. The question whether faculty self-governance in colleges and universities remains desirable is hotly debated. For critiques of the practice, see J. Stephen Guffey & Larry C. Rampp, *Shared Governance: Balancing the Euphoria* (1997), <http://eric.ed.gov/> (search "Eric#" for ED418617; then follow the link to the full text in pdf format); Eleanor V. Horne, *Why Does Change Take So Long? Shared Governance on Many Campuses Is Too Slow and Too Consumed With Process*, 2:4 TRUSTEESHIP 5 (July–Aug. 1995). The general trend in American higher education may be away from shared governance. See discussion *infra* note 216; see also American Federation of Teachers, *Shared Governance in Colleges and Universities: A Statement of the Higher Education Program and Policy Council (2002)*, [http://www.aft.org/pubs-reports/higher\\_ed/shared\\_governance.pdf](http://www.aft.org/pubs-reports/higher_ed/shared_governance.pdf); Larry G. Gerber, "Inextricably Linked": *Shared Governance and Academic Freedom*, 87 ACADEME 3, at 22–24 (May–June 2001); Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609, 610 (2001); James T. Richardson, *Big Bad Governance*, 7:3 TRUSTEESHIP 16, 20, 22 (May–June 1999).

Generally, the discussion here leaves to one side the question whether shared governance is a universally desirable institutional practice. The position advanced here is simply that where faculty self-governance is the institutional practice, judicial evaluation of faculty decision-making should take into account all of the concept's professional and legal implications. Cf. Byrne, *supra* note 5, at 288 (arguing that "courts are poorly equipped to enforce traditional academic freedom as a legal norm"). This position resembles Byrne's in that it calls for deference toward decisions made on academic grounds but differs from Byrne's in that it assumes that other norms will almost always also be relevant to courts' evaluation of disputes that raise academic freedom concerns. See *infra* Part IV.B.

interests of a profession whose members are, if powerful, nevertheless limited in numbers. This development, unlike the rise of the research-scientific paradigm and the formation of the AAUP, pertained only to public universities. The federal Morrill Act of 1862,<sup>43</sup> instituting the land-grant colleges, was probably the most ambitious instantiation of this “democratic” view of higher education, a view in some tension with the German research-university model.<sup>44</sup> J. Peter Byrne has characterized the democratic model as “reflect[ing] the demands placed on our colleges and universities by the society at large that they help fulfill broad goals of social mobility and general prosperity.”<sup>45</sup> This populist concept had an intellectual or ideological component as well: it could be used to promote a view of comprehensive higher education as necessary to the health of a democratic civil society, rather than as a luxury for the elite.<sup>46</sup> Reformers in this vein discussed public institutions of higher education as engines for increasing both the social mobility and the “intellectual liberty” of citizens.<sup>47</sup>

Reformers in the states during this period also began to promote the concept that strong public universities could be seedbeds for innovation and regional economic growth.<sup>48</sup> The growth of this competitive federalist conception of the role of public colleges and universities is the third of the pivotal nineteenth-century developments in American higher education. This competitive federalist approach paralleled an already existing commitment to “institutional pluralism” that Matthew T. Finkin has identified in nineteenth-century judicial approaches to the question of the legal autonomy of educational institutions.<sup>49</sup> Drawing on principles of religious toleration and the benefits of political diversity as well as market competition, this concept of competitive pluralism worked together with the democratic and research-scientific ideals to inspire the initial nineteenth-century efforts to emancipate public colleges and universities from the control of state legislatures. Starting with Michigan in 1850, and followed by California in 1879, some states began to confer constitutional status on their public institutions, establishing them as independent arms of state government.<sup>50</sup>

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43. Morrill Act, ch. 130, § 5, 12 Stat. 503 (1862), *amended by* CAL. CONST. art IX, § 9.

44. JOHN AUBREY DOUGLASS, *THE CALIFORNIA IDEA AND AMERICAN HIGHER EDUCATION: 1850 TO THE 1960 MASTER PLAN* 46 (2000); *see also* SCHLERETH, *supra* note 27, at 247–48, 252 (noting overlap between democratic ideal and new recognition as professions of such fields as engineering, nursing, social work, science, and business administration); Byrne, *supra* note 5, at 267–83.

45. Byrne, *supra* note 5, at 281.

46. DOUGLASS, *supra* note 44, at 46; *see also* ALLEN NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* 17–22, 33 (1962).

47. *See* NEVINS, *supra* note 46, at 17; DOUGLASS, *supra* note 44, at 13, 15, 20, 22, 25, 31, 39, 41, 44, 47, 63, 68.

48. *See, e.g.*, DOUGLASS, *supra* note 44, at 7, 8, 10, 12, 15, 16, 25, 27, 41, 47, 53, 63–64. *See also* CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”).

49. Finkin, *supra* note 7, at 833.

50. *See* LYMAN A. GLENNY & THOMAS K. DALGLISH, *PUBLIC UNIVERSITIES, STATE*

Arguably, the competitive pluralist conception of the purpose of higher education is now the prevailing norm. But it does not yet completely dominate legal discourse, and the other two approaches remain potent forces in decision-making within and surrounding institutions of higher education.<sup>51</sup> It was the professional research-scientific norm that most significantly influenced early statements on academic freedom by Supreme Court Justices, as the next section explains.

### C. Early judicial pronouncements on academic freedom

The term “academic freedom” first appeared in an opinion written by a Supreme Court Justice in connection with the First Amendment in 1952, in Justice Douglas’s dissent in *Adler v. Board of Education of City of New York*.<sup>52</sup> In *Adler*, the Court upheld (6-3) the Feinberg Law, a New York state ban on public employment for those advocating the overthrow of government by force. In his dissent, Douglas characterized the law as “certain to raise havoc with academic freedom”<sup>53</sup> and compared the regime it created to a “police state,” under which “[t]here can be no real academic freedom.”<sup>54</sup> He then linked academic freedom clearly to the value of the “the pursuit of truth” and the research-scientific paradigm enshrined in the AAUP documents cited above, linking those values, in turn, to the First Amendment’s protections:

This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down.<sup>55</sup>

The term “academic freedom” next appeared five years later in *Sweezy v. New Hampshire*, a decision lacking a majority opinion.<sup>56</sup> In *Sweezy*, the Court overturned a public university lecturer’s contempt conviction for, among other things, refusing to answer a state Attorney General’s questions regarding the content of one of his lectures. Chief Justice Warren’s plurality opinion described principles of academic freedom and First Amendment freedom of expression as parallel, but did not specifically ground academic freedom in the First Amendment.<sup>57</sup> His formulation appeared to identify academic freedom with the

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AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE 14–19 (1973). See also discussion *infra* Part II.A.

51. See, e.g., discussions *infra* Part II.D, IV.B.

52. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

53. *Id.* at 509.

54. *Id.* at 510.

55. *Id.* at 510–11. See also Van Alstyne, *supra* note 41, at 105–07.

56. 354 U.S. 234 (1957) (Warren, C.J., plurality opinion).

57. Chief Justice Warren wrote:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played

roles and rights of “teachers.”<sup>58</sup>

Justice Frankfurter’s concurring opinion in *Sweezy* has been far more frequently quoted in subsequent judicial opinions addressing academic freedom.<sup>59</sup> Linking

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by those who guide and train our youth. . . . Teachers and students must always remain free to inquiry, to study, and to evaluate . . . ; otherwise our civilization will stagnate and die.

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the principle that every citizen shall have the right to engage in political expression and association. That right was enshrined in the First Amendment.

*Id.* at 250. Note that, like Justice Frankfurter’s concurrence, discussed below, Chief Justice Warren’s statements do not recognize any distinction between the public and private members of “the community of American universities.” *Id.*

58. *Id.*

59. A recent citation search indicated that federal courts have quoted Justice Frankfurter’s language about the “four essential freedoms” and an institution’s right “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who shall be admitted to study,” 354 U.S. at 263 (language that Justice Frankfurter himself quoted from another source; *see infra* note 60), roughly twice as many times as Chief Justice Warren’s language about “[t]he essentiality of freedom in the community of American universities,” 354 U.S. at 250.

Justice Frankfurter’s language is quoted, although not always attributed to Justice Frankfurter or to his source, in, inter alia, *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 226 (2003) (Stevens, J., dissenting); *Bd. of Regents of Univ. of Wisc. Syst. v. Southworth*, 529 U.S. 217, 238 (2000) (Souter, J., concurring); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 196 (1990); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 233 n.13 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (No. 04-1152); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 212 (D.C. Cir. 2003); *Brown v. Li*, 299 F.3d 1092, 1104 (9th Cir. 2002); *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001); *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 47 (2d Cir. 2000); *Urofsky v. Gilmore*, 216 F.3d 401, 413 (4th Cir. 2000) (en banc); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2d Cir. 1999); *Feldman v. Ho*, 171 F.3d 494, 495 (7th Cir. 1999); *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1149–50 (7th Cir. 1999); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 123 n.5 (2d Cir. 1997); *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1434 (2d Cir. 1995); *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 383 (4th Cir. 1995); *United States v. Brown Univ.*, 5 F.3d 658, 678 n.15 (3d Cir. 1993); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989); *Lovelace v. S.E. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986); *EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 114 (3d Cir. 1985); *NLRB v. Lewis Univ.*, 765 F.2d 616, 625–26 (7th Cir. 1985); *EEOC v. Univ. of Notre Dame Du Lac*, 715 F.2d 331, 335 (7th Cir. 1983); *Martin v. Helstad*, 699 F.2d 387, 397 (7th Cir. 1983) (Coffey, J., concurring); *Gray v. Bd. of Higher Educ.*, 692 F.2d 901, 909 n.15 (2d Cir. 1982); *In re Dinnan*, 661 F.2d 426, 430–31 (5th Cir. 1981); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980); *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005); *Sadki v. SUNY Coll. at Brockport*, 310 F. Supp. 2d 506, 512 (W.D.N.Y. 2004); *Myers v. Loudoun Cty. Sch. Bd.*, 251 F. Supp. 2d 1262, 1276 (E.D. Va. 2003); *McFadden v. SUNY Coll. at Brockport*, 195 F. Supp. 2d 436, 446 (W.D.N.Y. 2002); *Mellen v. Bunting*, 181 F. Supp. 2d 619, 626 (W.D. Va. 2002); *Girma v. Skidmore Coll.*, 180 F. Supp. 2d 326, 344 (N.D.N.Y. 2001); *McAlpin v. Burnett*, 185 F. Supp. 2d 730, 735 (W.D. Ky. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 818 (E.D. Mich. 2000); *Fisher v. Vassar Coll.*, 852 F. Supp. 1193, 1221 (S.D.N.Y. 1994); *Jew v. Univ. of Iowa*, 749 F.

the concept to both the German model of academic self-government and a principle of democratic openness, but again not expressly to the First Amendment, Justice Frankfurter wrote:

These pages need not be burdened with proof . . . of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . . Suffice it to quote the latest expression on this subject. It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.

“In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry. . . . This implies the right to examine, question, modify or reject traditional ideas and beliefs. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>60</sup>

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Supp. 946, 962 (S.D. Iowa 1990); *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551, 553 (D. Colo. 1990); *EEOC v. Univ. of Notre Dame Du Lac*, 551 F. Supp. 737, 742 (N.D. Ind. 1982); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1407 (D. Mass. 1989); *Orbovich v. Macalester Coll.*, 119 F.R.D. 411, 413 (D. Minn. 1988); *Varma v. Bloustein*, 721 F. Supp. 66, 72 (D.N.J. 1988); *Rollins v. Farris*, 108 F.R.D. 714, 719 (E.D. Ark. 1985); *Zahorik v. Cornell Univ.*, 579 F. Supp. 349, 352 (N.D.N.Y. 1983); *Gray v. Bd. of Higher Educ.*, 92 F.R.D. 87, 91–92 (S.D.N.Y. 1981). This list contains fifty-one opinions.

Chief Justice Warren’s language appears in, inter alia, *Whitehill v. Elkins*, 389 U.S. 54, 60 (1967); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Brown v. Armenti*, 247 F.3d 69, 74 (3d Cir. 2001); *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001); *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc); *Bronx Household of Faith v. Cmty Sch. Dist. No. 10*, 127 F.3d 207, 213 (2d Cir. 1997); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597–98 (2d Cir. 1990); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274–75 (7th Cir. 1982); *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1063 (4th Cir. 1981); *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 846 n.2 (D.C. Cir. 1975); *N.D. State Univ. v. United States*, 84 F. Supp. 2d 1043, 1050 n.13 (D.N.D. 1999); *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y. 1998); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1014 (W.D. Va. 1996); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994); *Bishop v. Aronov*, 732 F. Supp. 1562, 1565 (N.D. Ala. 1990); *EEOC v. Univ. of Notre Dame Du Lac*, 551 F. Supp. 737, 741 (N.D. Ind. 1982); *Knight v. Minn. Cmty. Coll. Faculty Ass’n*, 571 F. Supp. 1, 9 (1982); *Cooper v. Ross*, 472 F. Supp. 802, 811 (E.D. Ark. 1979); *Gay Students Org. of Univ. of N.H. v. Bonner*, 367 F. Supp. 1088, 1093 (D.N.H. 1974); *Brooks v. Auburn Univ.*, 296 F. Supp. 188, 192 (M.D. Ala. 1969); *Albaum v. Carey*, 283 F. Supp. 3, 10 (E.D.N.Y. 1968); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 619 (M.D. Ala. 1967); *Fowler v. Wirtz*, 236 F. Supp. 22, 36 (S.D. Fla. 1964). This list contains twenty-three opinions.

60. *Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring) (quoting THE OPEN

This powerful language was the origin of several of the ambiguities noted at the beginning of this section. First, and most obviously, Justice Frankfurter was not writing for the Court. Second, in this passage, Justice Frankfurter does not connect the “four essential freedoms” to the First Amendment or to the Constitution, even indirectly. Finally, and perhaps most problematically, it is unclear who holds the right described, and even whether it is a legal right at all. Clearly, only individuals can “examine, question, modify, or reject traditional ideas and beliefs.”<sup>61</sup> Yet the final sentence of Justice Frankfurter’s quotation from the statement on the open universities in South Africa uses pronouns referring to the university itself—the institution—as possessing the freedom “to determine for itself on academic grounds” the conduct of its academic affairs, without clarifying whether faculty or lay administrators should make these determinations.<sup>62</sup>

Ten years after *Sweezy*, the Supreme Court struck down the law upheld in *Adler* in *Keyishian v. Board of Regents of University of State of New York*.<sup>63</sup> In *Keyishian*, an explicit link between academic freedom and the First Amendment finally appeared in a majority opinion. Nevertheless, the link drawn is diffuse and the identification of the right holder only marginally more clear. Writing for the *Keyishian* majority, Justice Brennan stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>64</sup>

Here, more clearly than in *Sweezy*, the right is identified with individual professors’ more conventional First Amendment expression rights. If the Court had stopped with *Keyishian*, the contours of academic freedom doctrine might have remained relatively clear.<sup>65</sup> *Sweezy* and *Keyishian*, as well as *Adler*, involved faculty members at public institutions and seemed to implicate the First

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UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres *et al.*, eds., Johannesburg: Witwatersrand Univ. Press 1957) (the statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)). For a detailed account of the context of the writing quoted by Frankfurter, see Hiers, *supra* note 7, at 46–57.

61. *Sweezy*, 354 U.S. at 262.

62. *Id.* at 263. The trend described in Part I.D below may explain the more frequent citation of Justice Frankfurter’s concurrence, which, unlike Chief Justice Warren’s plurality opinion, can be construed to be a statement about institutional rights. *Cf.* Hiers, *supra* note 7, at 44–57. Richard D. Hiers argues that those courts that have read the concurrence as articulating an institutional right have misinterpreted it. *Id.* Hiers’s position on the meaning of Frankfurter’s quotation from THE OPEN UNIVERSITIES IN SOUTH AFRICA, while a helpful counter to the tendency that has turned the passage into an academic freedom shibboleth, does not satisfactorily account for the pronoun usage in the passage quoted. Compare the majority opinion in *Urofsky*, which reads Frankfurter’s concurrence as referring only to institutional, not to individual, rights. 216 F.3d at 412–13.

63. 385 U.S. 589 (1967).

64. *Id.* at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

65. *See* Byrne, *supra* note 7, at 298.

Amendment straightforwardly in that in each case the state, which was also the faculty member's employer, was attempting to regulate the faculty member's speech and associations. From this perspective, academic freedom doctrine might be characterized as a special, institutionally sensitive approach to the basic First Amendment concern with restrictions on speech and association. In the public educational institution context, the analysis might overlap with public-employee speech doctrine.<sup>66</sup> Yet Justice Frankfurter's *Sweezy* concurrence in particular suggests that the concept of academic freedom might contain an additional dimension of positive, not just negative, liberty; it seems to imply a right to perform particular institutionally specific functions, possibly in the service of constitutional goals, rather than simply a right to be free from government interference on par with the similar rights of all other citizens.<sup>67</sup>

These implications of Justice Frankfurter's *Sweezy* concurrence are most visible in hindsight. As the next section will discuss, in subsequent opinions members of the Court appeared to depart significantly from the relatively simple doctrinal framework established in these early cases.

#### D. From individual to institutional academic freedom

Although the language quoted above from *Keyishian* appeared in a majority opinion, many subsequent Supreme Court statements concerning the constitutional meaning of "academic freedom" have been of uncertain weight, appearing in minority opinions or as dicta. Arguably, even the language in *Grutter* is dicta.<sup>68</sup> Post-*Keyishian* opinions have also appeared to expand the scope of the concept, making it even harder to identify the governing law on the subject. These difficulties have resulted in a large mass of contradictory case law in the lower

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66. Some commentators have argued that academic freedom doctrine should be reformulated as an institutionally sensitive variant of public-employee speech doctrine. See, e.g., 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 (2003) (arguing that academic freedom rights of individuals at public institutions should be analyzed using a variant of government-speech doctrine). Cf. Horwitz, *supra* note 2, 558–88 (arguing for an institutionally sensitive approach to First Amendment guarantees); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260, 1274–75 (2005) (supporting the same argument made by Horwitz). But see Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1 (2003–04) (arguing that government-speech doctrine is inappropriate framework for analysis of professors' academic freedom rights).

67. This possibility is one of the most intractable difficulties of recognizing an individual constitutional academic freedom right; it seems anomalous to recognize a First Amendment right to engage in particular kinds of speech and expressive conduct belonging only to members of a certain profession. Compare *Urofsky*, in which Judge Luttig, concurring, criticized the concept of individual academic freedom on the basis that it would create "special" speech rights in the university setting. 216 F.3d at 417 (2000) (Luttig, J., concurring).

68. See, e.g., Hiers, *supra* note 4, at 576–77 (characterizing references to academic freedom in *Grutter* as dicta); Tushnet, *supra* note 2, at 163 (arguing that the Court's deference to the University of Michigan in *Grutter* was not a dispositive aspect of its analysis or opinion). On the difficulties of identifying the boundaries of dicta, see Abramowicz & Stearns, *supra* note 11; Dorf, *supra* note 11.

courts.<sup>69</sup>

It is clear, for example, that Justice Powell's statements regarding academic freedom in *Regents of the University of California v. Bakke* do not represent the position of the Court; his discussion of academic freedom appears in a part of the opinion joined by no other Justice.<sup>70</sup> It is equally clear, however, that Justice Powell's statements have been immensely influential both on later circuit court decisions and on the Supreme Court's decision in *Grutter*.<sup>71</sup> Justice Powell's discussion in *Bakke*, drawing heavily on Justice Frankfurter's *Sweezy* concurrence, extended its institutional implications. Justice Powell concluded that "the attainment of a diverse student body" is "clearly . . . a constitutionally permissible goal for an institution of higher education" because "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>72</sup> Justice Powell identified this particular "freedom" as an aspect of "[a]cademic freedom," which, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."<sup>73</sup> Since *Bakke* did not involve extra-institutional restrictions on individual college or university professors' speech or association, the only academic action at issue was collective or institutional academic action. Justice Powell's formulation thus identified the exercise of academic freedom with institutional decision-making and policy-setting, although it still did not clarify whether such freedom belongs to the faculty acting collectively or to the administration. (The admissions policy in *Bakke* was set by a faculty committee.)<sup>74</sup> Despite this ambiguity, Justice Powell's invocation of academic freedom clearly departed from the approach of earlier Supreme Court opinions mentioning the concept. At the same time, Justice Powell followed the spirit of Justice Frankfurter's *Sweezy* concurrence in linking academic freedom to both the research-scientific ideal, with its implications of faculty self-governance, and the model of democratic openness.<sup>75</sup> Although its precedential status is weak, Justice Powell's opinion both affirms and expands previous statements about academic freedom by Supreme Court Justices.

Opinions following *Bakke* have, for better or worse, largely continued this trend

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69. See Byrne, *supra* note 7, at 91–112.

70. 438 U.S. 265, 311–15 (1978) (Powell, J.). See also Hiers, *supra* note 7, at 60–62 (discussing status of Powell's opinion in *Bakke*). In 1996, the Fifth Circuit concluded that Justice Powell did not write for the Court in this portion of the *Bakke* opinion. *Hopwood v. Texas*, 78 F.3d 932, 941–44 (5th Cir. 1996).

71. See, e.g., *Grutter v. Bollinger*, 288 F.3d 732, 738–49 (6th Cir. 2002); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197–1200 (9th Cir. 2000).

72. 438 U.S. at 311–12.

73. *Id.* at 312 (citing *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

74. See *Sweezy*, 354 U.S. at 272 ("[T]he faculty devised a special admissions program to increase the representation of 'disadvantaged' students in each Medical School class.").

75. See *id.* at 312–13 ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.").

of identifying academic freedom with the institution rather than with individual professors. Early statements in this vein also lacked precedential weight. In *Widmar v. Vincent*, for instance, the majority decided a challenge to an institution's policy regarding student access to facilities on the grounds of First Amendment Free Exercise Clause and public forum doctrine, not mentioning academic freedom.<sup>76</sup> Concurring in the judgment, Justice Stevens questioned the majority's reliance on public forum doctrine, which he feared "may needlessly undermine the academic freedom of public universities."<sup>77</sup> Justice Stevens quoted Justice Frankfurter's *Sweezy* concurrence and Justice Powell's opinion in *Bakke*, and reiterated the institutional understanding of academic freedom reflected in those opinions, but moved beyond both to suggest that the scope of institutional academic freedom might embrace institutional decisions about student extracurricular activities.<sup>78</sup>

In *Regents of the University of Michigan v. Ewing*, writing for the majority, Justice Stevens again articulated an institutional approach to academic freedom involving significant judicial deference to the decisions of college and university faculty and administrators.<sup>79</sup> *Ewing* concerned a medical student's due process challenge to his dismissal for substandard academic performance. Justice Stevens presented the university's academic freedom—which he equated with the academic assessment of students by faculty—as an important ingredient of the appropriate due process analysis.<sup>80</sup> Justice Stevens acknowledged the potential for conflict between this understanding of academic freedom and the academic freedom rights that might be asserted by individual faculty members or students against the state.<sup>81</sup> But Justice Stevens also aligned the type of academic freedom involved in the academic review of student status with the professional norm of faculty autonomy in the setting of academic standards, which in turn he seemed to present as aligned with individual faculty members' First Amendment rights:

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. . . . Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational

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76. 454 U.S. 263 (1981).

77. *Id.* at 278 (Stevens, J., concurring).

78. *Id.* at 279 n.2.

79. 474 U.S. 214, 225–28 (1985).

80. *Id.*

81. *See id.* at 226 n.12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.") (citing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.”<sup>82</sup>

This language, not rejected by any other Justice in *Ewing*, might be read to support a rather strong claim for a form of university autonomy deriving from the professional norms of faculty academic freedom and self-governance. But Justice Stevens did not present any such principle of institutional academic freedom as dispositive of the student’s due process claim.

Justice Stevens subsequently appears to have concluded that any deference to institutional decision-making should be closely cabined. In *Board of Regents of the University of Wisconsin System v. Southworth*, Justice Stevens joined Justice Souter’s concurrence, which counseled against equating academic freedom with deference to institutional decision-making.<sup>83</sup> In considering a First Amendment challenge by students to a public university’s system for disbursing activity fees to student groups, the majority in *Southworth* indicated that the “important and substantial purposes of the University, which seeks to facilitate a wide range of speech,” supported the application of public forum doctrine to the case.<sup>84</sup> Justice Souter, concurring and joined by Justice Stevens, noted that the case did not turn on the question of the university’s autonomy and stressed that the Court had never endorsed “broad conceptions of academic freedom that . . . might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.”<sup>85</sup>

The Court had earlier reached a similar conclusion, rejecting a broad claim to plenary university autonomy, in its unanimous 1990 decision in *University of Pennsylvania v. EEOC*.<sup>86</sup> In this case, a business professor who was denied tenure filed a Title VII discrimination charge against the University. Investigating the charge, the EEOC requested confidential peer review documents from the tenure committee that had made the challenged decision. The University of Pennsylvania resisted the EEOC subpoena despite repeated court orders seeking to enforce it. The University argued, in part, that its First Amendment right to “determine for itself on academic grounds who may teach” supported its claim that the materials were privileged from disclosure.<sup>87</sup> The Court, in an opinion written by Justice Blackmun, construed existing academic freedom precedent as relating primarily to government attempts to control the content of faculty speech<sup>88</sup> and characterized

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82. *Id.* at 225–26 (quoting *Keyishian*, 385 U.S. at 603).

83. 529 U.S. 217, 236 (2000) (Souter, J., concurring).

84. *Id.* at 231.

85. *Id.* at 237 (Souter, J., concurring).

86. 493 U.S. 182 (1990).

87. *Id.* at 196 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). Such a claim of qualified privilege had previously been accepted by the Seventh Circuit in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983). See also Lynda E. Frost, *Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. EEOC*, 17 J.C. & U.L. 329 (1991).

88. *Univ. of Pa.*, 493 U.S. at 197 (“When, in [*Sweezy*, 354 U.S. at 263, and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)] the Court spoke of ‘academic freedom’ and the right to determine on ‘academic grounds who may teach’ the Court was

the connection between this more clearly constitutional issue and the institutional privilege claimed by the University of Pennsylvania as “attenuated.”<sup>89</sup> The Court also distinguished *Ewing*, the strongest prior statement by a majority of the Court that could be read to suggest a constitutionally based institutional right of academic freedom, by aligning the deference articulated in *Ewing* with the “preservation of employers’ . . . freedom of choice”—that is, not with any rights peculiar to institutions of higher education, but with generally applicable principles of negative liberty.<sup>90</sup> But *University of Pennsylvania* is perhaps best understood as a clarification of the implications of *Ewing*; in *University of Pennsylvania*, the Court articulated its understanding of the scope of the judiciary’s competence to review the academic judgments of faculty. When a violation of competing constitutional provisions or constitutionally based statutory prohibitions, such as the policy against discrimination on the basis of sex, race, national origin, or religion, is alleged, the Court will not simply defer to an institution’s characterization of its decision as made on “academic grounds.”<sup>91</sup> The Court’s refusal, in *University of Pennsylvania*, to equate *Ewing*’s implied principle of deference with a principle of absolute privilege does not amount to a categorical rejection of deference to institutional decisions made on clearly academic grounds, where no competing concerns are indicated.<sup>92</sup>

Thus, despite initial appearances, *University of Pennsylvania* does not counter the general trend toward recognition of some kind of institutional academic freedom prerogative grounded in the First Amendment. The opinion is significant for other reasons. For one, although previous statements regarding academic freedom had occurred in litigation concerning public institutions, the Court in

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speaking in reaction to content-based regulation.”).

89. *Univ. of Pa.*, 493 U.S. at 199.

90. *Id.* at 198–99. The Court seems to have been using the term “freedom of choice” to refer to the freedom employers have with respect to retention of at-will employees.

91. See Rabban, *supra* note 13, at 290–94. The opinion for the District Court for the District of Massachusetts in *Guckenberger v. Boston University*, 8 F. Supp. 2d 82, 87–91 (D. Mass. 1998), although it involves deference to a faculty committee’s academic decision in an antidiscrimination suit, is not necessarily to the contrary. *Guckenberger* involved a suit by learning-disabled students challenging Boston University’s foreign language course requirement as a violation of the Americans With Disabilities Act. In the cited opinion, the district court held that Boston University had satisfied its burden of showing that abolition of the requirement would “fundamentally alter” its liberal arts mission, *id.* at 85–86 (quoting *Guckenberger*, 974 F. Supp. at 154–55), since the University had shown that it reached this conclusion on the basis of a sequence of seven faculty meetings held pursuant to a prior court order, *id.* at 86–87. The court’s deference to Boston University in this case did not occur in the context of a suit raising constitutional antidiscrimination or information-access principles, and in the court’s view the University’s deliberative process adequately balanced the types of competing considerations that the Supreme Court in *University of Pennsylvania*, 493 U.S. at 202 n.9, left to the discretion of the lower courts on remand. See discussion *infra* note 92.

92. Cf. *Guckenberger*, 8 F. Supp. 2d at 87–91. Further support for this understanding that the decision in *University of Pennsylvania* implies some recognition of a limited degree of deference to institutional decision-making and self-governance norms may be found in the fact that the Court expressly declined to address whether the district court to which it remanded the case should or should not permit redaction of subpoenaed and disclosed peer review materials. See *Univ. of Pa.*, 493 U.S. at 202 n.9.

*University of Pennsylvania* did not even mention that limitation as a ground for its opinion. The case indicates that there is no doctrinal obstacle to challenges by individual professors at private institutions to state restriction of their expression on grounds of constitutional academic freedom and suggests as well that certain decision-making bodies in private colleges and universities may be able to claim a certain amount of deference to their clearly academic decisions.<sup>93</sup> Additionally, the result in *University of Pennsylvania* illustrates one way in which, within the private college and university context, principles of university autonomy and openness or accountability, so often in conflict, may be harmonized. This reconciliation of autonomy and openness requires a different approach in the public institution context, as will be discussed in more detail below.<sup>94</sup>

Taken together, these opinions appear to acknowledge that academic freedom is in part an institutional prerogative but also to reject equation of that prerogative with any strong form of university autonomy or immunity from judicial scrutiny. Some lower courts have interpreted the statements discussed, up to and including *University of Pennsylvania*, as clearly indicating that academic freedom is at least in part an institutional prerogative. For instance, in *Piarowski v. Illinois Community College District 515*, decided the same year as *Ewing* but before *University of Pennsylvania*, the Court of Appeals for the Seventh Circuit acknowledged the potential for conflict between established institutional and individual rights of academic freedom.<sup>95</sup> More recently, taking this trend to a much-criticized extreme,<sup>96</sup> the Fourth Circuit in its en banc decision in *Urofsky v. Gilmore* declined to recognize any individual constitutional right to academic freedom at all.<sup>97</sup> *Urofsky* involved a challenge by several state university professors to a Virginia law prohibiting their access to certain types of electronic content using state-owned computer equipment. The court in *Urofsky*, rejecting the professors' argument that the law violated their academic freedom rights, concluded that the "Supreme Court, to the extent it has constitutionalized a right of academic freedom . . . , appears to have recognized only an institutional right of self-governance in academic affairs."<sup>98</sup> By adopting this principle and silently aligning the interests of the state with those of the university administration, the Fourth Circuit eliminated the need to address any conflict between faculty members' constitutional interests and the institutional interests of the university. The Supreme Court declined to review this conclusion.<sup>99</sup>

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93. Cf. Rabban, *supra* note 13, at 267.

94. See *infra* Part III.

95. 759 F.2d 625, 629 (7th Cir. 1985) (noting that the term "academic freedom" is "used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case").

96. See, e.g., Lynch, *supra* note 66, at 1099–107; Hiers, *supra* note 7, at 93–104.

97. *Urofsky v. Gilmore*, 216 F.3d 401, 409–15 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

98. *Id.* at 412.

99. *Urofsky*, 531 U.S. at 1070. It should be noted that the Seventh and Fourth Circuits may be the strongest proponents, among the lower federal courts, of the position that academic freedom should be understood to be an institutional prerogative. See Hiers, *supra* note 4, at 546–

Arguably, the result in *Urofsky* is incorrect not just because it rejects the notion that individual faculty decisions regarding teaching, curriculum design, and other academic matters might, if within relevant professional and other constitutional limits, be matters of public concern entitled to significant weight in any First Amendment analysis,<sup>100</sup> but also because it equates any institutional right with nonacademic administrators of the institution, and not with the faculty governance structure of the college or university. As discussed above, earlier statements on academic freedom, starting with Justice Frankfurter's concurrence in *Sweezy*, appear to have drawn on the professional norm of faculty self-governance in suggesting an institutional academic freedom right.<sup>101</sup> Identification of faculty decision-making and policy-setting bodies as the holders of any institutional right of academic freedom certainly cannot eliminate the possibility of conflict between institutional and individual rights, but this identification does seem more consistent with the commitment to free inquiry underlying those otherwise nebulously described rights in the Court's earliest academic freedom statements. In contrast, a claim that the nonacademic trustees or regents of an institution of higher education are entitled to claim constitutional protection from judicial review of their actions has very little to recommend it: it is directly at odds with the professional norm of academic freedom, which developed at least in part to emancipate faculty from the control of lay trustees, and thus is potentially at odds with the commitment to free inquiry that the professional norm shares with the Court's understanding of the First Amendment, as well as clearly at odds with any commitment to democratic openness, another value arguably closely linked to the First Amendment, in the public college and university context.<sup>102</sup>

It might seem that the Supreme Court foreclosed any such identification of institutional academic freedom with faculty self-governance in *Minnesota State Board of Community Colleges v. Knight*, a 1984 opinion written by Justice O'Connor,<sup>103</sup> but such a conclusion may be a misreading of that case. Just a few years before *Knight*, the Court had noted the strong tradition of faculty self-governance in private universities, although in the earlier instance the Court had not needed to address any constitutional implications of the tradition.<sup>104</sup> In *Knight*, a group of professors at a public community college challenged a state law requiring all consultations between the faculty and the state, even on matters not relating to the faculty's terms and conditions of employment, to be filtered through

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49, 551–56.

100. The court in *Urofsky* held that professors' curricular and research decisions were by definition not instances of speech on matters of public concern and could never be considered instances of such speech. 216 F.3d at 408–09. Lynch, *supra* note 66, at 1099–107, criticizes the opinion primarily on this basis.

101. See *supra* notes 56–67 and accompanying text.

102. See discussion *infra* Part III.A.

103. 465 U.S. 271 (1984).

104. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686–90 (1980) (Powell, J.). In *Yeshiva University*, the Court concluded that as a result of this tradition of self-governance, as well as the facts of the particular case, university professors should be considered “managerial employees” and hence “not employees within the meaning of the National Labor Relations Act.” *Id.* at 674–75.

the unionized faculty's exclusive bargaining representative.<sup>105</sup> The faculty plaintiffs in *Knight* were not union members and contended that the requirement violated their First Amendment petitioning and speech rights. The Court rejected their argument primarily on the grounds that the state law permitted informal communications to the state from non-union faculty and that the First Amendment does not guarantee each citizen a right to have the government heed his or her communications.<sup>106</sup> Justice O'Connor went on to state, in a discussion unnecessary to the Court's constitutional conclusion, that the plaintiffs could claim no additional constitutional academic freedom right to govern themselves:

To be sure, there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. . . . But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions. . . . Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution. . . . [T]here is no constitutional right to participate in academic governance.<sup>107</sup>

The significance of *Knight* in defining the scope and beneficiaries of institutional academic freedom is unclear. On the one hand, the opinion seems to draw a categorical distinction between any constitutional conception of institutional academic freedom and a collective faculty right. The obvious conclusions to draw from this statement would seem to be either that academic freedom is not an institutional right or interest, or that to the extent it is, it is held only by the institution's administration, and not by the faculty collectively. Both options, however, seem to be undercut by Justice O'Connor's opinion for the majority in *Grutter v. Bollinger*.<sup>108</sup> In *Grutter*, the Court apparently reaffirmed that academic freedom is at least in part an institutional concept.<sup>109</sup> Moreover, like *Bakke*, *Grutter* involved a faculty body setting admissions policy.<sup>110</sup>

One could avoid attempting to reconcile this apparent contradiction by arguing that the discussions of academic constitutional rights in both opinions appear in dicta.<sup>111</sup> Such an approach seems unsatisfactory, even if the characterization is correct. As the career of Justice Frankfurter's *Sweezy* concurrence indicates,<sup>112</sup>

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105. 465 U.S. at 273–79.

106. *Id.* at 280–85.

107. *Id.* at 287–88.

108. 539 U.S. 306, 324–33, 339–40 (2003).

109. *Id.*

110. *Id.* at 314–15.

111. Hiers, *supra* note 7, at 59–63; Hiers, *supra* note 4, at 576–77. But it is not clear that the holding-dicta distinction is concrete enough to bear the weight of such an argument. See Abramowicz & Stearns, *supra* note 11; Dorf, *supra* note 11.

112. See *supra* note 59.

lower courts look to the Supreme Court for guidance as well as controlling authority. Conflicting guidance is still problematic even when it is only advisory. A preferable reconciliation of *Knight* and *Grutter* would note the different factual postures of the cases and would read *Knight* narrowly as a rejection of the idea that any individual faculty member, or faculty members as a group, could have a colorable constitutional claim to a right to participate in self-governance.<sup>113</sup> This conclusion does not exclude the possibility that the academic decision-making of a group of faculty engaged in self-governance, up to certain limits such as those suggested by *University of Pennsylvania*, should receive deference, if not protection, deriving from First Amendment concerns.

This interpretation of the case law is not self-evident. As the next section explains, commentators have offered widely varying answers to the questions posed by this less-than-consistent series of statements. Nevertheless, these commentators have tended to converge on certain conclusions consistent with the approach proposed here.

#### E. Where should the law be?

Recent commentators on the Supreme Court's academic freedom statements are in considerable disagreement regarding the significance of those statements, as well as in their recommendations regarding the shape any legal concept of academic freedom should take. This section assesses the views of several commentators who have investigated whether academic freedom has been, and should be, understood as an individual right of professors and students, as an institutional right of college and university decision-making bodies, or as an amalgam of both. The positions of the four commentators discussed in this section range from complete rejection of institutional academic freedom as a legal concept to endorsement of a very high degree of judicial deference to the academic decisions of institutions of higher education, and include intermediate positions as well. Understanding the differences among these commentators' views helps to identify the issues that any clarification of the principle of academic freedom must confront.

The position taken here—that courts have been approaching and should continue to approach constitutional academic freedom as a qualified prerogative of faculty decision-making bodies, where such bodies exist—rejects the most extreme positions, advanced by Richard H. Hiers<sup>114</sup> and J. Peter Byrne.<sup>115</sup> Hiers contends that academic freedom should be understood exclusively as a speech right of

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113. William W. Van Alstyne suggests a different approach to understanding the scope of Justice O'Connor's statements on self-governance in *Knight*, noting that the case "concerned two-year community colleges" rather than research universities, where a system of faculty governance may be more entrenched. Van Alstyne, *supra* note 41, at 145–46. See also Carol A. Lucey, *Civic Engagement, Shared Governance, and Community Colleges*, 88 *ACADEME* 4, at 27 (July-Aug. 2002), available at <http://www.aaup.org/publications/Academe/2002/02ja/02jatoc.htm> (addressing problems generating faculty engagement in governance in community college systems).

114. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

115. See generally Byrne, *supra* note 7.

individual professors;<sup>116</sup> Byrne argues that constitutional academic freedom is a fundamentally institutional right.<sup>117</sup> After discussing these two approaches, this section turns to two intermediate positions that accord more closely with the understanding indicated by the analysis in previous sections: those of David Rabban<sup>118</sup> and Matthew T. Finkin,<sup>119</sup> who have both suggested that judicial understandings of constitutional academic freedom should remain sensitive to both individual and institutional freedoms and constraints.

Richard H. Hiers has argued repeatedly that academic freedom, in the constitutional sense, may only be understood as an expressive right held by individual professors.<sup>120</sup> Hiers argues that “institutional academic freedom” is a misnomer for a concept of university autonomy, which, whatever its merits as a social policy, is not a doctrinally coherent constitutional concept.<sup>121</sup> According to Hiers, the opinions courts have uniformly taken as the “points of departure” for the doctrine of academic freedom, Justice Frankfurter’s *Sweezy* concurrence and *Keyishian*, linked to the First Amendment only an expressive and associational right held by individual professors.<sup>122</sup> He contends that the concept of institutional academic freedom is incoherent because, first, institutions that have not been recognized as legal “persons” cannot claim constitutional rights;<sup>123</sup> second, decision-making is not speech;<sup>124</sup> and third, at least in the context of public colleges and universities, it makes no sense for a government entity, which public college and university faculty or administrators collectively must be considered to be, to assert a constitutional right.<sup>125</sup> Hiers sees the references to academic freedom in *Grutter*, and Justice O’Connor’s reliance there on Justice Powell’s *Bakke* opinion, as “unnecessary and unfortunate” but perhaps not serious, since the concept is not strictly necessary to the holding in either case.<sup>126</sup> Nevertheless, Hiers thinks that the courts’ confusion regarding institutional academic freedom threatens “serious adverse consequences” for faculty academic freedom of the type

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116. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

117. See generally Byrne, *supra* note 7.

118. See generally Rabban, *supra* note 13; Rabban, *supra* note 32.

119. See generally Finkin, *supra* note 7.

120. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

121. See Hiers, *supra* note 4, at 532.

122. Hiers, *supra* note 7, at 39–43.

123. See Hiers, *supra* note 4, at 557, 560. Strong counterarguments exist for each of Hiers’s points. For instance, Meir Dan-Cohen has forcefully argued that organizations should, under certain circumstances, be permitted to claim moral and legal rights. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 74–77 (1986) (making the case for an institutional right of academic freedom).

124. Hiers, *supra* note 4, at 557, 559–60. Decision-making might, however, be considered a form of expressive conduct, and other First Amendment clauses provide protection for activities other than speech. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (addressing First Amendment right of expressive association).

125. Hiers, *supra* note 4, at 557–59. But college and university faculty, even when acting collectively, need not always be identified as government actors. See, e.g., Byrne, *supra* note 7, for the arguments advanced by Byrne.

126. Hiers *supra* note 4, at 576, 575.

expressed in the AAUP's statements.<sup>127</sup> Hiers does not completely reject the practice of judicial deference to the academic decisions of college and university faculty acting collectively. He simply suggests that courts should candidly identify this deference as springing from social policy concerns, or as a matter of acknowledging and respecting educators' expertise, instead of misidentifying it as a constitutional principle.<sup>128</sup>

Hiers is unusual among academic commentators on the subject in his categorical rejection of the notion that institutional academic freedom is a meaningful legal concept. J. Peter Byrne, in contrast, argues that "constitutional academic freedom" should be understood primarily as an institutional concept.<sup>129</sup> Byrne distinguishes the professional norm of "academic freedom," deriving mostly from the research-scientific ideal and articulated in the AAUP's statements, from "constitutional academic freedom," which "should primarily insulate the university in core academic affairs from interference by the state."<sup>130</sup> In support of this recommendation Byrne points to the parallel concerns of the research-scientific ideal and the First Amendment, which may be seen as analogous means of ensuring that the optimal conditions for the seeking of truth exist.<sup>131</sup> He also contends that courts are "poorly equipped to enforce traditional academic freedom as a legal norm," since they lack the expertise in particular academic areas that is necessary for the process of peer review used to enforce academic freedom as a professional norm.<sup>132</sup> Byrne finds support for his recommendation of deference to institutional decision-making in both academic abstention doctrine<sup>133</sup> and state constitutional provisions for university autonomy, discussed in more detail below.<sup>134</sup> Byrne considers the recent case law on constitutional academic freedom incoherent<sup>135</sup> and symptomatic of a general "demise of constitutional academic freedom";<sup>136</sup> *Urofsky*, in particular, involved "the very type of 'governmental intrusion into the intellectual life of a university'" that, in Byrne's view, the Supreme Court has repeatedly rejected.<sup>137</sup> Byrne hails *Grutter* as "the most important victory to date for institutional academic freedom."<sup>138</sup>

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127. Hiers, *supra* note 7, at 37. One unfortunate example is the Fourth Circuit's decision in *Urofsky* to side with state governments and administrators rather than with faculty members. *See id.* at 102-03.

128. Hiers, *supra* note 4, at 565-67.

129. Byrne, *supra* note 7, at 255.

130. *Id.* Cf. Van Alstyne, *supra* note 41, at 79-82 (comparing AAUP's 1940 *Statement*, *supra* note 40, with Supreme Court case law on academic freedom).

131. Byrne, *supra* note 5, at 260-62, 264.

132. *Id.* at 288, 306-07.

133. *Id.* at 323-27.

134. *Id.* at 327-31; *see also infra* Part II.

135. Byrne, *supra* note 7, at 79.

136. *Id.* at 132; *see also id.* at 122-34.

137. *Id.* at 112.

138. *Id.* at 116. Cf. Fuentes-Rohwer & Charles, *supra* note 2, at 146 ("Rather than elevating one policy preference over another, in the name of the Constitution, it is clear to us that the courts should defer these decisions to those state actors with the knowledge and expertise in this area."); *see also id.* at 170 ("Absent a showing of bad faith, universities must be trusted to make these

Unlike both Hiers and Byrne, David M. Rabban considers constitutional academic freedom to have two aspects, individual and institutional.<sup>139</sup> This is because the professional norm, from which Rabban understands the constitutional doctrine to be correctly derived, involves real but only limited freedom for individual faculty; their autonomy is constrained but their freedom secured by collective—institutional—mechanisms such as peer review.<sup>140</sup> One of Rabban's chief contributions to the academic freedom debate has been to highlight the importance of this distinction between autonomy and freedom at individual and institutional levels.<sup>141</sup> In most respects, Rabban is in agreement with Byrne, although in keeping with his stress on constrained autonomy, Rabban views courts as more competent than Byrne implies<sup>142</sup> and, moreover, understands any institutional incompetence to cut both ways: "Universities . . . are not in a particularly good position to balance other social values against academic freedom."<sup>143</sup> For this reason, Rabban recommends some judicial deference to institutional decision-making on matters of academic concern, but advises a lesser degree of deference than Byrne does<sup>144</sup> and indicates that virtually no deference should be accorded the academic decisions of lay trustees.<sup>145</sup>

The final commentator to be considered was also one of the earliest on the subject, but his views, together with those of Rabban, accord most closely with the approach taken here. Writing in 1983, Matthew T. Finkin, like Byrne and Rabban, traced the concept of "academic freedom" to the German research-scientific model that influenced the professional norm promoted by the AAUP.<sup>146</sup> Like Rabban, Finkin contends that this concept must be differentiated from claims of university autonomy.<sup>147</sup> But Finkin does not take the position that university autonomy is not a legal principle; rather, he traces its origins both to early Supreme Court statements regarding speech and association rights in the educational context<sup>148</sup>

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difficult choices.").

139. Rabban, *supra* note 32, at 1412; Rabban, *supra* note 13, at 280.

140. Rabban, *supra* note 32, at 1409; Rabban, *supra* note 13, at 234.

141. Rabban, *supra* note 32, at 1409; Rabban, *supra* note 13, at 234.

142. See Rabban, *supra* note 13, at 283–95. See *id.* at 287 ("[J]udges should override 'a genuinely academic decision' only if '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.'") (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

143. Rabban, *supra* note 32, at 1419.

144. Rabban, *supra* note 13, at 300.

145. *Id.* at 285 ("Byrne may be correct that some administrators are presumptively competent to apply professional criteria in judging academic speech, but this presumption weakens as one moves up the hierarchy of university administration, and it is invalid as to trustees.").

146. See Finkin, *supra* note 7, at 822–29.

147. *Id.* at 818 ("Institutional autonomy and academic freedom are related but distinct ideas. Indeed, while they reinforce one another at some points, they may straightforwardly conflict at others.").

148. *Id.* at 829 ("The claim of secular institutions of higher education to be free of the reach of state power draws support from two different sources. The first is the general liberty, associated with the prerogatives of private property, of institutions to devote themselves to the aims charted for them by their founders and trustees . . . . The second source is founded in

and to early judicial decisions recognizing the proprietary rights pertaining to the private trusts and corporate charters that created private colleges and universities in America and affirming principles of tolerance and diversity—cases that Finkin reads as articulating a commitment to “institutional pluralism.”<sup>149</sup> Finkin is more critical of the institutional dimension of the concept of academic freedom than is Byrne, and he lays more stress than Rabban does on the importance of distinguishing between institutional actors in recognizing rights of university autonomy.<sup>150</sup> Finkin states:

The potential evil of the theory of “institutional” academic freedom lies in this very lack of differentiation [between the institutional acts of lay trustees and the institutional acts of self-governing faculty groups], because, “the interests insulated are not necessarily those of teachers and researchers but [are those] of the administration and governing board; the effect is to insulate managerial decision making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution’s administration.”<sup>151</sup>

Finkin’s point is similar to the suggestions offered in the previous section about the best reading of the Supreme Court’s apparently inconsistent recent statements on the subject of institutional academic freedom. It is difficult to dispute that the foundational links between academic freedom and the First Amendment, in *Sweezy* and *Keyishian*, drew heavily on the professional norm, which in turn derived from the German model and the research-scientific paradigm.<sup>152</sup> This provenance cannot be reconciled with the indisputable recent turn toward recognition of the right as, at least in part, an institutional prerogative without making Finkin’s distinction between the collective faculty as an institutional body and the institutional administration, and identifying the faculty as holders of the institutional right. That right should be understood to involve two types of prerogatives: a presumption of validity for academic decisions challenged by individuals and made by self-governing faculty bodies at public institutions and a presumption of expertise and validity for academic decisions made by self-governing faculty boards that conflict with legislative or other government actions.<sup>153</sup> In neither case should the presumption be irrebuttable; a showing that the decision-making body acted for other than professional reasons or that its policy or action contravenes other established rights or important public policies should be allowed to overcome the presumption. The suggestion here is simply that the prerogative’s constitutional significance should be candidly recognized and considered in any interest balancing that occurs.

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academic freedom in the traditional sense.”); *see also id.* at 830–40.

149. *Id.* at 833.

150. *Id.* at 849–57.

151. *Id.* at 851 (quoting Matthew W. Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 *ACADEME* 192, 196 (1979)).

152. *See supra* notes 27–42, 55–67 and accompanying text.

153. This component of the suggested prerogative draws on the example of university autonomy law but locates the prerogative in faculty rather than regents or trustees. *See discussion infra* notes 180–181 and accompanying text.

The California approach, as Parts II and III explain, complicates this picture. The California state constitution grants the university's Regents—a lay body—something close to autonomy from many types of government interference. California courts have arguably expanded this autonomy even further than the state constitution warrants. Still, as state actors, the Regents are under a variety of legal constraints, as well as extralegal pressures. The reasons for the autonomy granted the Regents and the extent to which these countervailing forces offset it, as well as the relations of this dynamic to the various principles underlying the concept of academic freedom, are the subjects of Parts II and III.

## II. AUTONOMY OF AND CONSTRAINTS ON THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

### A. Constitutional status and general limitations on autonomy

Article IX, section 9, of California's constitution entrusts the Board of Regents of the University of California "with full powers of organization and government" of the university.<sup>154</sup> California courts have consistently read this constitutional provision as providing the Regents with significant legal, managerial, and academic autonomy. This Part describes the history of the original grant of this power to the Regents and the policies lying behind that decision before turning to the constraints on the Regents' autonomy, a discussion continued in Part III.

The University of California did not always have constitutional status. Article IX, section 4, of California's first state constitution, adopted in 1849, provided for legislative establishment of a state land-grant university.<sup>155</sup> Nineteen years later, following hastily enacted legislation intended to take advantage of the land-grant deadline established by the Morrill Act,<sup>156</sup> the California legislature passed an Organic Act chartering the University of California.<sup>157</sup> This statute made a mostly appointive Board of Regents the governing board of the University of California

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154. CAL. CONST. art. IX, § 9(a).

155. This section provided in part,

The Legislature shall take measures for the protection, improvement, or other disposition of such lands as have been or may hereafter be reserved or granted by the United States . . . to the State for the use of a University; and the funds accruing from the rents or sale of such lands . . . shall be and remain a permanent fund, the interest of which shall be applied to the support of said University, with such branches as the public convenience may demand for the promotion of literature, the arts and sciences, as may be authorised [sic] by the terms of such grant. And it shall be the duty of the Legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said University.

CAL. CONST. art. IX, § 4 *available at* [http://www.ss.ca.gov/archives/level3\\_const1849txt.html](http://www.ss.ca.gov/archives/level3_const1849txt.html).

156. Morrill Act, ch. 130, § 5, 12 Stat. 503 (1862), *amended by* CAL. CONST. art. IX, § 9. *See* DOUGLASS, *supra* note 44, at 3, 35–40, 46.

157. Organic Act, 1868 Cal. Stat. 148. An organic law or act is one creating a government or government agency. For an extensive online archive relating to the foundation and development of the University of California, *see* The History of the California Master Plan for Higher Education, [http://sunsite.berkeley.edu/uchistory/archives\\_exhibits/masterplan/index.html](http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/index.html). *See also* Part II.C *infra*.

and provided for an Academic Senate to manage the university.<sup>158</sup> For the next nine years, the university and its governance were legislative creatures, under the relatively direct control of the state legislature.

During the 1870s, allegations of Regental mismanagement and corruption led to legislative investigations resulting in a variety of proposed statutory alterations to the university structure established in 1868.<sup>159</sup> One rejected bill would have provided for elected Regents holding office for four-year terms.<sup>160</sup> Further proposals for reform surfaced during a constitutional convention held amid widespread public dissatisfaction with the legislature in 1879. The amendments to California's constitution resulting from this convention included extensive amendments to Article IX. Most significantly, the amendments added a new section 9 incorporating by reference many of the provisions of the Organic Act and elevating the university to the status of a constitutionally defined public trust to be kept "entirely independent of all political or sectarian influence."<sup>161</sup>

Although Article IX, section 9, was amended in 1918 to delete references to the 1868 Organic Act and to refine the definitions of the university's and Regents' functions, the current section 9 is substantially similar to this 1879 version. Section 9 now reads, in pertinent part:

(a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university . . .

. . . .

(f) The Regents of the University of California shall . . . have all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. . . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . .<sup>162</sup>

The California delegates responsible for the 1879 amendment, like their predecessors in Michigan, seem to have decided to provide the university with insulation from "political or sectarian influence"<sup>163</sup> not only to avert future political

158. Organic Act, 1868 Cal. Stat. 248.

159. See DOUGLASS, *supra* note 44, at 51–55.

160. *Id.* at 54–55.

161. *Id.* at 61–72.

162. Section 9 now also defines the composition of an advisory committee to assist the Governor in selecting Regents for appointment, § 9(e), and provides for twelve-year terms in office for the eighteen appointed Regents, § 9(b), as well as for a maximum of two additional student and faculty members of the Board, appointed by the appointive Regents for variable terms, § 9(c).

163. CAL. CONST. art. IX, § 9(f).

scandals but also to ensure that the institution would develop into an asset bringing the state cultural status, economic advantage, and civic health.<sup>164</sup> Although arguments for autonomy based on the research-scientific paradigm also surfaced during the debates over the previous decade, the delegates do not ultimately seem to have given priority to this model, which might have indicated placing some constitutional constraints on the authority of the lay Regents.<sup>165</sup> Rather, the delegates appear to have been motivated primarily by democratic ideals and by a form of competitive state patriotism,<sup>166</sup> a variant of the institutional pluralism that Finkin identifies in early legal justifications for recognizing the autonomy of private trust-based educational institutions.<sup>167</sup> Despite the dominance of the democratic and competitive federalist ideals at the 1879 convention, the research-scientific ideal continued to shape institutional practice within the University of California, particularly early in the twentieth century, as will be discussed in Part II.C below.

A number of other states in the Midwest and West also attempted to give their land-grant universities constitutional status in the mid and late nineteenth century.<sup>168</sup> Not all of these states' courts, however, have been as willing as California's to interpret applicable constitutional provisions as granting the governing boards of their public institutions a significant degree of legal autonomy from legislative control.<sup>169</sup> California judicial decisions have referred to the university, identified with its Regents, as "a branch of the state itself,"<sup>170</sup> "intended

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164. See DOUGLASS, *supra* note 44, at 61–72. In insulating the university from "political and sectarian influence," the California delegates adopted the rationale advanced by Michigan lawmakers in support of their earlier decision to grant their own public university constitutional status. GLENNY & DALGLISH, *supra* note 50, at 19 (listing California among the states that "attempted to follow Michigan's lead" in conferring strong constitutional status on their land-grant universities). See also DOUGLASS, *supra* note 44, at 64 ("Enthralled with Michigan's 1849 definition of its university as a 'coordinate branch of state government,' . . . [Regent Joseph Winans, who drafted the 1879 amendments,] advocated a similar level of autonomy for the University of California."). In 1840, a Michigan legislative committee, reporting on methods of improving the University of Michigan's academic status and achievements, had suggested that "[w]hen legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed . . . . [I]t is not surprising that State universities have hitherto . . . failed to accomplish, in proportion to their means, the amount of good that was expected of them." GLENNY & DALGLISH, *supra* note 50, at 17–18. Ten years after this report, just after California ratified its first constitution, the Michigan Constitution was amended to provide the University of Michigan with constitutional status and thus to reduce the legislature's power over the institution. *Id.* at 18.

165. See DOUGLASS, *supra* note 44, at 51–54, 61–62, 68–70; see also discussion *supra* notes 27–42 and accompanying text.

166. See *supra* notes 48–53 and accompanying text; see also DOUGLASS, *supra* note 44, at 61–72; GLENNY & DALGLISH, *supra* note 50, at 17–18.

167. Finkin, *supra* note 7, at 833.

168. GLENNY & DALGLISH, *supra* note 50, at 14–19.

169. *Id.* at 31–34. See also Valerie L. Brown, *A Comparative Analysis of College Autonomy in Selected States*, 60 ED. LAW REP. 299, 301–10 (1990) (examining Colorado, Kentucky, New Jersey, New York, and Texas).

170. *Pennington v. Bonelli*, 15 Cal. App. 2d 316, 321 (1936).

to operate as independently of the state as possible.”<sup>171</sup> The California Attorney General has characterized the Regents and the university as a “branch of the state government equal and coordinate with” the legislature, the judiciary, and the executive.<sup>172</sup> Relying on characterizations such as these, California courts have prevented numerous legislative attempts to regulate the university as a legal entity by interpreting such legislation as inconsistent with Article IX, section 9.<sup>173</sup> Despite a widespread sense among commentators that university autonomy in general is now threatened or in decline,<sup>174</sup> California courts continue to recognize the Regents’ autonomy and either to invalidate enactments conflicting with Article IX, section 9, or to recognize the university’s immunity to state and local regulation.<sup>175</sup>

These courts have, to be sure, expressly recognized a few areas in which the legislature’s acts may permissibly affect the University of California, that is, areas of constraint on the Regents’ constitutional autonomy.<sup>176</sup> These areas fall into three main categories. First, the legislature has certain fiscal powers over the university. The legislature’s appropriation power “prevent[s] the Regents from compelling appropriations for salaries,”<sup>177</sup> and the University of California is subject to some legislative control to ensure the security of its funds.<sup>178</sup> Second,

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171. *Regents of Univ. of Cal. v. Superior Court*, 17 Cal. 3d 533, 537 (1976).

172. 30 Op. Cal. Att’y Gen. 162, 166 (1957).

173. *See, e.g., San Francisco Labor Council v. Regents of the Univ. of Cal.*, 26 Cal. 3d 785 (1980) (holding Education Code prevailing wage rate requirement inapplicable to University because violating Art. IX, § 9); *Regents of the Univ. of Cal. v. City of Santa Monica*, 143 Cal. App. 3d 130 (1976) (holding Regents exempt from local building codes, zoning regulations, and permit and inspection fees in constructing improvements solely for educational purposes).

174. *See* CLARK KERR & MARIAN L. GADE, *THE GUARDIANS: BOARDS OF TRUSTEES OF AMERICAN COLLEGES AND UNIVERSITIES* 25–26 (1989); GLENNY & DALGLISH, *supra* note 50; HIGHER EDUCATION: FROM AUTONOMY TO SYSTEMS (James A. Perkins & Barbara Baid Israel eds., 1972); Estelle A. Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J.C. & U.L. 381 (1985). For a different view, see David W. Breneman, *Are the States and Public Higher Education Striking a New Bargain?*, Ass’n of Governing Bds. of Universities and Colleges, Public Policy Paper No. 04-02 (July 2004), available at <http://www.agb.org>.

175. *See Kim v. Regents of the Univ. of Cal.*, 80 Cal. App. 4th 160 (2000) (holding Regents constitutionally exempt from overtime wage regulation); *Favish v. Regents of the Univ. of Cal.*, 53 Cal. Rptr. 2d 757 (Cal. Ct. App. 1996) (holding consumer fraud statute inapplicable to the Regents) (depublished); *Scharf v. Regents of the Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991) (holding University of California-specific open files law invalid as conflicting with Art. IX, § 9). Efforts to give other states’ public institutions constitutional status continue into the present. In 2000, Hawaiian voters approved “a constitutional amendment to allow the University of Hawaii to formulate policy and exercise control over its internal operations without prior legislative authorization,” i.e., to grant the university constitutional status. CENTER FOR PUBLIC HIGHER EDUCATION TRUSTEESHIP AND GOVERNANCE, STATE GOVERNANCE ACTION REPORT, AUTUMN 2001 UPDATE 14 (2001), <http://www.agb.org/content/center/pages/action.pdf>.

176. *See generally* Horowitz, *supra* note 6, at 27–31.

177. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 163 Cal. Rptr. 460, 461 (Cal. 1980), *citing* *Cal. State Employees’ Ass’n v. Flournoy*, 108 Cal. Rptr. 251 (Cal. Ct. App. 1970).

178. *Braun v. Bureau of State Audits*, 79 Cal. Rptr. 2d 791 (Cal. Ct. App. 1998), *cert. denied*, 528 U.S. 818 (1999).

general “police power regulations governing private persons and corporations may be applied to the university.”<sup>179</sup> Finally, legislation “may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs.”<sup>180</sup>

The term “internal university affairs” in California law appears to embrace, but is also certainly broader than, the primarily academic and not managerial sphere of the “four essential freedoms” discussed by Justice Frankfurter in his *Sweezy* concurrence.<sup>181</sup> It also bears some resemblance to the concept of “municipal affairs” used by state courts to assess the validity of charter cities’ enactments as against conflicting state law.<sup>182</sup> But neither analogy is exact. “Internal university affairs” clearly includes more than just academic affairs, so the federal case law addressing the concept of academic freedom is not always readily adaptable to the University of California context. Nor is the extensive California case law defining the boundaries of “matters of statewide concern” as against “municipal affairs,” even though the California Supreme Court itself has relied on this analogy in at least one opinion addressing the scope of “internal university affairs.”<sup>183</sup> It is probably most useful to understand “internal university affairs” simply as the judicially created definition of the appropriate realm of the University of California’s constitutional autonomy. As the next sections indicate, the nebulousness of this category remains a problem; California courts have not satisfactorily defined the concept or its relation to the issues raised by federal case law, including the “four essential freedoms” enumerated by Justice Frankfurter in his *Sweezy* concurrence.<sup>184</sup>

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179. *San Francisco Labor Council v. Regents of the Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980).

180. *Id.*; see also *Tolman v. Underhill*, 249 P.2d 280, 282 (Cal. 1952) (holding university-established loyalty oath for faculty employees invalid because teacher loyalty is a “subject of general statewide concern” and therefore subject to State-legislated loyalty oath instead); *Regents of the Univ. of Cal. v. Superior Court*, 551 P.2d 844, 846 (Cal. 1976) (holding university to be lacking “immunity” from statewide usury laws); Horowitz, *supra* note 6, at 27–31; Scully, *supra* note 6, at 928–29.

181. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

182. CAL. CONST. art XI, § 5(a). See also, e.g., Horowitz, *supra* note 6, at 34–35 & nn.42–46.

183. See *San Francisco Labor Council*, 608 P.2d at 279 (Cal. 1980). See also Horowitz, *supra* note 6, at 36; Scully, *supra* note 6, at 938–39. Scully notes that in *San Francisco Labor Council*, the California Supreme Court

ignored several significant differences between the “independence” of charter cities and the “independence” of the University. First, the University, unlike charter cities, depends on the legislature for its funds. Second, charter cities elect their local governing authorities as well as their representatives in the state legislature; University Regents are appointed by the governor. Third, the University is a multiunit, multicity employer that transcends local boundaries. To the extent that its employees are to be treated as public employees, they should be treated as employees of the state rather than of any given municipality. Finally, and most significantly, the relationship between separate levels of government is different from that between separate branches of government at the same level.

Scully, *supra* note 6, at 938–39 (citations omitted).

184. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

Besides judicial interpretations of the scope of Article IX, constraints on the Regents' constitutional autonomy include other state constitutional provisions, legislative enactments, and extralegal norms and practices. The following sections discuss these constraints in turn, starting with legislative enactments before moving to the extralegal shared-governance tradition and then to early judicial opinions addressing the Regents' sphere of autonomy. Open government laws and the recent sunshine amendment to the California Constitution, which will also certainly affect the Regents' autonomy and decision-making, are the subjects of Part III.

### B. Statutory constraints on the University of California

The University of California was not the state's first institution of higher education. That honor belongs to two "normal schools," training schools for elementary school teachers, founded in San Jose and San Francisco in the 1850s and merged into a San Jose campus, the California State Normal School, in 1862.<sup>185</sup> In 1871, this school came under the jurisdiction of the State Board of Education; from this point forward, a network of affiliated training schools, including polytechnic institutes, was gradually established throughout the state.<sup>186</sup> The normal schools were renamed "State Colleges" in 1935.<sup>187</sup> The democratic ideal discussed above—which saw the purpose of higher education as the provision of useful instruction open to all—clearly drove the foundation and expansion of this network of schools to an even greater degree than it had driven the establishment of University of California, in the foundation of which principles of openness, competitive exclusivity, and research-scientific goals had all been significant.<sup>188</sup>

In 1960, after decades of research on the subject, the state legislature adopted a groundbreaking Master Plan for Higher Education in California that brought the State Colleges, California's community colleges, and the University of California together under a single statutory umbrella.<sup>189</sup> This legislation, the Donahoe Act of 1960,<sup>190</sup> established a Coordinating Council for Higher Education,<sup>191</sup> which

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185. See DOUGLASS, *supra* note 44, at 55–57; Historic Milestones, The California State University, <http://www.calstate.edu/PA/info/milestones.shtml> (last visited Oct. 25, 2005); About the CSU, <http://www.calstate.edu/PA/info/system.shtml> (last visited Oct. 25, 2005); SJSU History, [www.sjsu.edu/about\\_sjsu/history/](http://www.sjsu.edu/about_sjsu/history/) (last visited Oct. 25, 2005).

186. See Historic Milestones, The California State University, *supra* note 185.

187. *Id.*

188. See DOUGLASS, *supra* note 44, at 53–57.

189. For a detailed online history of the research leading up to the Master Plan, see The History of the California Master Plan for Higher Education, at [http://sunsite3.berkeley.edu/uchistory/archives\\_exhibits/masterplan/index.html](http://sunsite3.berkeley.edu/uchistory/archives_exhibits/masterplan/index.html) (last visited Oct. 25, 2005). See also DOUGLASS, *supra* note 44, at 246–326, app. 1.

190. Donahoe Act of 1960, ch. 49, 1961 Cal. 392 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)).

191. Donahoe Act of 1960, ch. 49, 1961 Cal. 392, 396–97 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)). In 1976, this Council became the California Postsecondary Education Commission (CPEC). In 1995, the act creating the CPEC was amended to clarify its mission: "to assure the effective utilization of public postsecondary

became the model for similar coordinating bodies in other states,<sup>192</sup> and defined the respective roles of the State Colleges (renamed the California State University in 1982), the community college system, and the University of California.<sup>193</sup> Under the Master Plan as enacted in 1960 and continued to the present, the University of California is the only branch of this system empowered to grant doctoral degrees and thus the only branch to which the research-scientific ideal pertains with full force.<sup>194</sup>

In 1991, the legislature revised the Donahoe Act and relocated it to a different part of the California Education Code.<sup>195</sup> Strictly speaking, although the Donahoe Act defines the role of the University of California within California's educational system, it does not purport to regulate the university. Section 67400 of the Act provides that "[n]o provision of this part shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, make that provision applicable."<sup>196</sup> Another part of the Education Code,<sup>197</sup> however, contains provisions specific to the University of California in some areas in which the university has been determined not to possess legal autonomy, including certain fiscal matters,<sup>198</sup> the issuance of bonds,<sup>199</sup> and specific employment matters.<sup>200</sup> This part of the Education Code also provides for the procedures to be followed at the Regents' meetings, discussed in more detail below.<sup>201</sup>

### C. Nonlegal constraints on the Regents: the shared governance tradition

The University of California's internal governance structure has been determined primarily not by the state legislature or in the courts but within the university itself, at the Regental level, and below. Nevertheless, its current internal governance structure was significantly inspired by early legislation. Clearly drawing on the German and research-scientific models, the 1868 Organic Act chartering the university provided that, under the Regents,

[a]ll the Faculties and instructors of the University shall be combined

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education resources, thereby eliminating waste and unnecessary duplication, and to promote diversity, innovation, and responsiveness to student and societal needs through planning and coordination." See CPEC website, at <http://www.cpec.ca.gov/SecondPages/CommissionHistory.asp> (last visited Oct. 25, 2005).

192. See DOUGLASS, *supra* note 44, at 314.

193. Donahoe Act of 1960, ch. 49, 1961 Cal. 392, 396 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)).

194. See The Heart of the 1960 Master Plan for Higher Education, at [http://sunsite.berkeley.edu/uchistory/archives\\_exhibits/masterplan/heart.html](http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/heart.html) (last visited Oct. 25, 2005).

195. CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005).

196. *Id.* § 67400.

197. *Id.* §§ 92000–92856.

198. *Id.* §§ 92100–92160.

199. *Id.* §§ 92400–92571.

200. *Id.* §§ 92600–92620.

201. *Id.* §§ 92020–92033.

into a body which shall be known as the Academic Senate, which shall . . . be presided over by the President . . . and which is created for the purpose of conducting the general administration of the University and memorializing the Board of Regents; regulating, in the first instance, the general and special courses of instruction, and to receive and determine all appeals couched in respectful terms from acts of discipline enforced by the Faculty of any college. . . . [E]very person engaged in instruction in the University, whether resident professors, non-resident professors, lecturers or instructors, shall have permission to participate in its discussions; but the right of voting shall be confined to the President and the resident and non-resident professors.<sup>202</sup>

When the Organic Act was absorbed into the Constitution in 1879, references to the Academic Senate disappeared from Article IX, section 9. Although the Academic Senate continued to exist following the 1879 amendment, it would not be delegated powers like those it had held under the 1868 Organic Act for another forty years.<sup>203</sup> Benjamin Ide Wheeler, President of the University of California from 1899 to 1919, preferred to deal with the Regents himself rather than to delegate significant powers to the faculty, and no formal Regental delegation of authority to the Academic Senate occurred during his presidency.<sup>204</sup>

After Wheeler's retirement, the Academic Senate requested more formal authorization of its governance powers.<sup>205</sup> In 1920, with the cooperation of the university's new President, the Regents approved a Standing Order officially delegating to the Academic Senate internal administrative roles similar to those envisioned by the 1868 Organic Act.<sup>206</sup> Some histories of higher education refer to this event as the "Berkeley Revolution" because it inaugurated an unprecedented system of shared governance within a prominent public university and seemed to realize in a particularly high-profile forum the ideal of professorial self-governance designed to secure academic freedom that had inspired the formation of the AAUP.<sup>207</sup>

The Regents' 1920 Standing Order remains substantially in effect today as Standing Order 105.<sup>208</sup> In its current form, the order gives the Senate power to set

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202. 1868 Cal. Stat. 255–56.

203. See John Aubrey Douglass, *Shared Governance at the University of California: An Historical Review*, Center for Studies in Higher Education, Paper CHSE1–98, at 2–5 (Mar. 1998), <http://repositories.cdlib.org/cshe/CHSE1–98/> (last visited Oct. 26, 2005).

204. See *id.* See also ANGUS E. TAYLOR, *THE ACADEMIC SENATE OF THE UNIVERSITY OF CALIFORNIA: ITS ROLE IN THE SHARED GOVERNANCE AND OPERATION OF THE UNIVERSITY OF CALIFORNIA* 1–2 (1998).

205. See TAYLOR, *supra* note 204, at 2–5.

206. See *id.* at 5; Douglass, *supra* note 203, at 5.

207. See Douglass, *supra* note 203, at 5; David A. Hollinger, *Faculty Governance, The University of California, and the Future of Academe*, 87 *ACADEME* 3 (May–June 2001), available at <http://www.aaup.org/publications/Academe/01mj/mj01holl.htm> (noting that the Berkeley division of the University of California academic "senate is one of the most powerful in American higher education" and examining the potential of institutional academic senates as mechanisms for ensuring faculty solidarity and autonomy).

208. Regents of the University of California, *Standing Orders*, available at

standards for the conferral of degrees; to authorize all curricular decisions with the input of faculty involved; to appoint, promote, and grant tenure to faculty; to establish committees to advise chancellors and the university President regarding budget matters; and to lay before the Regents, through the President, “its views on any matter pertaining to the conduct and welfare of the University.”<sup>209</sup>

Although these powers do not differ significantly from those the Regents granted the Senate in 1920,<sup>210</sup> the relationship among the Regents, the university’s President, and the Academic Senate has not been static since that time. The balance of power among the three has fluctuated with changes in the composition of the Regents, in the identity and administrative style of successive university presidents, and in the physical expansion and institutional reorganization of the university, as well as with broader cultural, political, and economic shifts.<sup>211</sup> In 1995, for instance, the Regents appeared to many observers to exercise an unusual amount of unilateral power when they approved SP-1 and SP-2, the policies ending affirmative action practices in university admission and hiring.<sup>212</sup>

However surprising it may have been, the Regents’ approval of SP-1 and SP-2 underlined the Regents’ technical legal supremacy over the other branches of the University of California governance, namely, the President and the Academic Senate.<sup>213</sup> Because of their constitutionally derived supremacy, the Regents are

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<http://www.universityofcalifornia.edu/regents/bylaws/standing.html>.

209. *Id.*

210. See Douglass, *supra* note 203, at 5.

211. See generally TAYLOR, *supra* note 204 (tracing shifts in the relationship from 1920 to the 1970s). See also WILLIAM TROMBLEY, THE CALIFORNIA HIGHER EDUCATION POLICY CENTER, UC REGENTS: LOTS OF POMP, LITTLE CIRCUMSTANCE—CAN A PART-TIME BOARD COPE WITH UC’S COMPLEX PROBLEMS? (1995), available at [http://www.capolicycenter.org/ct\\_1095/cts\\_1095.html](http://www.capolicycenter.org/ct_1095/cts_1095.html) (discussing historical shifts in the amount of power assumed by the Regents); William Rodarmor, *Who Runs UC? The Faculty and the President Take on the Regents*, CAL. MONTHLY, Feb. 1996, at 14–16 (discussing similar historical shifts against the backdrop of the Regents’ 1995 approval of SP-1 and SP-2, prohibiting affirmative action in admissions and hiring at the University).

The Regents’ recent ascendancy might be part of a broader trend. Several commentators have noted that college and university governing bodies such as the Regents are increasingly borrowing their guiding principles from the world of business and management, rather than from the world of academia and the AAUP. See, e.g., GOVERNING PUBLIC COLLEGES AND UNIVERSITIES: A HANDBOOK FOR TRUSTEES, CHIEF EXECUTIVES, AND CAMPUS LEADERS 77–112 (Richard T. Ingram ed., 1993); KERR & GADE, *supra* note 174, at 126–27; Joan Wallach Scott, *The Critical State of Shared Governance*, 88 ACADEME 41 (July–Aug. 2002), available at <http://www.aaup.org/publications/Academe/02ja/02jasco.htm>; Hollinger, *supra* note 207. This managerialization of university structure and of the Regents’ governance style, some commentators contend, is eroding the solidarity and strength of faculty governing bodies. See Hollinger, *supra* note 207; Scott, *supra* at 44 (noting that a “devaluation of the faculty is one of the means by which the restructuring of universities is taking place”). See also discussion *supra* note 42.

212. See Rodarmor, *supra* note 211.

213. The Regents have the power to appoint and remove the President; their controversial removal of President Clark Kerr in 1967 is perhaps their most notorious exercise of this power. See TAYLOR, *supra* note 204, at 69–82. Similarly, despite the considerable influence it has wielded at various points since 1920, the Academic Senate continues to exist at the Regents’ pleasure.

the focus of most analyses of institutional governance, and suggestions regarding the reform of college and university governance focus on them as the site of needed change. Of course, any such reform can occur only through constitutional amendment or, to a lesser degree, through judicial interpretation of Article IX, section 9, of the California Constitution. Some attempts at such reform have been made, but most have effected only modest redefinitions of the Regents' authority. For example, a 1972 constitutional amendment instituted a requirement of Senate approval of the Governor's Regental nominees.<sup>214</sup> A 1974 amendment reduced the Regents' terms in office from sixteen to twelve years.<sup>215</sup> Most attempts at more radical structural governance reform have failed. In the 1990s, a proposed initiative constitutional amendment that would have changed the eighteen appointive Regents' offices to elective offices failed to gain the signatures needed for inclusion on the 1994 and 1995 ballots.<sup>216</sup>

Arguably, the security of the Regents' legal supremacy in academic decision-making has not always been and should not be as clear as it now seems to be. Cases such as *Sweezy* and *Keyishian*, as well as later academic freedom statements, might at one time have been read to suggest a federal constitutional basis for potentially competing principles of faculty self-determination. Yet despite the strong tradition of shared governance at the University of California, California courts never reached such a conclusion, as the next section explains.

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214. See Historical Notes, CAL. CONST. art. IX, § 9 (1996).

215. See *id.* See also Scully, *supra* note 6, at 931.

216. See Edward Epstein, *Backlash on UC Regents' Affirmative Action Vote: Initiative Would Make Them Elected Officials*, S.F. CHRONICLE, Aug. 29, 1995; Laura Nader & David Flynn, *Should the Regents Be Elected?*, CAL. MONTHLY, Feb. 1994, at 15-16; Virginia Matzek, *A Fortress Under Assault: Electing the UC Regents*, BERKELEY INSIDER, Jan.-Feb. 1994, at 27-30. See also OFFICE OF THE CALIFORNIA SECRETARY OF STATE, TITLE AND SUMMARY, UNIVERSITY OF CALIFORNIA, GOVERNANCE: INITIATIVE CONSTITUTIONAL AMENDMENT, Oct. 5, 1993 (on file at the Institute of Governmental Studies Library, University of California, Berkeley).

One obstacle to substantial legal reform of the Regents' role and powers may be the flexibility of the current system of "shared governance." Ceding some control to the Academic Senate has allowed the Regents to position themselves as a body whose power is limited in fact, if not in law. This positioning may make the legally absolute nature of the Regents' power seem to be a less threatening force. Such positioning is not necessarily opportunistic. One commentator has suggested that the Regents, the President, and the Academic Senate have been able to develop a flexible system of shared governance characterized more by consensus than by political maneuvering because all three bodies share common goals for the University: the "maximization of the University's autonomy" and the "pursuit of preeminence." Martin Trow, *Governance in the University of California: The Transformation of Politics Into Administration*, 11 HIGHER EDUC. POL'Y 201, 201 (1998). Another commentator suggests an alternative explanation for the Regents' ability to avoid substantial reform: University boards of trustees and regents are increasingly characterizing themselves as bound and limited by managerial or business necessity, rather than by deference to faculty concerns. Scott, *supra* note 211; see also Scully, *supra* note 6, at 935-36.

D. Judicial interpretations of Article IX, section 9: affirming plenary  
Regental autonomy in controversies over faculty politics

Well before *Sweezy* and *Keyishian*, California courts had concluded that the University of California's constitutional autonomy limited the ability of those outside the institution to control its academic operation.<sup>217</sup> Although California courts later concluded that the state's interest in uniform regulation of its employees' speech and association required limits on university autonomy,<sup>218</sup> the courts subsequently affirmed this autonomy, identified as vested in the Regents, against a faculty claim to control over the university's curriculum.<sup>219</sup> In this way, the courts transformed the doctrine of university autonomy from a principle that protected the institution from outside interference and that could be aligned with the professional norm of academic freedom into a doctrine of plenary Regental power. California courts have also deviated from federal academic freedom law in another way: they have never expressly appealed to the First Amendment or to its counterparts in the California Constitution in these cases.<sup>220</sup> Instead, cases addressing university autonomy and professorial politics in California have focused exclusively on the University of California's constitutional status under Article IX, section 9.

In *Wall v. Regents of the University of California*, decided in 1940, the California Court of Appeal relied on the Regents' constitutional autonomy to reject a citizen's petition for a writ of prohibition to prevent the university's continued employment of philosopher and antiwar activist Bertrand Russell.<sup>221</sup> The court in *Wall* focused on the Regents' status as a corporation, suggesting that the courts had no more authority to dictate this body's internal affairs than they would have to dictate the internal affairs of a private corporation.<sup>222</sup> The court did not suggest any link between university autonomy and free speech guarantees, much less faculty self-governance. Rather, even though it concerns a public university, *Wall* clearly falls into the tradition of proprietary autonomy doctrine—committed to an institutional pluralist ideal—identified by Finkin in his history of the concept of university autonomy.<sup>223</sup>

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217. See *Wall v. Regents of the Univ. of Cal.*, 102 P.2d 533 (Cal. Ct. App. 1940).

218. See *Tolman v. Underhill*, 249 P.2d 280 (Cal. Ct. App. 1952).

219. See *Searle v. Regents of the Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

220. The California Constitution currently guarantees the "liberty of speech [and] press." CAL. CONST. art. I, § 2. The constitution guarantees to the people "the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." *Id.* § 3. These guarantees were included in the original 1849 constitution. See *id.* § 9 (providing that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects"); *id.* § 10 (guaranteeing the same rights as the current Art. I, § 3). The text of the 1849 constitution is available online at the California State Archives, [http://www.ss.ca.gov/archives/level3\\_const1849txt.html](http://www.ss.ca.gov/archives/level3_const1849txt.html).

221. 102 P.2d 533 (Cal. 1940).

222. *Id.* at 534 ("The authority of the directors in the conduct of the business of a corporation must be regarded as absolute when they act within the law. The court cannot substitute its judgment for that of the directors.").

223. See Finkin, *supra* note 7, at 830–40.

Judge McComb's concurring opinion in *Wall* hints at the tension between this approach and academic freedom principles. McComb wrote: "[I]t is a matter of international knowledge that the University of California has under the guidance of the board of regents become one of the great universities of the world and that the university possesses a faculty composed of educators of the highest standing."<sup>224</sup> More directly than the majority, McComb appears to endorse competitive evaluation, presumably according to professional academic standards, as a way of measuring the success of California's system and therefore also the validity of the Regents' autonomy. But he rejects the notion that faculty self-governance is necessary to attain that type of success. Attributing the university's preeminence to the Regents and their independence, McComb ignores an equally important source of the institution's distinctiveness: the participation of its "educators of the highest standing" in a system of shared governance.<sup>225</sup>

Twelve years after *Wall*, in the leading California faculty loyalty oath case, the California Supreme Court established an important limitation on the university's autonomy but again did not link its reasoning to free speech or association principles or to self-governance. In *Tolman v. Underhill*,<sup>226</sup> decided the same year as *Adler*, the California Supreme Court invalidated a university-specific loyalty oath imposed by the Regents.<sup>227</sup> The court invalidated this oath because it conflicted with a law of statewide applicability "occup[ying] the field" and requiring a less stringent loyalty oath of all public employees.<sup>228</sup> Like the court in *Wall*, the court in *Tolman* grounded its resolution of the controversy entirely in the question of the Regents' constitutional autonomy.<sup>229</sup> Because the court in *Tolman* established a limit on the university's autonomy, it might seem that the decision protected the speech and association rights of professors at the expense of the Regents' power. But the court in *Tolman* did not suggest that the professors in that case had valid individual free expression claims or any interest in self-governance, much less that constraints on their academic decision-making should be considered any "special concern of the First Amendment."<sup>230</sup> Instead, the court held that University of California employees were just like other state employees.<sup>231</sup>

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224. 102 P.2d at 534 (McComb, J., concurring).

225. *Id.*; see also discussion *supra* Part II.C.

226. 249 P.2d 280 (Cal. 1952).

227. *Id.* at 283.

228. *Id.* at 281 ("[W]e are satisfied that [the faculty members'] application for relief must be granted on the ground that state legislation has fully occupied the field and that university personnel cannot properly be required to execute any other oath or declaration relating to loyalty than that prescribed for all state employees."). The Regents' loyalty oath required faculty members to state that they were not Communist Party members as a condition of continued employment. *Id.* The State loyalty oath, in contrast, simply required public employees to affirm their support for the U.S. and California Constitutions. *Id.* at 281 n.1.

229. See *id.* at 712.

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

231. 249 P.2d at 283. Indeed, this was the faculty members' argument. See Timeline: Summary of Events of the Loyalty Oath Controversy 1949–54, [http://sunsite.berkeley.edu/uchistory/archives\\_exhibits/loyaltyoath/symposium/timeline/short.html](http://sunsite.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/symposium/timeline/short.html) (part of the online exhibit The University Loyalty Oath: a 50th anniversary retrospective, <http://sunsite.berkeley.edu/>

Although both *Wall* and *Tolman* tacitly rejected the ideal of faculty self-governance, neither case required the California courts to determine whether such university autonomy as the university did possess was vested solely in the Regents or in the Regents together with the faculty as a group. Nor did either case require the courts to decide whether faculty interests grounded in the First Amendment or its equivalent in the California Constitution should constrain Regental autonomy.<sup>232</sup> Not until the 1970s did any dispute between the Academic Senate and the Regents requiring such a determination reach the state courts.<sup>233</sup> The dispute in which this question eventually arose was a straightforward struggle between faculty and Regents over control of the curriculum and faculty appointment.

In 1968, the Academic Senate, which at that time was vested by the Regents with the power to authorize courses but not the power to appoint faculty, had approved a course involving a large number of lectures by Black Panther leader Eldridge Cleaver.<sup>234</sup> In response, under pressure from then Governor Ronald Reagan, state political leaders, and the university President, the Regents adopted a resolution preventing courses involving more than one lecture by a faculty member not appointed by the Regents from being offered for credit.<sup>235</sup> Cleaver taught the course anyway, and students and faculty sought a writ of mandate to prevent the Regents from withholding credit for it.<sup>236</sup> In *Searle v. Regents of the University of California*, decided in 1972, the California Court of Appeal affirmed denial of the student and faculty petition. The court concluded that the university autonomy vested in the Regents by Article IX, section 9, authorized the Regents' action. The court rejected the petitioners' suggestion that the Regents' delegation of curricular control to the Academic Senate also implied Senate control over the granting of credits for courses approved by the Senate.<sup>237</sup> Just as important for purposes of the present discussion, it also rejected their free expression claims: "The constitutional right of freedom of expression includes, of course, the right to hear as well as the

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uchistory/archives\_exhibits/loyaltyoath/index.html).

232. It is true that the decision in *Tolman* followed several years of highly visible faculty opposition to the Regents' loyalty oath and that the case was brought by faculty members. See TAYLOR, *supra* note 204, at 16–35. But in 1950, even before *Tolman* was decided, the Academic Senate, on the initiative of members of the faculty sympathetic to the Regents' position, had approved a Senate statement declaring members of the Communist Party "not acceptable as members of the faculty." See *id.* at 29; Horowitz, *supra* note 6, at 28 n.20. The Academic Senate only disavowed this position on Communist faculty in a 1969 resolution, two years after the corresponding statewide oath had been invalidated. See TAYLOR, *supra* note 204, at 99–104. Soon after deciding *Tolman*, the California Supreme Court upheld a statewide loyalty oath resembling the oath struck down in *Tolman*. *Fraser v. Regents of Univ. of Cal.*, 249 P.2d 283 (Cal. 1952). In 1967, the court struck down this statewide oath on First Amendment grounds. *Vogel v. County of L.A.*, 434 P.2d 961 (Cal. 1967). During this period, then, the Academic Senate and the Regents were largely in accord on the question of faculty political qualifications, so any question of their respective claims to primacy did not arise.

233. *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

234. See *id.* at 451; TAYLOR, *supra* note 204, at 82–84.

235. See TAYLOR, *supra* note 204, at 85–92.

236. *Searle*, 100 Cal Rptr. at 195.

237. *Id.* at 195–96.

right to speak. But it does not include the right to receive or to bestow university credit for the listening to or for the choosing of the speaker.”<sup>238</sup>

In confirming the Regents’ power on the basis of the University of California’s constitutional autonomy, the decision in *Searle* defined the Regents’ sphere of power as including at least some of the “four essential freedoms” Justice Frankfurter enumerated in his *Sweezy* concurrence.<sup>239</sup> In rejecting the notion that the petitioners had any valid constitutional claims, the court indicated that it did not consider those freedoms—control over faculty appointments and curricular control—to have any constitutional status apart from their reservation to the Regents under state constitutional law. The court declined to draw the connection between the *Sweezy* freedoms and faculty decision-making, as well as between those freedoms and the First Amendment, that arguably emerged in statements such as Justice Powell’s *Bakke* opinion later in the 1970s.<sup>240</sup> *Searle* pointed the way to a very different path for state law pertaining to the University of California.<sup>241</sup> The result in *Searle* seems problematic because it does not

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238. *Id.* at 196.

239. *Sweezy v. N.H.*, 354 U.S. 234, 263 (Frankfurter, J., concurring).

240. See discussion *supra* Part I.C.

241. *Contra* Byrne, *supra* note 5, at 327–31 (arguing that the Supreme Court’s constitutionalization of academic freedom should be viewed as an outgrowth of State constitutional grants of university autonomy to institutional governing boards, and arguing that “[c]onstitutionalizing academic freedom . . . involve[d] . . . adaptation of the traditional legal supports of the college to preserve intellectual independence for the modern university”). See also *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (noting that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself”).

In the shadow of this apparent expansion of Regental power, university faculty and the Academic Senate recently reasserted their individual and collective academic freedom. In summer 2003, the Academic Senate adopted a new internal policy on academic freedom, APM-010, to replace a policy statement drafted in 1934 and adopted in 1944. See General University Policy Regarding Academic Opportunities: Academic Freedom, <http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf>; see also Richard D. Atkinson, Academic Freedom and the Research University, [http://www.ucop.edu/ucophome/coordrev/policy/Academic\\_Freedom\\_Paper.pdf](http://www.ucop.edu/ucophome/coordrev/policy/Academic_Freedom_Paper.pdf) (describing history of new policy and former policy). The prior policy statement mentioned neither faculty governance nor the relationship between Regents and faculty. Although it was drafted and adopted several decades before the decision in *Searle*, the previous version of APM-010 is aligned with the result and reasoning in that case. The previous policy stated in part:

Essentially the freedom of a university is the freedom of competent persons in the classroom. In order to protect this freedom, the University assumes the right to prevent exploitation of its prestige by unqualified persons or by those who would use it as a platform for propaganda. It therefore takes great care in the appointment of its teachers.

Atkinson, at 2–3. The new APM-010, in contrast, focuses on the autonomy of faculty members:

Academic freedom requires that teaching and scholarship be assessed by reference to the professional standards that sustain the University’s pursuit and achievement of knowledge. The substance and nature of these standards properly lie within the expertise and authority of the faculty as a body. The competence of the faculty to apply these standards of assessment is recognized in the Standing Orders of The Regents, which establish a system of shared governance between the Administration

acknowledge the possibility of competing constitutional interests or policies in the context of academic decision-making. And California law has never satisfactorily resolved this tension between the competing notions of participatory governance, both within and outside institutions of higher education, and Regental autonomy, derived from principles of political insulation, competitive federalism, and institutional pluralism.<sup>242</sup> Part III discusses some other ways in which California courts have avoided addressing this conflict, before concluding with a discussion of the reasons they may shortly need to address it.

### III. ACCOUNTABILITY AND UNIVERSITY AUTONOMY IN THE CALIFORNIA CONTEXT

#### A. Open government laws and higher education

The adjacent guarantees of freedom of expression and petitioning rights in both the U.S. and California Constitutions reflect the close connection between the circulation of information and the functioning of a democratic government.<sup>243</sup> Citizens unable to learn what their government is doing cannot effectively mobilize to challenge those government actions that they do not endorse. Citizens given access to only certain approved categories of information are similarly hobbled in their decision-making and political action. Both the research-scientific paradigm and the democratic model of higher education, in slightly different and sometimes competing ways, may be understood to reflect conceptions of higher education as an institutional mechanism for ensuring the existence and wide dissemination of the kind of accurate information needed for full civic participation.<sup>244</sup> These understandings are part of the basis for the federal courts' approach to academic freedom and constrained university autonomy as "a special concern of the First Amendment."<sup>245</sup>

Beginning in the late nineteenth century, lawmakers in the United States began to put into place complementary mechanisms for ensuring free information flow in

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and the Academic Senate. Academic freedom requires that the Academic Senate be given primary responsibility for applying academic standards, subject to appropriate review by the Administration, and that the Academic Senate exercise its responsibility in full compliance with applicable standards of professional care.

Members of the faculty are entitled as University employees to the full protection of the Constitution of the United States and of the Constitution of the State of California. These protections are in addition to whatever rights, privileges, and responsibilities attach to the academic freedom of university faculty.

Academic Freedom, *supra*. This proposed replacement explicitly asserts both individual and collective faculty academic freedom rights. But the statement describes these rights as professional, not legal, entitlements. *Id.* The proposed APM-010 seems to acknowledge that any successful faculty legal challenge to Regental assertions of power in the academic sphere will likely need to draw on individual faculty assertions of constitutional speech rights, which the statement reserves to faculty as distinct from academic freedom rights.

242. See Finkin, *supra* note 7, at 833; see also *supra* notes 164–167 and accompanying text.

243. See *supra* note 220.

244. See generally Byrne, *supra* note 5, at 273–83.

245. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); see also *supra* Parts I.B–E.

the interest of informed civic participation: open-government, or sunshine, laws.<sup>246</sup> One congressional sponsor of the federal Freedom of Information Act (FOIA) acknowledged the overlap between open government and First Amendment concerns when he noted that “[t]he thrust of the Act is the right of the public to know. Inherent in the right to speak and print is the right to know, without which the other two rights become pretty empty.”<sup>247</sup> A 2004 sunshine amendment to the California Constitution, Proposition 59, underlines the relationship between the public’s right to access information about government actions and the public’s assembly and petitioning rights by placing statements of open-government principles alongside the statements of assembly and petitioning rights in Article I of the California Constitution.<sup>248</sup>

Sunshine laws are an increasingly significant part of the legal landscape. The federal government and all fifty states have enacted such laws.<sup>249</sup> Sunshine laws include laws requiring certain public bodies to make some of their records available to the public (open-records laws) and laws requiring certain governmental meetings to be open to the public (open-meetings laws). The federal FOIA, enacted in 1967, was initially an open-records law.<sup>250</sup> The FOIA inspired a number of similar state laws, including California’s open-records law—the Public Records Act—enacted in 1968.<sup>251</sup> However, California’s open-meetings laws predated the addition of open-meetings provisions to the FOIA in 1976;<sup>252</sup> the Brown Act, requiring California local government bodies’ meetings to be open to the public, was enacted in 1953.<sup>253</sup> An open-meetings law applying to state government bodies and first enacted in 1967 has been known since 1980 as the Bagley-Keene Open Meeting Act.<sup>254</sup> Moreover, a handful of states—now including California—have enshrined open-government policies in their state

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246. See Harlan Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, 12 J.C. & U.L. 127, 132 (1985).

247. Edward M. Schaffer et al., Comment, *A Look at the California Records Act and Its Exemptions*, 4 GOLDEN GATE U. L. REV. 203, 204 (1974) (quoting 35 U.S.L.W. 2590 (April 11, 1967)).

248. Article I, section 3(a), of the California Constitution provides that “[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.” The amendments approved in Proposition 59 constitute section 3(b) of Article I. For relevant portions of the wording of this amendment, see note 319 *infra*.

249. As noted, California is among the states that now also include open government provisions in their constitutions. See CAL. CONST. art. I, § 3(b); FLA. CONST. art. I, § 24; LA. CONST. art. XII, § 3; MONT. CONST. art. II, §§ 8–9; N.H. CONST. art. VIII.

250. 5 U.S.C. § 552.

251. CAL. GOV’T CODE §§ 6250–6270 (West 1995). For a discussion of the relationship between the federal Freedom of Information Act and state open government acts, see Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1284–95 (1996). See also Cleveland, *supra* note 246, at apps. A–C (summarizing state open government laws as of 1985).

252. 5 U.S.C. § 552b (2000).

253. CAL. GOV’T CODE § 54950 (West 1995).

254. *Id.* §§ 11120–11132.

constitutions.<sup>255</sup> In 2004, California voters approved Proposition 59, which amended the state constitution to provide that “[t]he people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”<sup>256</sup> The amendment also includes a number of other aspects discussed briefly in Part III.D. Most important, since it is a constitutional provision, it applies directly to the constitutionally insulated Regents of the University of California, unlike some of the open-government legislation that preceded it.

Most sunshine laws now in force, like the California and federal versions, date from the mid-twentieth century, the period during which federal courts began to draw connections between academic freedom and constitutional guarantees.<sup>257</sup> Not only do sunshine laws overlap in purpose and chronology with academic freedom law, they also directly affect the operation of public institutions, whose administrations are generally subject to their provisions.<sup>258</sup> Some of the problems raised by application of open-government laws to public institutions, of course, are not specific to the college or university context. For instance, both federal and state open-government laws recognize that the First Amendment-aligned values that they serve may sometimes collide with other basic interests, such as interests in privacy, public safety, and national security.<sup>259</sup> To protect these interests, legislatures have built exemptions into both open-records laws and open-meetings laws. But because of the fundamental nature of the interests that motivated the enactment of open-government laws in the first place, courts have traditionally asserted that these exemptions are to be construed narrowly.<sup>260</sup> Proposition 59 enshrines this presumption, providing that “[a] statute, court rule, or other authority . . . shall be broadly construed if it furthers the people’s right of access, and

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255. See *supra* note 249.

256. CAL. CONST. art. I, § 3(b)(1).

257. Cleveland, *supra* note 246.

258. See generally *id.*; see also James C. Hearn & Michael K. McLendon, *Sunshine Laws in Higher Education*, 91 *ACADEME* 4 (May–June 2005) (“One university attorney told us, ‘I joke . . . that seven people fully exercising their rights under the California public records act could shut the university down.’”).

259. See, e.g., CAL. GOV’T CODE § 6250 (West, 1995) (“In enacting this chapter [the Public Records Act], the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”). See also CAL. CONST. art. I, § 3(b)(3) (“Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 . . .”). On the conflict between national security and open government principles, see, e.g., Ava Barbour, *Ready . . . Aim . . . FOIA! A Survey of the Freedom of Information Act in the Post-9/11 United States*, 13 *B.U. PUB. INT. L.J.* 203 (2004); Thomas James Connors, *The End of Access? The Government’s New Information Policy*, 88 *ACADEME* 4 (July–Aug. 2002); Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 *ADMIN L. REV.* 1195 (2004).

260. See *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Some have suggested that judicial assertions of a presumption in favor of disclosure no longer reflect the prevailing judicial practice. See, e.g., Beall, *supra* note 251. Proposition 59 was in part an attempt to reverse this trend. See CAL. CONST. art. I, § 3(b)(2).

narrowly construed if it limits the right of access.”<sup>261</sup>

In the college and university context, open-government laws may collide not only with privacy, public safety, and national security interests, but also with interests in academic freedom and university autonomy. Although it did not involve a public university, *University of Pennsylvania v. EEOC* illustrates one way in which the professional norm of academic freedom could be used to defend an institution’s tight control over information circulation.<sup>262</sup> The remaining sections of Part III examine other collisions between the principles of open access to information and university autonomy in the California courts and legislature before discussing the implications of Proposition 59 for both university autonomy and academic freedom.

### B. Open-meetings laws and the University of California

Although the Regents are subject, with some qualifications, to California’s open-meetings laws, California courts appear never to have enforced these laws against the Regents or any other governing body at the University of California.<sup>263</sup> In two challenges to university action brought under these laws, the state’s courts construed relevant statutory provisions to prevent their application to the bodies in question and avoided addressing any constitutional issues that might have been raised by the challenges. By reading the open-government laws narrowly, the courts in a general sense respected university autonomy. But however advisable the courts’ avoidance of the state constitutional questions posed may have been as a matter of judicial policy, it has had unfortunate results for university autonomy doctrine.<sup>264</sup> The courts’ conclusions in this area imply an excessively broad scope for Regental autonomy, insulating the Regents from public scrutiny. More important, in these cases the courts passed up excellent opportunities to clarify the scope of the Regents’ autonomy by addressing and resolving the overlapping and conflicting concerns underlying the principles of university autonomy and governmental openness.

Before 1971, it was not clear whether the University of California was exempted from the coverage of the Bagley-Keene Act, California’s open-meetings law.<sup>265</sup> In 1971, an amendment to Article IX of the state constitution added section

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261. CAL. CONST. art. I, § 3(b)(2).

262. 493 U.S. 182, 196–97 (1990) (discussing University of Pennsylvania’s arguments regarding need for confidentiality of tenure review materials); *see also* Scharf v. Regents of Univ. of Cal., 286 Cal. Rptr. 227, 231 & n.6 (Cal. Ct. App. 1991) (discussing AAUP position on confidentiality of peer evaluations in tenure review process).

263. *See* Cleveland, *supra* note 246, at 133 (noting that “[o]nly in Colorado and California . . . have regents . . . been adjudged to be beyond the scope of the sunshine laws”). *See also* ROBERT M. HENDRICKSON, *THE COLLEGES, THEIR CONSTITUENCIES AND THE COURTS* 18–22 (1991).

264. On justifications for the federal version of the avoidance canon, *see* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 446–55 (2005).

265. The Bagley-Keene Open Meetings Act (Bagley-Keene Act) does not expressly provide

9(d),<sup>266</sup> which requires that Regents' meetings "shall be public, with exceptions and notice requirements as provided by statute."<sup>267</sup> Pursuant to this provision, in 1976 the legislature enacted legislation imposing particular procedural requirements on meetings of the Regents.<sup>268</sup> In 1982, the legislature amended Education Code section 92030 to provide that the Bagley-Keene Act's procedural requirements do apply to meetings of the Regents, with a few exceptions.<sup>269</sup>

The first case in which a California court addressed the application of these provisions to the University of California involved faculty participation in university governance. In *Tafoya v. Hastings College of the Law*, a group of students at Hastings College of the Law sued to have the law school's faculty meetings declared subject to the open-meeting laws.<sup>270</sup> These meetings had not previously been announced or open, but the students believed that they had been used to advise the Hastings Board of Directors on "educational policy and expenditures."<sup>271</sup> The court held that the students had failed to state a cause of action, paradoxically defining the Hastings faculty meetings as both subject to Educational Code section 92030 and not subject to this section. The faculty meetings were not subject to the section because they were not meetings of the

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for or exclude the University of California from its coverage. It provides that it applies to "every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law." CAL. GOV'T CODE § 11127 (West 1995). *But see* *Tafoya v. Hastings College of the Law* (concluding from subsequent amendment of the statute that "[w]hen the Bagley-Keene Act was first enacted in 1967, the Legislature did not intend it to govern the meetings of the Regents.") 236 Cal. Rptr. 395, 399 (Cal. Ct. App. 1987).

266. See Historical Notes, CAL. CONST. art. IX, § 9 (1996).

267. CAL. CONST. art. IX, § 9(d).

268. CAL. EDUC. CODE §§ 92020-92033 (West 2005); see also *Tafoya*, 236 Cal. Rptr. at 399.

269. See CAL. EDUC. CODE § 92032. These include an exception for "special meetings," for which the Regents must provide public notice, including information about the agenda of the meeting, but which are otherwise undefined by subject matter. *Id.* § 92032(a). Also excepted are "closed sessions," at which the Regents "consider or discuss" subjects including: litigation, when open discussion of the litigation would be "detrimental to . . . the public interest" *id.* § 92032(b)(5); the appointment and review of "university officers or employees," including "the president of the university," *id.* § 92032(b)(7); and matters "relating to complaints or charges brought against university officers or employees, . . . unless the officer or employee requests a public hearing," *id.* § 92032(b)(8). Other matters as to which "closed sessions" may be held include matters concerning national security, *id.* § 92032(b)(1); the conferral of honorary degrees, *id.* § 92032(b)(2); gifts and bequests, *id.* § 92032(b)(3); the purchase or sale of investments for endowment and pension funds, *id.* § 92032(b)(4); and the disposition of property, when open discussion could "adversely affect the [R]egents' ability to . . . dispose of the property on the terms . . . they deem to be in the best public interest," *id.* § 92032(b)(6). Closed sessions are also permitted for determining the membership of committees, *id.* § 92032(e); and proposing a student regent, *id.* § 92032(f). The Regents also need not give public notice of meetings of presidential search or selection committees. CAL. EDUC. CODE § 92032(g). Not all public colleges and universities conduct confidential presidential searches. See Michael J. Sherman, *How Free Is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665 (2000) (examining benefits and drawbacks of confidential presidential searches).

270. Hastings is a law school campus of the University of California system. *Tafoya*, 236 Cal. Rptr. at 395.

271. *Id.* at 396.

Regents or its subcommittees, the only bodies that section 92030 identified as university bodies subject to the Bagley-Keene Act.<sup>272</sup> The students had also, however, argued that if the faculty and governing Hastings Board were not subject to section 92030, then they must be “state bodies” directly subject to the Bagley-Keene Act and required to hold open meetings.<sup>273</sup> The court rejected this argument, reasoning that Hastings was defined in the Donahoe Act as “affiliated” with the University of California, and that its governing bodies were therefore not separate state bodies but bodies legally subordinate to the Regents, which in turn were subject to section 92030.<sup>274</sup> Under this logic, it appears that neither the Bagley-Keene Act nor section 92030 will be construed to apply to the meetings of any University governing bodies other than the Regents.

This result is perplexing. On the one hand, it seems to be in tacit alignment with the understanding of academic freedom suggested in Part I, which explained the principle as consisting at least in part of an attitude of deference to the decisions and practices of self-governing faculty bodies, in the absence of allegations that they are engaged in something other than legitimate academic self-governance.<sup>275</sup> Moreover, under decisions like *Searle*,<sup>276</sup> University of California faculty collectively have little legal autonomy; their power is narrowly circumscribed and probably may even be retroactively redefined by the Regents. Arguably, there is a lesser public interest in holding such a body accountable for its decisions through enforcement of open-meetings requirements. Yet the court in *Tafoya* did not explicitly rest its conclusions on these grounds. Instead, it presented those conclusions as based on a pure question of statutory interpretation and on characterization of the Hastings faculty committee as a mere creature of the Regents. Reiteration of the Regents’ broad power was not strictly necessary, since Regental action was not even at issue in the case, but referring to the breadth of that power provided a powerful principle supporting the court’s conclusion.<sup>277</sup> While consistent with the relationship between faculty and Regents articulated in *Searle*,<sup>278</sup> the approach taken in *Tafoya* sets an unfortunate example; it illustrates the length to which California courts will go to construe open-government laws narrowly in the context of university decision-making and represents a missed opportunity to clarify the nature and scope of the Regents’ authority.

The California Supreme Court subsequently confirmed these concerns in a case

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272. *Id.* at 399–400. Examining the legislative history of Education Code § 92030, the court concluded, “[W]e infer that the Legislature intended that only the meetings of the Regents and certain committees would be subject to the open meeting requirements of the Bagley-Keene Act and that the faculty meetings would be exempt.” *Id.* “Regents” is defined as “the Board of Regents of the University of California and its standing and special committees or subcommittees, other than groups of not more than three regents appointed to advise and assist the university administration in contract negotiations.” CAL. EDUC. CODE § 92020 (West 2005).

273. *Id.* at 400–01.

274. *Id.* at 401.

275. See discussion *supra* Parts I.D–E.

276. *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

277. *Tafoya*, 236 Cal. Rptr. at 397–99.

278. *Searle*, 100 Cal. Rptr. at 195–97.

involving an attempt to have the Bagley-Keene Act applied directly to the Regents. In *Regents of the University of California v. Superior Court*, decided in 1999, the court construed the Bagley-Keene Act so as to prevent its post hoc application to a Regental decision.<sup>279</sup> The case involved challenges to the Regents' 1995 adoption of SP-1 and SP-2, the University of California policies abolishing the use of affirmative action in admissions and hiring. A taxpayer and a student newspaper sued to have the Regents' action declared void under the Bagley-Keene Act, which clearly applied to the decision in question.<sup>280</sup> The plaintiffs alleged that, before the open meeting at which the Regents formally voted on the policies, the Regents had "made a collective commitment or promise to approve" the policies via serial telephone calls, which constituted a serial meeting in violation of the Act.<sup>281</sup> The plaintiffs sued under sections of the Bagley-Keene Act providing interested persons with (1) a right of action to sue "for the purpose of stopping or preventing . . . threatened violations" of the Act<sup>282</sup> and (2) a right of action to have decisions based on violations of the Act declared "null and void," if any such action for nullification was commenced "within 90 days from the date the [body's] action was taken."<sup>283</sup> The plaintiffs filed their suit seven months after the Regents' meeting. They explained the delay as resulting from fraudulent concealment of the serial meeting and argued that this estopped the Regents from relying on the thirty-day bar.<sup>284</sup>

The California Supreme Court concluded that the plaintiffs had not stated a cause of action under either section of the Bagley-Keene Act.<sup>285</sup> The court concluded that the section providing a right of action for the purpose of "stopping or preventing . . . threatened violations" of the Act extended "only to present and future actions and violations and not past ones."<sup>286</sup> The plaintiffs sought to invalidate an action already taken, so they could not proceed under this section. The court also concluded that the legislature had not intended the thirty-day statute of limitations to be subject to extensions on an equitable basis.<sup>287</sup>

The court in *Regents v. Superior Court* did not allude to the Regents' constitutional autonomy, although this principle would obviously have supported its narrow construction of the Bagley-Keene Act.<sup>288</sup> By presenting its analysis as a

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279. 976 P.2d 808 (Cal. 1999).

280. *Id.* at 813–14.

281. *Id.* at 812.

282. CAL. GOV'T CODE § 11130(a) (West 1995).

283. *Id.* § 11130.3(a) (West 1995) (amended 1999).

284. *Regents v. Superior Court*, 976 P.2d at 811.

285. *Id.* at 825.

286. *Id.* at 816–18. The court concluded, "In sum, section 11130(a) grants a right of action: (1) to stop or prevent a present or future violation of the act—but *not* to reach back to a past one; and (2) to determine whether the act is applicable to a present or future action—but *not* a past one." *Id.* at 818.

287. *Id.* at 818–23. The court noted, "[S]ection 11130.3(a)'s 30-day statute of limitations would not preclude the doctrine of fraudulent concealment if the statute contained the doctrine in terms or at least by implication. But it does not do so. The statute is altogether devoid of reference or even allusion to the doctrine." *Id.* at 823.

288. The court instead based its conclusions on lengthy examinations of the language of the

context-free matter of statutory interpretation, the court was able to avoid either addressing or resolving the tension between principles of autonomy and openness in the university context. To the insulation from legislative control afforded the Regents by Article IX, section 9, the court in *Regents v. Superior Court* added a partial insulation from more general public inquiry. The effect of the majority's conclusion was to weaken the Regents' accountability, or in other words, to strengthen their autonomy. Such a result is consistent with a very general and unelaborated notion of Regental autonomy, but it is in tension with the policies underlying the open-government laws, which seek to foster civic participation. Moreover, it is also in tension with the original purposes of Article IX, section 9. The 1879 amendment giving the Regents autonomy sought to insulate them from political or sectarian influence, not from public accountability.<sup>289</sup> The court in *Regents v. Superior Court* avoided addressing any of these issues, despite their relevance to the question presented.

The pattern of avoidance illustrated by *Tafoya* and *Regents v. Superior Court* seems unfortunate. As the next section will show, in the context of open-records laws California courts have been more willing to consider the constitutional issues implicated by application of sunshine provisions to the university. Yet the results have been only slightly more illuminating regarding the scope of Regental autonomy.

### C. Open-records laws and the University of California

Eight years before *Regents v. Superior Court*, in the context of a challenge to the validity of an open-records law applying to the University of California, a California Court of Appeal explicitly discussed the concept of academic freedom in a decision with a result similar to that in *Regents v. Superior Court*, strongly affirming the Regents' autonomy.<sup>290</sup> In this case, the court managed to avoid confronting the contradictions noted above not by avoiding constitutional issues but by divorcing academic freedom and the public-records laws from their relationships to constitutional principles. The court defined the prevailing interest—university autonomy—as constitutional and the countervailing interests—access to information and academic freedom—as statutory and prudential.

Certainly the provisions of the California Public Records Act (PRA) are statutory. But under cases such as *Tolman*, this does not necessarily exempt the

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provisions and their legislative history. Yet the California legislature subsequently amended both provisions under which the plaintiffs in *Regents v. Superior Court* had sued, noting in so doing its intent "to supersede the decision of the California Supreme Court in [*Regents v. Superior Court*]." 1999 Cal. Adv. Legis. Serv. ch. 393 (Deering) (amending Government Code sections relating to open meetings). See also *Shapiro v. San Diego City Council*, 117 Cal. Rptr. 2d 631, 639–40 (Cal. Ct. App. 2002) (referring to the 1999 amendment as a legislative attempt to "undo th[e] ruling" in *Regents v. Superior Court*). The provisions now allow suits to have past actions of bodies declared subject to the Act and extend the time to file actions seeking nullification to 90 days.

289. See discussion *supra* Part II.A.

290. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 277 (Cal. Ct. App. 1991).

University of California or its Regents from those provisions.<sup>291</sup> Whether or not the University must disclose information requested under the PRA in any given case instead turns on several factors. First, the information must fall within the PRA's definition of "public records."<sup>292</sup> Second, the information must not fall within one of the exemptions listed in the PRA.<sup>293</sup> Finally, it appears that a court reviewing a PRA request must be satisfied that disclosure would not infringe the Regents' constitutional autonomy or invade the sphere of "internal university affairs."<sup>294</sup>

This, at least, was the primary basis for the holding in *Scharf v. Regents of University of California*.<sup>295</sup> A 1978 addition to the California Education Code,

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291. *Tolman v. Underhill*, 249 P.2d 280, 282–83 (Cal. 1952). The PRA defines the State agencies subject to its requirements as including "every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution." CAL. GOV'T CODE § 6252(a) (West 1995 & Supp. 2005). (Article IV of the constitution is devoted to the state legislature; article IV, section 20 addresses the state Fish & Game Commission. Article VI of the constitution concerns the state judicial branch.) The PRA's definition of its scope thus does not exempt the university, nor are university records as such included among the enumerated PRA exceptions in the California Government Code. *See id.* § 6254.

292. "Public records" are defined to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL. GOV'T CODE. § 6252.

293. Exemptions relevant to the college and university context include exemptions for materials pertaining to pending litigation, *id.* § 6254(b) (West 1995), *amended by* 2005 Cal. Adv. Legis. Serv. ch. 22 (Deering); personnel files, the disclosure of which would constitute an unwarranted invasion of personal privacy, CAL. GOV'T CODE § 6254(c); law enforcement or investigatory records, *id.* § 6254(f); test questions or examination data, *id.* § 6254(g); records exempted by other federal or state law, including evidentiary privilege provisions, *id.* § 6254(k); and records relating to employee and labor relations, defined by the PRA as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics," *id.* § 6252(e); as well as records revealing the agency's "deliberative processes, . . . theories, or strategy," *id.* § 6254(p). Section 6254 was amended in 2005, without any material changes to these exceptions. The PRA also specifically exempts records of state agencies relating to actions taken under section 3560 of the California government code. *See id.* § 3560 (addressing higher education employer-employee relations). Scully has described these provisions as a "curtailing of some University autonomy in an effort to promote a broader societal policy—collective bargaining—which the University itself might never have voluntarily promoted." Scully, *supra* note 6, at 952.

294. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991). In a 1978 decision, the California Court of Appeal held that a disciplined university employee had a right under the PRA to certain aspects of an "audit report" that the university had compiled about her following her reports of financial irregularity by her supervisors. *Am. Fed'n of State, County, & Mun. Employees v. Regents of Univ. of Cal.*, 146 Cal. Rptr. 42 (Cal. Ct. App. 1978). The court's opinion did not address any argument that disclosure of the audit report would invade the sphere of the University of California's affairs, but its reasoning—a straightforward balancing of the public interest in disclosure of the audit report against the privacy interests implicated—suggested that it assumed the public interest in disclosure to be a matter of statewide and general concern. *Id.* at 44–45. In contrast, under a 1975 California Attorney General opinion, the Regents need not disclose records of any of their fiscal transactions until those transactions are completed. 58 Op. Cal. Att'y Gen. 273 (1975).

295. *Scharf*, 286 Cal. Rptr. at 227.

applicable specifically and only to the University of California, allowed employees access to their own personnel files,<sup>296</sup> including letters of recommendation or tenure committee reports, so long as the name and affiliation of any sources were deleted from the records.<sup>297</sup> In 1990, a number of former University of California faculty members who had been denied tenure sought access to their files under this law. The Alameda County Superior Court declared the law unconstitutional on its face and an invasion of the Regents' autonomy.<sup>298</sup> The state Court of Appeal affirmed, rejecting the faculty members' arguments that the law addressed an area of general statewide concern.<sup>299</sup> The court noted that the "diverse and conflicting state statutes pertaining to employee inspection of personnel files . . . do[] not constitute a coherent state scheme uniformly applicable to public and private employers," so that the law at issue could not fairly be characterized as an exercise of the state's police power.<sup>300</sup> Citing cases and commentary on academic freedom, the court also noted that "the grant or denial of tenure . . . is a defining act of singular importance to an academic institution,"<sup>301</sup> or an "internal university affair."<sup>302</sup> These facts, the court reasoned, distinguished *Scharf* from *Tolman*, in which the California Supreme Court had held that employee loyalty was not an internal university affair but a matter of statewide concern.<sup>303</sup>

*Scharf* is remarkable, however, not for the above conclusions but for its discussion of the relationship between the autonomy of the university and Regents under the California Constitution and principles of academic freedom developed outside of the University of California context.<sup>304</sup> In *Scharf*, the court virtually

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296. CAL. EDUC. CODE § 92612 (1995).

297. See *Scharf*, 286 Cal. Rptr. at 231 (quoting the text of the law as enacted in 1978). In 1980, the University of California prevailed in a suit it had brought to have the law declared unconstitutional under Article IX, section 9, despite the Attorney General's argument that the law "reflected a statewide legislative policy favoring access by employees to those records which their employers rely upon in making personnel decisions." Scully, *supra* note 6, at 940 (quoting Notice and Motion for Preliminary Injunction, *Deukmejian v. Regents of the Univ. of Cal.*, No. 26642 (Super. Ct. Cal., filed Jan. 19, 1979)). The Los Angeles Superior Court's decision in this case was not appealed, and the legislature did not repeal the law. A decade later, it was challenged again by the plaintiffs in *Scharf*.

298. See *Scharf*, 286 Cal. Rptr. at 229–30.

299. *Id.* at 232–33. In 1993, in response to *Scharf*, the legislature amended section 92612 of the California Education Code to add subsection (d), which provides that the subsections invalidated in *Scharf* are "not . . . applicable to the University of California unless adopted by the regents." See CAL. EDUC. CODE § 92612 (d) (West 1995).

300. *Scharf*, 286 Cal. Rptr. at 233.

301. *Id.* at 234.

302. *Id.* at 233.

303. *Id.* at 234 (distinguishing *Tolman v. Underhill*, 249 P.2d 280 (Cal. 1952)).

304. The only other California opinion to address explicitly both university autonomy and academic freedom is that of the California Court of Appeal in *Smith v. Regents of the University of California*, 65 Cal. Rptr. 2d 813 (Cal. Ct. App. 1997). In this case, the court considered the permissibility of using mandatory student fees collected by the Regents and disbursed to the Associated Students of the University of California (ASUC) to support political advocacy by student groups. The court found that this use of fees did not violate the First Amendment rights of the fee-paying students because the political activity occurring under the ASUC umbrella was an aspect of the University's educational function and because the Regents, who had made the

equated the category of “internal university affairs” with the domain of institutional academic freedom identified in opinions by courts outside California<sup>305</sup> and in nonlegal statements concerning the professional norms of academic freedom, tenure, and peer review.<sup>306</sup> But the court in *Scharf* did not link any of these concepts to either state or federal constitutional provisions. Nor did it allude to any of the other interests impelling the development of the professional norm of academic freedom, the federal concept of academic freedom, or even the ratification of Article IX, section 9.<sup>307</sup> It also refused to recognize that the plaintiffs had any constitutional or other comparable interest in obtaining access to their tenure review materials.<sup>308</sup> Rather, the court in *Scharf* presented its result as dictated by a single state constitutional provision: Article IX, section 9.

This approach, like those taken in *Tafoya*<sup>309</sup> and *Regents v. Superior Court*,<sup>310</sup> extols Regental decision-making autonomy without acknowledging the need for principled constraints, specific to the college and university context, on that autonomy. These constraints are necessary because the reasons for the original grant of autonomy to the Regents do not suggest that their autonomy should be unlimited. In particular, those reasons do not indicate that the Regents should be

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funding decision in question, were vested with “considerable discretion . . . to determine how best to carry out the university’s educational mission.” *Id.* at 821. The court in *Smith*, in referring to the United States Supreme Court’s long history of decisions concerning the First Amendment, reasoned that academic freedom precedent indicated that institutions’ academic function was to “foster energetic debate and the free interchange of views.” *Id.* at 819. In *Smith*, as in *Scharf*, the Regents’ autonomy and a principle of academic freedom were found to be aligned. However, the concepts of academic freedom used in each case were different. *Smith* appeals to a notion of academic freedom protecting the speech and association rights of students; *Scharf* appeals to a concept of institutional academic freedom.

*Smith* was the culmination of roughly a decade of litigation on the issue in California. The Court of Appeal was deciding the case on remand from the California Supreme Court. *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500 (Cal. 1993). In its 1993 opinion ordering remand, the California Supreme Court had suggested that despite the Regents’ autonomy, the student fees might need to be refunded in certain instances. *Id.* at 505, 517–18. This determination was invalidated by the United States Supreme Court’s decision in *Board of Regents of the University of Wisconsin System v. Southworth*. 529 U.S. 217 (2000) (holding that a refund system is not a constitutional requirement for funding of student groups through mandatory fees at a public college or university).

305. See *Scharf*, 286 Cal. Rptr. at 233–34 (citing, inter alia, *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983)).

306. See *id.* at 231, 235 n.9 (citing AAUP’s 1940 *Statement*, supra note 40).

307. See, e.g., *id.* at 232.

308. *Id.* at 235–39. The court distinguished *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), in which the Supreme Court had rejected a university’s claim that qualified privilege attached to tenure review documents, primarily on the basis that the plaintiffs in that case were asserting violations of the Civil Rights Act’s “policy against discrimination, which Congress has indicated is of the ‘highest priority.’” *Scharf*, 286 Cal. Rptr. at 238 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). The plaintiffs in *Scharf* did not allege that they had been discriminated against on any grounds prohibited by civil rights legislation; they contended that the confidentiality of the review materials violated their rights to due process and privacy, in addition to the Education Code provision at issue. *Scharf*, 286 Cal. Rptr. at 235–37.

309. 236 Cal. Rptr. 395 (Cal. Ct. App. 1987).

310. 976 P.2d 808 (Cal. 1999).

exempted from open-government laws. Such laws exist to secure interests very closely related to those impelling the creation of public institutions of higher education.<sup>311</sup> The purpose of Article IX, section 9, was not to shield the actions of the Regents from public view but to protect the Regents from political or sectarian influence.<sup>312</sup> Since the statutory provision at issue in *Scharf* applied solely to the University of California, there was no need for the court in *Scharf* to consider the boundaries of the Regents' autonomy by addressing whether the Regents should be immune to similar but less targeted legislation. Rather, it could have simply held the statute invalid under Article IX, section 9, because its exclusive focus on the internal affairs of the University of California and its difference from other statutes governing private colleges' and universities' obligations to their faculty employees<sup>313</sup> prevented its interpretation as addressing a matter of statewide concern, unlike the public-employee legislation at issue in *Tolman*.<sup>314</sup> Thus, the court did not need to venture a definition of "internal university affairs" that drew on academic freedom sources.<sup>315</sup> Having invoked these sources, the court should also have acknowledged that they might be taken to raise either competing or redundant constitutional concerns, or in other words, that academic freedom is "a special concern of the First Amendment."<sup>316</sup> At the very least, the court should have explained why it rejected the conclusion that academic freedom has a constitutional dimension.<sup>317</sup> The course the court took—affirming plenary Regental authority over all internal university affairs, and acknowledging Article IX, section 9, as the only constitutional provision relevant to questions of academic freedom, confidentiality, or access to records at the University of California—is in direct conflict with the approach to institutional academic freedom advocated in Part I of this article. Yet institutional administrative autonomy from legislative

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311. See *supra* Part III.A.

312. See *supra* Part II.A.

313. See *Scharf*, 286 Cal. Rptr. at 233 ("Significantly, private universities and colleges, which are subject to the general statute regarding inspection of personnel files, may refuse to disclose peer review information . . .") (citations omitted).

314. See *id.* at 234 (discussing *Tolman v. Underhill*, 249 P.2d 280 (Cal. 1952)).

315. Not only did the court draw on such sources, it emphasized them:

Additionally, and perhaps most importantly, the evaluation of scholarship and the grant or denial of tenure or promotion, unlike the ascertainment of loyalty, is a defining act of singular importance to an academic institution. As one court has stated, "the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities." [*EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983).] The process of peer review, which is closely related to academic freedom, . . . is undoubtedly more essential to the separate and independent existence [of the authority] of the University than some acts that have been found to be within the self-governing authority of the University, such as the fixing of minimum salaries.

*Scharf*, 286 Cal. Rptr. at 234–35 (citation omitted).

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

317. See *Scharf*, 286 Cal. Rptr. at 231 ("[W]e decline to evaluate the competing contentions [regarding the importance of confidentiality to tenure review] just described, as the dispute is, at bottom, one of policy. Our analysis focuses narrowly upon the specific legal issues that have been raised.")

interference, academic freedom based on a norm of faculty self-governance, and open government are not fundamentally incompatible goals; all that is required to reconcile the principles is careful acknowledgment of, and balancing of, the interests behind each.

Under the recent sunshine amendment to the California Constitution, the course of avoidance followed in all three of the open-government opinions discussed here may no longer be available to California courts. The next section explores the possibility that the amendment could force these courts to address more explicitly the relationships among the competing constitutional principles of university autonomy, academic freedom, speech and association rights, and, now, open government.

#### D. Ramifications of Proposition 59 for university autonomy doctrine

The inclusion of open-government principles in the California Constitution might require a shift in California courts' approach to the doctrine of university autonomy in cases in which parties seek to have open-government laws applied to the University of California. The sunshine provision now appears in Article I, section 3, of the state constitution, which previously provided simply that "[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."<sup>318</sup> The sunshine provision significantly expands Article I, section 3.<sup>319</sup> But with the arguable exception of a subdivision affirmatively shielding the legislature from sunshine laws, the amendment is largely a policy statement and a positioning of the

318. CAL. CONST. art. I, § 3(a).

319. In pertinent part, the added language provides:

(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 [of Article I] . . . .

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7 [of Article I].

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision . . . .

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of these provisions . . . .

CAL. CONST. art. I, § 3(b).

newly declared access right relative to other constitutional rights, rather than a guarantee of particular rights and responsibilities. Those tasks are left to existing open-government legislation.<sup>320</sup>

Nevertheless, the amendment does perform two important positive tasks. First, it confers constitutional status on the principles underlying current open-government laws. Formerly, these principles existed mainly in legislative history and judicial opinion and therefore carried relatively little weight. Second, the amendment directly instructs courts to avoid narrow interpretations of statutes furthering the public's right to access. Enshrining open-government principles in the Constitution, and commanding courts to construe them generously, would seem to require courts to consider these interests in cases involving open-government laws.<sup>321</sup> Together, these components of the sunshine amendment could steer courts away from results like those reached in the cases considered in the preceding sections, and particularly from results like that in *Regents v. Superior Court*.<sup>322</sup>

The amendment provides scant guidance, however, for the alternative course that courts should take in balancing access rights against most other constitutional guarantees. To be sure, the amendment acknowledges some potential conflicts with other constitutional principles and indicates that when they arise, certain other rights, such as individual rights to privacy and due process, should take priority over the public's access rights.<sup>323</sup> But the implications of these provisions for other unenumerated conflicts are ambiguous. Do these directives imply that access rights are to be subordinated to all other constitutional guarantees in case of conflict? Or that they should be subordinated only to those constitutional guarantees traditionally identified as fundamental by federal and state courts alike? The latter inference seems more reasonable but does not resolve the problem of how such an interest balancing should be conducted in practice. And conflicts seem inevitable.

For instance, although the amendment does not directly conflict with the terms of Article IX, section 9, a court faced with a challenge to legislation implicating both of these sections of the constitution will need to decide which section should

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320. *Id.* § 3(b)(5).

321. See Claire Miller, *Sunshine Amendment Puts Burden of Proof on Government for Public Records*, University of California Berkeley Graduate School of Journalism (Nov. 2, 2004), [http://journalism.berkeley.edu/projects/election2004/archives/2004/11/sunshine\\_amendm.html](http://journalism.berkeley.edu/projects/election2004/archives/2004/11/sunshine_amendm.html).

322. See discussion *supra* Part III.C. Supporters of a draft amendment identical in relevant respects to Proposition 59 suggested that, in line with these principles of openness, the amendment would place the burden on public bodies to justify exemptions from the open-government laws, instead of placing that burden on citizens seeking information. See *Beef Up Access to Records*, L.A. TIMES, Jan. 17, 2003, at B16. The amendment achieves this goal in part by requiring the inclusion of "findings demonstrating the interest protected by [any] limitation [on openness] and the need for protecting that interest" in any statute or ruling adopted after the amendment. CAL. CONST. art. I, § 3(b)(2). This requirement, too, might require a different analysis than that adopted by the majority in *Regents v. Superior Court*, which focused solely on statutory construction to reach a conclusion constraining openness by restricting rights of action under the Bagley-Keene Act.

323. See CAL. CONST. art. I, § 3(b)(3)–(6).

receive priority. The law at issue in *Scharf* is an example of a law that could implicate both sections of the state constitution.<sup>324</sup> This law regulated the University of California, thus implicating Article IX, section 9, and provided that certain public university employee records should be open to the employees concerned, thus potentially implicating the sunshine amendment.<sup>325</sup> In *Scharf*, as discussed above, the Court of Appeal concluded that Article IX, section 9, was dispositive of the question. Now, however, similarly situated plaintiffs could claim that their access rights under Article I, section 3, require a rule such as that contained in the statute struck down in *Scharf*. Such an argument might not be sound, given the restriction of these access rights to employees, but it would be harder for a court to ignore than the relatively insubstantial privacy and due process arguments that the plaintiffs in *Scharf* did raise.<sup>326</sup> An obligation to perform a direct balancing of access rights against university autonomy principles would not necessarily lead to different results or require courts to second-guess the Regents, but it would presumably require courts to articulate the reasons for both constitutional guarantees, clarifying the boundaries of Regental authority. Such a clarification would help to move California university autonomy doctrine away from its current form, according to which courts treat the Regents as a legal black box, insulated from interference or scrutiny and consequently lacking accountability. Again, this prevailing approach to university autonomy is not required by the text of Article IX, section 9.<sup>327</sup> More important, it conflicts with the reasons Article IX, section 9, was ratified<sup>328</sup> as well as with the First Amendment concerns motivating federal academic freedom law and open-government laws.<sup>329</sup>

California university autonomy law would benefit from courts' unshrinking consideration of federal academic freedom law and its purposes in future litigation involving the University of California and the Regents. Consideration of these issues would be especially appropriate in disputes that, like those in *Searle* and *Scharf*, raise the issue of the scope of the Regents' power over "internal university

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324. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991).

325. The amendment identifies a right of access only to "the writings of public officials and agencies" and "the conduct of the people's business." CAL. CONST. art. I, § 3(b)(1). Depending on how courts construe this language, they might not find that it supports an employee's access to tenure review reports filed by other faculty members. However, the language could be construed to allow access to official summaries of actions taken by tenure review committees or minutes of their meetings, which were also covered by the law at issue in *Scharf* and as to which the California Court of Appeal also found the law at issue in that case invalid. *See Scharf*, 286 Cal. Rptr. at 235–38 & n.4.

326. *Scharf*, 286 Cal. Rptr. at 235–38.

327. Article IX, section 9, requires simply that the Regents and the University of California be "kept free" from "all political or sectarian influence" "in the appointment of its regents and in the administration of its affairs." CAL. CONST. art. IX, § 9(f). This requirement does not imply anything about faculty participation in governance or the public's right to access information about the Regents' activities.

328. *See* discussion *supra* Part II.A.

329. *See* discussion *supra* Parts I.C–E, III.A.

affairs.”<sup>330</sup> The court in *Scharf* was on the right path when it noted parallels between university autonomy and academic freedom,<sup>331</sup> but it did not go far enough. Of course, for the concept of federal academic freedom to be useful in clarifying university autonomy doctrine, the federal concept would itself need clarification. The next section provides some suggestions for moving beyond this chicken-and-egg problem.

#### IV. LESSONS FOR ACADEMIC FREEDOM AND UNIVERSITY AUTONOMY DOCTRINE

##### A. Review of the problems

The problems with the quasi-constitutional federal concept of academic freedom and the state law doctrine of university autonomy, as outlined in the discussion above, are in some ways similar. In both spheres, some legal basis exists to support an argument that the decision-making of lay college and university administrators should be virtually immune to challenge or scrutiny. In both spheres, however, such a conclusion would sometimes be inconsistent with other relevant policy considerations as well as the purposes behind each doctrine. The reasons for this problem are different in each area.

The constellation of sharply differing opinions in *Grutter* exemplifies the problem at the federal level.<sup>332</sup> These opinions push the contested nature of the concept into the spotlight. Justice O’Connor’s opinion for the majority,<sup>333</sup> like Justice Thomas’s dissent,<sup>334</sup> acknowledges that the precedential pedigree of the concept of academic freedom is unclear.<sup>335</sup> And arguably, the result in *Grutter* does not even turn on the concept of academic freedom;<sup>336</sup> Justice O’Connor uses the term only in an expository discussion of Justice Powell’s *Bakke* opinion.<sup>337</sup> Elsewhere, her opinion declares the consistency of the *Grutter* holding with “our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits”<sup>338</sup> and notes that “universities occupy a

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330. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. at 232–33; *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194, 195–97 (Cal. Ct. App. 1972).

331. *Scharf*, 286 Cal. Rptr. at 234–35.

332. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

333. *Id.* at 324–25 (noting the unclear precedential status of Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978), and the resulting judicial controversy about the weight to be given that opinion).

334. *Id.* at 362–64 (Thomas, J., dissenting) (noting, *inter alia*, that Justice Frankfurter’s reference to the “essential freedoms” of universities in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), appeared in a concurring opinion).

335. See also Hiers, *supra* note 4, at 533.

336. See, e.g., *id.*, at 576–77 (characterizing references to academic freedom in *Grutter* as dicta); Tushnet, *supra* note 2, at 163 (arguing that the Court’s deference to the university was not a dispositive aspect of its analysis or decision).

337. *Grutter*, 539 U.S. at 324.

338. *Id.* at 328–29 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bakke*, 438 U.S. at 319, n.53; *Bd. of Curators of Univ. of Miss. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978)).

special niche in our constitutional tradition,” citing *Sweezy* and *Keyishian*.<sup>339</sup> This is hardly a clear statement of a constitutional right of institutional academic freedom. But Justice Thomas severely criticizes the majority opinion as just such a statement,<sup>340</sup> characterizing that opinion as “invent[ing the] new doctrine[.] . . . that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause.”<sup>341</sup> Where Justice Thomas focuses on the lack of authority for such a conclusion,<sup>342</sup> Justice Scalia’s dissent focuses on the lack of clarity in the majority’s rationale and anticipates that litigants and lower courts are unlikely to be cautious in their readings of the opinion.<sup>343</sup>

As discussed in Part I, the problems with justification and scope identified by Justices Thomas and Scalia are endemic in the case law addressing this question. These problems overlap and may both ultimately be traced to a failure to clarify the relationship of the concept to the First Amendment. Failure to address the nature of the concept’s constitutional grounding is also failure to describe the scope of its constitutional meaning. In attempting clarification of the legal concept, beginning with the similarities between the professional norm and any constitutional guarantees makes sense, but ending with the conclusion that the norm involves professional, not legal, standards and therefore cannot be imported wholesale into legal doctrine may not be the most fruitful approach.<sup>344</sup> An alternative approach, suggested here, is to look for answers not only in the professional norm from which the federal legal concept has borrowed its name, but also elsewhere in the law. This involves surveying both the legal principles competing with professional academic freedom interests in particular cases<sup>345</sup> and the other legal concepts bearing on the purposes and roles that American culture and law have assigned to institutions of higher education. Identifying where these principles overlap with the professional norm can help to provide a more robust basis for understanding the norm’s relationship to the First Amendment, translating it into legal terms, and clarifying the scope of the legal concept.

The California approach to university autonomy presents a contrast with both the professional norm of academic freedom and federal judicial opinions discussing academic freedom as a quasi-constitutional concept. University autonomy as articulated by California courts places plenary power in the Regents and has nothing to do with speech or association guarantees.<sup>346</sup> In a strong sense,

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339. *Id.* at 329 (citing, *inter alia*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250).

340. *Id.* at 362–64 (Thomas, J., dissenting).

341. *Id.* at 363.

342. *Id.* at 364.

343. *See id.* at 347–49 (Scalia, J., dissenting) (arguing that the lack of clarity in the majority’s holding and reasoning will induce extensive unnecessary litigation); *see also id.* at 362 (Thomas, J., dissenting) (describing majority’s deference to the university as “antithetical to strict scrutiny”); *Fuentes-Rohwer & Charles, supra* note 2, at 156–68; *Lopez, supra* note 2, at 846; *Ware, supra* note 2, at 2108–12.

344. *See, e.g.*, *Urofsky v. Gilmore*, 216 F.3d 401, 409–13 (4th Cir. 2000) (en banc).

345. *See, e.g.*, *Grutter*, 539 U.S. at 322–33; *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198–201 (1991).

346. *See* discussions *supra* Parts II.D, III.B, III.C.

university autonomy doctrine presents the converse problem to the problems with academic freedom law. The constitutional basis for the doctrine of university autonomy is quite clear; indeed, in California, it seems to be the very lack of ambiguity regarding the legal source of the doctrine that has led to an impoverished articulation of its purposes and scope. As discussed in Parts II and III, California courts have been unwilling to acknowledge any need for constraints on Regental autonomy deriving from the characteristics of the research university context, even though they appear willing to acknowledge professional and legal academic freedom interests in cases that do not involve the Regents or the University of California.<sup>347</sup> The result has been a doctrine equating university autonomy with plenary Regental power, virtual immunity from scrutiny, and dramatically decreased accountability, and denying any constitutional dimension to potentially competing notions of academic freedom or faculty self-governance in a university with unusually strong traditions of both. As discussed above, this problem is compounded by the courts' reluctance to acknowledge the underlying justifications for the concept at issue—in this case, the purposes of Article IX, section 9—and the interrelationships of those justifications with other constitutional concerns.<sup>348</sup>

The chief problems in both areas thus spring from a failure to consider the full range of competing legal and policy principles at issue and to confront the tensions between them. This part next reviews the purposes and legal dimensions of some of the major competing norms and a few of the ways they might be reconciled before suggesting the lessons that the concept of academic freedom may hold for university autonomy doctrine, and vice versa.

#### B. Three competing norms

This discussion has repeatedly returned to several core concepts relevant to constitutional analysis in litigation involving institutions of higher education: the research-scientific ideal,<sup>349</sup> the models of institutional pluralism and competitive federalism,<sup>350</sup> and the democratic ideals of openness and civic responsibility.<sup>351</sup> Each of these principles, or sets of principles, is related in different ways to legal guarantees or goals. But all three have historically played important parts in defining the place and role of colleges and universities in the American legal landscape, and all three continue to influence decision-making within and surrounding institutions of higher education. Considered together, the concepts create a complex dynamic, but the tensions among them are not irreconcilable.

The research-scientific ideal, as pointed out by Byrne, Finkin, and Rabban and detailed in the AAUP's statements, assumes that an important purpose of research colleges and universities is to provide an environment in which a self-regulating

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347. See *supra* note 8.

348. See discussions *supra* Parts II.A, II.D, III.B–C.

349. See discussions *supra* Parts I.B–C, I.E.

350. See discussions *supra* Parts I.B, II.A, III.D.

351. See discussions *supra* Parts I.B, II.A, III.A–D.

corps of experts may freely seek the truth in their disciplines.<sup>352</sup> The Supreme Court's early academic freedom statements clearly draw on this ideal.<sup>353</sup> The academics who promoted the ideal in the late-nineteenth and early twentieth centuries sought professional autonomy from lay administrators so that they could be free to consider all ideas and information, not just those favored by the trustees or founders of the institutions within which these academics worked.<sup>354</sup> The ideal thus presented colleges and universities as places where the "marketplace of ideas" that the First Amendment is arguably meant to protect might receive its purest realization.<sup>355</sup> The research-scientific ideal also stresses faculty self-governance as a necessary institutional mechanism for securing academic freedom.<sup>356</sup> This mechanism functions to define an arena devoted entirely to free inquiry within certain bounds established by the process of inquiry itself. But the research-scientific ideal has competitive as well as inclusive aspects. By definition, experts are a select group. Even the "experiment station" metaphor invoked in the AAUP's 1915 Declaration as a crucial part of the research-scientific ideal—like the marketplace of ideas metaphor itself—presupposes that unworthy ideas and theories will be discarded.<sup>357</sup>

The competitive dimension of the research-scientific ideal takes center stage in the models of institutional pluralism<sup>358</sup> and competitive federalism,<sup>359</sup> both of which propose that institutional excellence emerges from diversity among institutions. The institutional pluralism approach is relevant across the spectrum of public and private colleges and universities, while the competitive federalism approach makes sense only in relation to public institutions, but the concepts are otherwise quite similar. Both focus not on the characteristics of individual institutions and on what such institutions share, but on the benefits of a nonuniform system of diverse institutions. Both apply a marketplace or laboratory metaphor to the entire system of institutions, rather than to the activities that occur within each institution.<sup>360</sup> In practice, both approaches thus promote a *laissez-faire* attitude

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352. See Byrne, *supra* note 5, at 270–79; Finkin, *supra* note 7, at 822–29; Rabban, *supra* note 13, at 233–41; see also *supra* notes 35–38 and accompanying text.

353. See, e.g., Van Alstyne, *supra* note 41, at 81; see also *supra* notes 56–67 and accompanying text.

354. See, e.g., Byrne, *supra* note 5, at 270–79; Finkin, *supra* note 7, at 826–29; Rabban, *supra* note 13, at 233; see also Jordan E. Kurland, *Commentary on Buttressing the Defense of Academic Freedom*, 22 WM. MITCHELL L. REV. 545, 545 (1996); About AAUP, <http://www.aaup.org/aboutaaup/hist.HTM> (describing incident involving faculty dismissal from Stanford on the basis of research topics disfavored by trustee that inspired founding of the AAUP by Arthur O. Lovejoy and John Dewey).

355. See, e.g., Byrne, *supra* note 5, at 258–61, 332–34; Rabban, *supra* note 13, at 241; Schauer, *supra* note 66, at 1274.

356. See *supra* notes 35–38, 139–151 and accompanying text.

357. See discussion *supra* Part I.B.

358. See Finkin, *supra* note 7, at 830–40.

359. See *supra* notes 48–50 and accompanying text.

360. Cf. *Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting *New State Ice*

toward the decision-making of institutions and states, at least where that decision-making does not threaten other important social policies; this hands-off attitude is understood as a necessary structural prerequisite for the efficient generation of institutional diversity and the provision of incentives for innovation. Appeals to a norm of competitive pluralism can therefore be used to support a high degree of deference to the decision-making of lay administrators in both private and public college and university contexts. Courts have turned to the pluralist ideal, as Finkin describes, to preserve the autonomy of private institutions from government regulation;<sup>361</sup> competitive federalist concerns also seem to be among the purposes behind the 1879 amendment that provided the constitutional basis for university autonomy doctrine in California.<sup>362</sup> Arguably, this model is now the dominant attitude toward higher education in the United States.<sup>363</sup> But it has not yet become the only determinant of institutional practice. Both the research-scientific model and the democratic model, discussed next, remain appropriate to legal analysis. Significantly, the competitive pluralist understanding of the purpose of colleges and universities does not inherently require that administrators' decision-making be given priority over that of faculty in all institutions.<sup>364</sup>

The democratic model, in contrast, is as concerned with equality as the pluralist model is with competition. The democratic ideal approaches open access to education as a prerequisite for economic mobility and social welfare as well as for civic participation.<sup>365</sup> The Morrill Act is probably the preeminent legal expression of this model. Its stress on opening access to educational resources is consonant with the First Amendment principle of open access to information. But the democratic ideal is also congruent with other constitutional goals and guarantees, such as the First Amendment petitioning right and the Equal Protection Clause. The democratic ideal values open access to educational resources and knowledge not as ends in themselves, as the research-scientific paradigm does, but as means of ensuring equality of opportunity and the ability to exercise constitutional rights and perform civic responsibilities.<sup>366</sup> Thus, where the scientific-research model is generally faculty-focused and the competitive pluralist model generally institution- or economy-focused, the democratic model is primarily student-focused. As a result, it does not place a premium on institutional self-determination. Rather, it can be used to support government intervention in the actions and decisions of higher education institutions, as in the application of open-government laws to

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Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

361. See Finkin, *supra* note 7, at 830–34.

362. See *supra* note 164 and accompanying text.

363. See, e.g., John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528 (2002); American Federation of Teachers, *supra* note 42, at 4–6; see also *Grutter v. Bollinger*, 539 U.S. 306, 349–62 (2003) (Thomas, J., dissenting) (drawing heavily on this conception).

364. See discussion *supra* notes 42, 216 and accompanying text; see also *supra* notes 221–225 and accompanying text.

365. See *supra* notes 44–48 and accompanying text.

366. See *supra* notes 44–48 and accompanying text; see also Byrne, *supra* note 5, at 281–83; Horwitz, *supra* note 2, at 479, 555.

public colleges and universities<sup>367</sup> or of equality principles to public or private institutions.<sup>368</sup> But although the democratic model measures academic value differently than the research-scientific ideal does,<sup>369</sup> the democratic model does not inherently require government intervention or aggressive review of college and university decision-making.

The contrast between Justice O'Connor's and Justice Thomas's opinions in *Grutter* illustrates the ways in which these principles can blend and collide. Justice O'Connor's approach is preferable, despite its lack of bright lines, because it manages to harmonize the principles; her opinion stresses how, when an institution chooses to incorporate the democratic model and competitive pluralism into its research-scientific self-definition, a court should defer to that institution's expert conclusion that an admissions system focused on equality of opportunity and diversity, rather than competitive evaluation according to a uniform yardstick, ultimately advances both the search for truth and civic participation without compromising innovation.<sup>370</sup> Justice Thomas's dissent, in contrast, subordinates the democratic and research-scientific norms to a watered-down norm of competitive pluralism, and more important, refuses to admit the possibility of an approach that could serve all three aims.<sup>371</sup> Justice Thomas acknowledges the possibility of a purely democratic, open approach to admissions, but presents such an approach as entirely incompatible with merit-based admissions systems,<sup>372</sup> and implies that the democratic norm is unavailable to justify the University of Michigan's admissions practices, since so many graduates of that university's law school leave Michigan.<sup>373</sup> Justice Thomas rejects out of hand the legal relevance of the research-scientific model, deriding Justice O'Connor's citations of social science research in support of her conclusions<sup>374</sup> and suggesting that appeals to this ideal are usually, if not always, disingenuous<sup>375</sup> and pretextual.<sup>376</sup> Even his

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367. See discussion *supra* Part III.A.

368. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

369. See Byrne, *supra* note 5, at 281–83.

370. *Grutter v. Bollinger*, 539 U.S. 306, 322–33 (2003).

371. *Id.* at 349–78 (Thomas, J., dissenting).

372. *Id.* at 368–69.

373. *Id.* at 360. On this point, Justice Thomas seems to conflate the democratic ideal with the competitive federalist ideal.

374. *Id.* at 364 (Thomas, J., dissenting).

375. *Id.* (“The Court relies heavily on social science evidence to justify its deference. The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students.”) (citations omitted).

376. *Id.* at 369 (“Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. . . . Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that ‘[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews.’”) (citing letter from Herbert E. Hawkes, dean of Columbia College, to E.B. Wilson, June 16, 1922 (reprinted in H. WECHSLER, *THE QUALIFIED STUDENT* 160–61 (1977))).

allegiance to the competitive pluralistic model is incomplete, since he does not consider deference to the University of Michigan's admissions policy a legally supportable option.<sup>377</sup> In rejecting all three principles, Justice Thomas fails to do justice to the roles all have played in defining and strengthening American higher education for more than a century.

In the remaining two sections of this article, I draw on the three norms described here and on Justice O'Connor's example to suggest new approaches to clarifying both university autonomy doctrine and the federal constitutional concept of academic freedom.

### C. Lessons for university autonomy doctrine

As described above, university autonomy doctrine derives from Article IX, section 9, of the California Constitution. The motivations of the lawmakers who gave the University of California this status appear to have been most closely aligned with the competitive pluralist model, although both democratic and research-scientific norms influenced the initial formation of the university itself.<sup>378</sup> California courts have hewed very closely to the laissez-faire implications of the competitive pluralist model in their interpretations of Article IX, section 9, particularly in their articulation of the meaning of "internal university affairs."<sup>379</sup> In so doing, they have not only slighted the historic and continuing relevance of the other two norms to the University of California but also expanded the Regents' power beyond the protections implied by the language of Article IX, section 9.

A better approach to university autonomy doctrine would acknowledge the relevance of these competing norms, which find support in the First Amendment, other aspects of the federal Constitution, and Article I, section 3, of the California Constitution. It would also exhibit more sensitivity to the language of Article IX, section 9, itself, which asserts the Regents' insulation from the legislature but does not purport to diminish their accountability to the public or the faculty to whom they have delegated decision-making responsibility. Taking these other considerations into account would support a modified definition of "internal university affairs" that would under certain circumstances reduce the Regents' plenary power over faculty decision-making relating to strictly academic concerns such as the "four essential freedoms" enumerated in Justice Frankfurter's *Sweezy* concurrence.<sup>380</sup> As long as the Regents continue to acknowledge commitment to a system of shared governance, conflicts between faculty and Regents in these areas should prompt not reflexive citation of the broad scope of Article IX, section 9, but judicial inquiry into whether the Regents have shown that they considered relevant faculty input.<sup>381</sup> As discussed above in Part III.D, a more cautious approach to the

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377. *Id.* at 362–64, 367.

378. *See generally* DOUGLASS, *supra* note 44, at 46–71.

379. *See* discussions *supra* Parts II.D, III.B, III.C.

380. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

381. *See* Regents of the University of California Standing Order 105.2, Duties, Powers, and Privileges of the Academic Senate, *available at* <http://www.universityofcalifornia.edu/regents/bylaws/so1052.html> (last visited Nov. 6, 2005).

scope of Article IX, section 9, in relation to other constitutional provisions would also require a different judicial approach to the construction of open-government provisions applicable to the Regents and the University of California.

Such an approach would harmonize California's constitutional provision for university autonomy with the array of competing constitutional concerns that are equally relevant in the research university context. It would, moreover, further the purposes of Article IX, section 9, by helping to secure the preeminence of California's research university system, a preeminence that must be attributed at least in part to its tradition of shared governance.<sup>382</sup>

#### D. Lessons for academic freedom law

In contrast to university autonomy doctrine, analyses of the federal constitutional concept of academic freedom tend to begin with nonlegal principles—chiefly the professional norm of academic freedom—and to note the consistency of that norm in some respects with First Amendment principles. This tendency has led to difficulties in articulating the legal concept and its connection to the First Amendment. The professional norm in its entirety seeks to perform a function within the community of research colleges and universities that is analogous to the function performed by the First Amendment's speech guarantees in the United States community at large.<sup>383</sup> But because the professional norm embraces interdependent individual and institutional rights and responsibilities,<sup>384</sup> it is difficult to shoehorn the professional norm into existing First Amendment doctrine.<sup>385</sup> This difficulty may make it tempting for courts confronted with constitutional challenges to institutional actions or decisions in the college or university context to turn to pluralist or democratic norms and constitutional principles to justify the appropriate approach to review of institutional decision-making.<sup>386</sup> Recourse to these norms is potentially dangerous because they do not provide any basis for restricting judicial deference to decisions made by faculty acting collectively.<sup>387</sup> Yet such decision-making remains a crucial institutional component of the professional norm of academic freedom—and therefore relevant to First Amendment concerns with the protection of a space for academic expression—as well as a significant element of institutional practice in the research college and university context.

A better approach would follow the context-sensitive example set by Justice O'Connor's opinion in *Grutter* and seek to acknowledge and accommodate all three norms along with the appropriate constitutional principles, as those norms

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382. See generally Douglass, *supra* note 203.

383. See Rabban, *supra* note 13, at 240–41.

384. See Rabban, *supra* note 32, at 1407–09; Rabban, *supra* note 14, at 286–87, 293–94.

385. Cf. Horwitz, *supra* note 2, at 558–88; Schauer, *supra* note 66, at 1260, 1274.

386. See, e.g., Byrne, *supra* note 5, at 281–83; Finkin, *supra* note 7, at 846–57.

387. See Rabban, *supra* note 32, at 1407–12; see also discussion *supra* Part IV.B. The pluralist or laissez-faire norm indicates deference to institutional decision-making but does not require a distinction between the decision-making of lay boards and that of faculty. The democratic model does not indicate deference at all.

and principles are relevant on a factually specific case-by-case basis.<sup>388</sup> Such an approach would, in research colleges and universities, support deference to collective faculty decision-making, or application of a presumption of good faith to such decision-making, but not deference to lay administrators' decision-making in academic areas. This recommendation does not conflict with the Court's statement in *Minnesota State Board of Community Colleges v. Knight* that "there is no constitutional right [of faculty] to participate in governance."<sup>389</sup> Deference to the procedurally proper decisions of existing faculty governance bodies does not entail a recognition that the Constitution requires those bodies to exist or requires individuals to be permitted to participate in them. But where such bodies do exist, demonstration of their functional commitment to creating and preserving a space for free inquiry and of their consistency with professional norms should entitle their determinations to a presumption of good faith absent a showing that they have departed from that commitment or those norms.<sup>390</sup>

This understanding of the legal concept of academic freedom suggests that judicial review of institutional decision-making relating to academic concerns in research institutions should acknowledge the relevance of multiple overlapping norms and constitutional principles to that institutional context and to the various types of expression that occur within it—both the expression of individual faculty members in their professional roles, and the expressive conduct of collective faculty decision-making. This understanding also indicates that when these two types of expression conflict, institutional decisions complying with the relevant professional norms should prevail, since individual faculty members' professional speech is given its meaning and made possible through such mechanisms. But the approach does not categorically subordinate individual academic freedom rights to institutional prerogatives, as did the Fourth Circuit in *Urofsky v. Gilmore*<sup>391</sup> and as the California university autonomy doctrine may also tend to do in a different way.<sup>392</sup> Rather, the approach suggested here recognizes that just as the concept of individual academic freedom rights is defined by a particular type of institutional context, institutions' First Amendment-derived prerogatives are shaped and constrained by the requirement that those institutions function to preserve a sphere of free inquiry. Decisions made in institutions of higher education by bodies other than faculty decision-makers or in furtherance of other goals may in many cases be valid and constitutionally defensible, but their validity must depend on principles other than the First Amendment's guarantees or the constitutional concept of academic freedom, and where the norms described here are institutionally relevant—in research colleges and universities with systems of shared governance—courts should always acknowledge their constitutional weight.

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388. See discussion *supra* Part IV.B.

389. 465 U.S. 271, 288 (1984).

390. See *Grutter v. Bollinger*, 539 U.S. 306, 324–33, 339–40 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (Powell, J.).

391. See 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

392. See discussion *supra* Parts II.D, IV.C.

## CONCLUSION

The problems and paradoxes of federal academic freedom law have been widely acknowledged. This article has sought to suggest a new perspective on those difficulties through a comparison of the concept of constitutional academic freedom as articulated by federal courts, and particularly Supreme Court Justices, with the approach that California courts have taken toward the state law-based university autonomy of the University of California, the research branch of the state's higher education system. The California doctrine of university autonomy is problematic, but the difficulties with this body of law vary in instructive ways from the difficulties that have plagued federal academic freedom law. By widening the scope of the inquiry, this comparison allows a long view of the various legal and policy norms relevant to judicial scrutiny of the decision-making of research institutions. The article concludes that courts, too, should consider all of these norms in assessing the constitutional implications of institutional decision-making in the university context.



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REVIEW OF WELCH SUGGS'S  
*A PLACE ON THE TEAM: THE TRIUMPH AND  
TRAGEDY OF TITLE IX*

CATHERINE PIERONEK\*

INTRODUCTION

In *A Place on the Team: The Triumph and Tragedy of Title IX*,<sup>1</sup> Welch Suggs, senior editor for athletics at *The Chronicle of Higher Education*, adds another work to the recent series of books<sup>2</sup> exploring how Title IX of the Education Amendments of 1972<sup>3</sup> has affected both positive and negative changes in collegiate and high school athletic programs. *A Place on the Team* has some important strengths, particularly in the way in which the book presents an interesting perspective on the history of the development of college and university sports, and on the social environment that ultimately created the need for a law to bring gender equity to all facets of educational programs. But when he moves beyond his vivid retelling of Title IX's history and into the realm of public policy, Mr. Suggs fails to achieve any sense of balance in his discussion of the strengths and weaknesses of the current scheme of Title IX enforcement in athletic programs.

Instead, Mr. Suggs, like so many other authors with a strong point of view about Title IX, casts his facts and arguments in a way that supports his core view that Title IX is a "silly and superfluous law"<sup>4</sup> as applied to athletic programs sponsored by educational institutions.<sup>5</sup> Mr. Suggs does acknowledge that a reader might conclude that he approaches his work with this obvious bias: "Some people will consider [the themes presented in the book] to be my personal opinions and will

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1. WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* (2005).

2. See, e.g., KAREN BLUMENTHAL, *LET ME PLAY: THE STORY OF TITLE IX, THE LAW THAT CHANGED THE FUTURE OF GIRLS IN AMERICA* (2005); BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* (2003); JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* (2002).

3. 20 U.S.C. §§ 1681-88 (2000), amended by 20 U.S.C. § 1687 (Supp. II 2002).

4. SUGGS, *supra* note 1, at 197.

5. Mr. Suggs does at least acknowledge that the law "makes perfectly good sense in an educational context." *Id.* at 8.

accuse me of slanting my findings to fit them.”<sup>6</sup> Yet, despite this apparently prophylactic observation, Mr. Suggs makes no attempt to explain either why he believes that his book presents anything other than his personal opinions or why he considers his work to be “fair and accurate.”<sup>7</sup> In reality, his book presents simply one person’s view of one set of the problems attendant to a law of broad scope and general application.

Mr. Suggs’s viewpoint derives from his belief that Title IX has caused women’s sports to develop into the same unhealthy enterprise into which men’s athletic programs evolved over the last century. He states, “In mandating that women athletes be treated the same as men, the law [has] encouraged women’s sports to develop in the hypercompetitive, highly commercialized model that evolved in men’s sports over the past century and a half.”<sup>8</sup> While he acknowledges that women, like men, play sports “[t]o have fun, to excel, to push themselves and their bodies to their limits,”<sup>9</sup> he nevertheless faults the way in which the law has “radically transform[ed] the lives of millions of girls and women”<sup>10</sup> by creating an environment that, among other evils, “forces high-school [girls] to make one of the most important decisions of their lives, where they go to college, based on how well they can kick a soccer ball.”<sup>11</sup>

In his discussion of the ill effects of Title IX, Mr. Suggs completely ignores the fact that a wide variety of factors beyond the college and university admissions process influences whether a girl will choose to participate in sports, including: the interests of the girl herself, who may choose to participate in athletics to satisfy her own competitive nature<sup>12</sup> or to develop healthy lifestyle habits; her parents, who may see sports as a way for their daughter both to develop into a healthy and confident young woman and, perhaps, to secure a scholarship to college and university; and the collegiate administrators who, albeit because of Title IX, must offer athletic opportunities to women, and then decide, perhaps for reasons other than Title IX such as school pride or spirit, to recruit that girl to build the best

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6. *Id.* at 197.

7. *Id.*

8. *Id.* at 3.

9. *Id.* at 2.

10. *Id.* at 4.

11. *Id.*

12. Senda Berenson of Smith College (Smith), who invented the women’s version of basketball around the same time that James Naismith developed the men’s version in 1892, found out quickly that girls and women do exhibit their competitive natures, given the chance. *Id.* at 21. Late nineteenth-century newspaper accounts recorded in vivid detail how female students at Smith showed enthusiastic support for their basketball teams in competition. *Id.* Ms. Berenson herself “thought that just a few students would come out to watch [the games], but the whole college with class colors and banners turned out. . . . The cheering and screaming was a high-pitched sound I do believe no one had ever heard before.” *Id.* (quoting *HER STORY IN SPORT: A HISTORICAL ANTHOLOGY OF WOMEN IN SPORT* (Reet Howell ed., 1982)) (internal alterations omitted).

In 1899, Ms. Berenson helped to found the National Women’s Basketball Committee, whose “stated purpose was to develop common rules for the sport of basketball.” *Id.* The committee also “took on the duty of controlling ‘unrestrained’ competition among college women.” *Id.* Obviously, these early female student-athletes exhibited a competitive spirit.

possible team in her sport. The law merely enables an individual decision to participate in sports—for reasons good or bad, with consequences beneficial or detrimental.

Ultimately, Mr. Suggs presents a history of Title IX and women's sports that both overstates and oversimplifies the role of the law in turning women's sports into a highly competitive enterprise. To summarize Mr. Suggs's view:

- Historically, women's sports developed differently from men's sports, emphasizing "the ideals of worthy citizenship even at the expense of fine technique."<sup>13</sup> Women played "for the love of the game,"<sup>14</sup> and "for fun,"<sup>15</sup> while men played competitively, engaging in a "business enterprise"<sup>16</sup> that fostered athletic competitions as "good excuses for a crowd to socialize, drink, and gamble."<sup>17</sup>
- The women's and men's models of sports happily co-existed, side-by-side, for nearly a century, beginning in the late 1800s, until Congress enacted Title IX in 1972.<sup>18</sup>
- Beginning in 1972, educational institutions and their athletic administrators, in the name of equality, began to alter the female model of sports participation, aligning it with the male model in all things—the benefits as well as the drawbacks.<sup>19</sup>
- At the start of the twenty-first century, female student-athletes must bear the consequences of this "tragic" quest for equality, as winning has become as important for girls and women as it has always been for boys and men.<sup>20</sup>

This line of reasoning has obvious flaws. And, Mr. Suggs's own work actually brings forth some of the less obvious flaws in his own thesis, especially in the book's history-based discussion of the various forces that converged in 1972 to change women's sports. This history, in fact, points out how the early artificial suppression of women's competitive spirits actually forced women into an unnaturally uncompetitive athletic environment, and shows how Title IX released women's sports from a century of restraint.

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13. *Id.* at 7 (quoting Mabel Lee, Dir. of Physical Educ., Univ. of Neb., Sports and Games—An Educational Dynamic Force, Paper Read at the Meeting of the Women's Division, N.A.A.F. (Jan. 3–5, 1929), <http://www.barnard.columbia.edu/amstud/resources/women/lee.htm>) (internal quotation marks omitted).

14. *Id.* at 13.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* at 13–31.

19. *See id.* at 57–65.

20. *See id.* at 175.

## HISTORY OF WOMEN'S SPORTS

Chapters 1, 3, and 6 present perhaps the most interesting part of the book: a history of the development of women's sports, beginning in the late nineteenth century.<sup>21</sup> Chapter 1 focuses on the differences between men's and women's sports from their inceptions. Mr. Suggs animates this discussion with the personal stories of a wide-ranging and diverse collection of individuals involved in athletic competition throughout this history, from President Theodore Roosevelt<sup>22</sup> to the University of Tennessee's women's basketball coach, Pat Summitt.<sup>23</sup> More importantly, however, this part of the discussion proves to be the most intriguing because it raises a host of questions. Mr. Suggs, unfortunately, leaves those intriguing questions unanswered.

Beginning in the mid-nineteenth century, British theologians argued that the physical inactivity (or, perhaps more accurately, laziness) favored by gentlemen (and especially ladies) of the time put British society "at risk of being overrun by heathens."<sup>24</sup> At the same time, physicians "began to advocate mild physical activity, the pursuit of bodily well-being, and, of course, careful eugenics to keep the Anglo-Saxon race pure and free."<sup>25</sup> Similar trends emerged in the United States at around the same time.<sup>26</sup> "As a result, [physical] education became an integral part of daily life at most northeastern [U.S.] colleges at that time."<sup>27</sup>

Initially, men's athletics developed as a way to build strong bodies and, in turn, strong minds and morals, and as a way to "develop[] manhood."<sup>28</sup> For physical educators of the time, "sport [was] a means to an end—developing one's body in concert with the mind, the ancient Greek ideal."<sup>29</sup> Then, on a fateful day in 1852, Harvard and Yale participated in a rowing contest—an event that featured questions about the eligibility of Harvard's coxswain, an eight-day party in the Adirondacks to promote rail travel to the host resort, gambling on the outcome, and a silver plate awarded to the winning Harvard team.<sup>30</sup> Mr. Suggs laments this development, of course, noting that "virtually all of the ills of college sports were present at the creation."<sup>31</sup> Moreover, he notes that "the game was an end in itself. The intoxicants of winning and the cheering crowd drowned out the moralizing of

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21. Chapter 9 includes a discussion of the development of girls' sports at the high school level. This discussion seems out of place, however, and really distracts from the threads of thought running throughout the book. *See id.* at 142–52.

22. *Id.* at 16–17, 27.

23. *Id.* at 45–47, 62, 65.

24. *Id.* at 14.

25. *Id.*

26. *See id.* at 15.

27. *Id.*

28. *Id.* at 16.

29. *Id.* at 19. Never mind that, in addition to promoting these ideals, some physical educators of the time also promoted participation in sport for less idealistic reasons, seeing sport as a way "to develop a strong race of white Anglo-Saxon Protestants to resist immigrants." *Id.*

30. *Id.* at 17.

31. *Id.* at 18.

physical educators.”<sup>32</sup> The ruin of men’s sports, in his view, pre-dates the U.S. Civil War.

Mr. Suggs then traces the development of women’s sports. Women’s colleges and universities, too, recognized the importance of physical health to academic success. But women engaged in physical activity “strictly in moderation.”<sup>33</sup> As Mr. Suggs explains:

Two powerful social prejudices kept women from participating intensely in any sport or physical activity alongside their brothers. First, upper-class women were expected to be pale and dainty, and they often wore clothing like corsets that prevented them from breathing, much less running and jumping. Muscles and tans were marks of the lower classes. Second, a woman’s primary functions in society were to attract a man and bear children, and participating in sport was thought to impair the ability to do either. Until the middle of the twentieth century, a common myth was that being athletic could cause a woman’s uterus to fall out.<sup>34</sup>

Women’s athletic programs developed under the direction of women, who kept competition “low key” for two reasons.<sup>35</sup> First, these early “teacher-coaches” sought to preserve the modesty and accommodate the “perceived daintiness” of young women.<sup>36</sup> Second, the teacher-coaches had a “general suspicion of competition, particularly as it was being practiced in men’s sports.”<sup>37</sup> As Mr. Suggs explains it, women’s sports purposely developed along a different path because of a belief among women’s coaches that “[t]he way men were conducting intercollegiate sports was inherently wrong,” in that men had “[lo]st sight of fair play and sportsmanship” in their pursuit of winning.<sup>38</sup>

In Chapter 3, Mr. Suggs moves on to explain how, in the days following the passage of Title IX, a struggle for control of women’s sports began. On one side, the Association for Intercollegiate Athletics for Women (AIAW) sought to preserve the ideals of the early developers of women’s sports.<sup>39</sup> “AIAW officials . . . saw competition as desirable, but only within limits, so they built into rules safeguards to maintain the amateur, educational approach to sport.”<sup>40</sup> On the other

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32. *Id.* at 19–20.

33. *Id.* at 20.

34. *Id.*

35. *Id.* at 23.

36. *Id.* Here, Mr. Suggs includes a 1928 quote from Ethel Perrin, a board member of the Women’s Division of the National Amateur Athletic Federation:

Girls are not suited for the same athletic program as boys . . . . Under prolonged and intense physical strain, a girl goes to pieces nervously. A boy may be physically so weak that he hasn’t the strength to smash a creampuff but he still has the “will” to play.

A girl is the opposite.

*Id.* (internal quotation marks omitted).

37. *Id.*

38. *Id.*

39. *Id.* at 47.

40. *Id.*

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side, the National Collegiate Athletic Association (NCAA) fought for control of women's athletics. Cast in its most favorable light, the NCAA saw this effort as an easier way for member institutions that were trying to comply with Title IX to bring women's programs in line with men's programs.<sup>41</sup> The AIAW, not surprisingly, saw the move merely as a way for the NCAA "to consolidate its power as a monopoly over amateur sports" and questioned how the NCAA might change women's sports.<sup>42</sup>

This chapter points out the two very different forces at odds at the time. On the one hand, a committed group of women fought to keep women's sports under the control of an organization that sought to preserve the nineteenth-century values that formed the foundation of women's sports programs.<sup>43</sup> On the other hand, educational institutions found it extremely difficult to comply with Title IX when two different organizations, with two different sets of standards and rules, controlled the operation of their men's and women's athletic programs.<sup>44</sup>

As an example of the problems that this arrangement presented, Mr. Suggs notes that, as early as 1973, female student-athletes in Florida sued the AIAW over its ban on scholarships.<sup>45</sup> Although the AIAW changed its scholarship rule in 1973, this change ultimately proved insufficient to stop the NCAA's efforts to control women's sports programs.<sup>46</sup> To Mr. Suggs and others, the AIAW's decision effected a "critical change [to] women's college sports,"<sup>47</sup> because it led to some of the same behaviors thought to have caused problems in men's sports: recruiting; the need to spend money to improve programs to attract recruits; bidding wars for coaches; and, above all, the desire to win.<sup>48</sup> Mr. Suggs fails to explain, however, how a college or university could treat its male and female student-athletes equally when the NCAA, with its competitive focus, allowed men to receive scholarships, while the AIAW, which eschewed NCAA-style competition, did not allow women to receive the same benefit.

Ultimately, whatever its initial motivations for entering into the fight to control women's sports, the NCAA won the battle when, in 1980, the organization voted to hold women's championships in several sports beginning in the 1981–82 academic year.<sup>49</sup> This step toward consolidating men's and women's sports under one organization, with the inevitable demise of the AIAW soon to follow, in Mr. Suggs's view, began an irreversible paradigm shift in women's sports—one that moved women closer and closer to the competitive men's sports model.

Mr. Suggs concludes his discussion of the history of women's sports in Chapter 6, where he explores how women's sports programs changed in the 1980s and

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41. *See id.*

42. *Id.*

43. *See id.* at 57–59.

44. *See id.* at 59–62.

45. *Id.* at 60.

46. *Id.* at 62.

47. *Id.* at 61.

48. *See id.* at 61–63.

49. *See id.* at 64.

early 1990s. Here, he describes a new breed of women's sports advocates entirely different from those of just a decade earlier. As Mr. Suggs explains, this new breed of women's sports advocates pushed their programs to unprecedented successes once freed from the historical obsession with preserving femininity and daintiness and the prospects of marriage and children for female student-athletes, and even apparently freed from the need to preserve the apparent purity of the existing women's sports model.<sup>50</sup> In fact, as the number of women participating in intercollegiate athletics increased, "so did interest in and the intensity of women's sports. The coaches who had learned their skills in the late 1970s [after Title IX was enacted] began to develop a new ethos for making women into the best athletes they could possibly be."<sup>51</sup>

As an example of this new breed of women's coaches, Mr. Suggs identifies Anson Dorrance, coach of the University of North Carolina's (UNC) women's soccer team—the most successful program in NCAA history.<sup>52</sup> He notes how "[Coach] Dorrance developed an approach to coaching unlike any of his competitors',"<sup>53</sup> in that it emphasized "aggressiveness, teamwork, and fitness."<sup>54</sup> He explains how Coach Dorrance, who coached both the men's and women's soccer teams at UNC for a decade, recognized that "[w]omen need more nurturing, and they need to learn the take-no-prisoners attitude that seems to come naturally to male athletes."<sup>55</sup>

Enamored as he is with the historical purity of women's sports, Mr. Suggs fails to pursue one line of thought in his review of that history. At least as far back as 1892, it was evident that women enjoyed competition.<sup>56</sup> But to preserve Victorian notions of womanhood, early women's sports advocates artificially suppressed these competitive tendencies. Had women's sports instead been allowed to develop into a competitive enterprise more gradually and naturally, perhaps women would have found a way to make sports exciting and interesting but still healthy and sensible. After all, as Mr. Suggs explains, women do approach sports differently from men. For example, in describing the differences between coaching men and women, Coach Dorrance has noted that "women need a different approach from their coach. . . . Women desire a 'connectiveness' in a team setting in which players and coaches all have a relationship with each other."<sup>57</sup> He further explains that "women don't really enjoy competing with their friends."<sup>58</sup> This, then, is a key question that Mr. Suggs leaves unanswered: Absent the artificial suppression of competition that hampered the development of women's sports for eighty years, might women's sports have otherwise developed

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50. *See id.* at 97–104.

51. *Id.* at 96.

52. *See id.* at 98, 101. The team won seventeen titles in the first twenty years of NCAA women's soccer championships. *Id.* at 101.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See supra* note 12.

57. SUGGS, *supra* note 1, at 102.

58. *Id.* at 103.

into a model of healthy competition that men's sports might have tried to emulate?<sup>59</sup>

#### THE LEGISLATIVE AND REGULATORY HISTORY OF TITLE IX

In Chapters 2, 4, and 5, Mr. Suggs presents a history of the enactment of Title IX and the development of its regulatory scheme. In these chapters, he shows how the civil rights movement of the 1960s created a new framework within which to evaluate and understand basic principles of equality, and describes the events that gradually led to “a general shift in federal civil rights enforcement away from a goal of procedural equality—making sure that a process was nondiscriminatory on its face—and toward a goal of substantive, or end-result, equality.”<sup>60</sup> He explains how this process also impacted the development of Title IX. Along the way, he makes some interesting observations that point out the origin of some of the difficulties with the current regulatory scheme.<sup>61</sup>

Chapter 2 recounts how Congress passed the Civil Rights Act of 1964, and discusses the regulatory scheme of two of its most influential provisions: Title VI,<sup>62</sup> which prohibits discrimination on the basis of race in programs and activities, including educational programs and activities, that receive federal financial assistance, and Title VII,<sup>63</sup> which prohibits discrimination on the basis of race, color, religion, gender, or national origin in hiring and employment. Together, however, these laws still left women unprotected from discrimination in programs and activities that receive federal financial assistance, including educational programs and activities.<sup>64</sup>

Mr. Suggs makes the point that, although Title VI and Title VII both forbid hiring or firing individuals to satisfy a quota, federal agencies took the equal-treatment goal of the law “to mean affirmative action, requiring companies and schools to make an effort to identify and recruit qualified minorities beyond the procedures they used to identify and recruit others.”<sup>65</sup> As a result of this interpretation of the law, “potential contractors on federal construction projects [had] to state in their bids how many members of minority groups they would hire if they won a particular contract.”<sup>66</sup> Mr. Suggs makes the interesting observation that the requirement “to hire a noticeable number of minorities,”<sup>67</sup> along with an overall approach to enforcement that “emphasiz[ed] compliance over punishments,”<sup>68</sup> “would show up later in the regulations published under Title

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59. At least one other author has pursued the notion of women's sports becoming a model for a healthier collegiate athletic environment. See PORTO, *supra* note 2.

60. SUGGS, *supra* note 1, at 36.

61. *See id.* at 37–44.

62. 42 U.S.C. §§ 2000d-1 to -7 (2000).

63. 42 U.S.C. §§ 2000e-1 to -17 (2000).

64. *See* SUGGS, *supra* note 1, at 32–34.

65. *Id.* at 35.

66. *Id.*

67. *Id.*

68. *Id.* at 37.

IX.”<sup>69</sup>

Mr. Suggs integrates into this discussion a history of the women’s rights movement, which, after essentially going dormant around 1920, when women received the right to vote, became active again in the mid-1960s with the 1963 publication of Betty Friedan’s *The Feminist Mystique*.<sup>70</sup> He explains how, in 1970, women began to file suits against colleges and universities to receive equal treatment in the faculty hiring process.<sup>71</sup> This activism led Congress to pass Title IX, both to fill the gap in protection between Title VI and Title VII and to address the very real problem of discrimination against women in higher education that resulted from the fact that colleges and universities had denied that Title VII applied to faculty hiring.<sup>72</sup>

Chapter 4 discusses the battles fought to develop the implementing regulations relevant to athletics, finally published in 1975—a process that took twice as long as usual for such an effort.<sup>73</sup> While most of the regulatory scheme proved straightforward—an observation borne out by the fact that the Department of Education has not had to issue clarification after clarification to explain equality in educational programs and activities other than athletics—athletics presented a tremendous challenge.<sup>74</sup> Divergent attitudes among the stakeholders in the collegiate athletic enterprise merely complicated matters. While women’s groups insisted on complete equality, with an ultimate goal of truly coeducational teams, they realized that the existing lack of skill and training among women at that time would hamper their efforts to join men’s teams, so instead opted for a “separate until equal” approach.<sup>75</sup> The AIAW, which had control of women’s sports in the way that the NCAA had control of men’s sports, lobbied for separate women’s programs to accommodate its philosophical approach to women’s athletics, but insisted on equal funding, which would provide more opportunities for women.<sup>76</sup> The NCAA and other men’s athletic organizations, along with the educational institutions themselves, insisted that Title IX did not apply to athletics.<sup>77</sup>

Ultimately, the regulations released by the Department of Health, Education, and Welfare (HEW) in 1975 made it clear that Title IX did apply to athletics,<sup>78</sup> and also “put to rest the idea that athletics programs could satisfy gender-equity obligations simply by allowing women to try out for traditionally male teams.”<sup>79</sup> But, as Mr. Suggs points out, with the inclusion of items such as the provision of

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69. *Id.* at 36.

70. *Id.* at 38.

71. *Id.* at 39.

72. *See id.* at 38–39.

73. *Id.* at 82. A typical regulatory process lasts about eighteen months, while the Title IX regulatory process required three years. *Id.*

74. *See id.* at 66–67.

75. *See id.* at 70.

76. *Id.*

77. *See id.* at 70–71.

78. 34 C.F.R. § 106 (2005).

79. SUGGS, *supra* note 1, at 72.

academic tutors,<sup>80</sup> “[t]he regulations seem to have been written with the idea of male athletes at a college like Penn State in mind, not female athletes at, say, Yale, or any athletes at the high school level.”<sup>81</sup> Thus began the alignment of women’s collegiate sports programs with the competitive model of men’s sports.

Although HEW issued an intentionally vague set of regulations in an attempt to preserve institutional autonomy and to give educational institutions flexibility in their efforts to comply with the law, Mr. Suggs identifies this vagueness as one of the key problems with the enforcement scheme: “The regulations offered no singular statement or formula to define equal opportunity. Instead the rules left it up to HEW to decide whether an institution was in compliance.”<sup>82</sup> The NCAA council complained that “the generality of the regulations has pushed colleges and universities to look for safest harbors and simplest routes to Title IX compliance, trying to find numbers and formulas to immunize themselves against lawsuits.”<sup>83</sup> Colleges and universities complained that the regulations breached institutional autonomy and academic freedom.<sup>84</sup>

The 1975 regulations gave educational institutions three years, until July 21, 1978, to come into compliance with Title IX.<sup>85</sup> As that date approached, however, enforcement efforts stalled in anticipation of a new policy interpretation, on which HEW had begun work in 1978, to address the vagueness complaints.<sup>86</sup> Ironically, in clarifying the regulations, this 1979 Policy Interpretation also ended up restricting how the regulations could be interpreted and, thus, further limited institutional autonomy.<sup>87</sup> In fact, as Mr. Suggs points out later in the book, in 2002, while testifying before a federal commission reviewing Title IX, Brown University’s general counsel “argue[d] that the government ought to reverse the 1979 policy interpretation . . . to preserve institutional autonomy.”<sup>88</sup>

In Chapter 5, Mr. Suggs discusses the lackluster approach to Title IX enforcement on the part of the Department of Education’s Office of Civil Rights (DED-OCR),<sup>89</sup> and the similarly lackluster approach to compliance that existed throughout much of the 1980s on the part of educational institutions. He includes brief discussions of some of the early Title IX cases, including *Cannon v.*

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80. See 34 C.F.R. § 106.41(c)(5)–(6) (2005).

81. SUGGS, *supra* note 1, at 72.

82. *Id.* at 75.

83. *Id.*

84. *Id.* at 76–77.

85. 34 C.F.R. §§ 106.1, 106.41(d) (2005).

86. See SUGGS, *supra* note 1, at 81–83.

87. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

88. SUGGS, *supra* note 1, at 123.

89. In 1979, Congress split the Department of Health, Education, and Welfare (HEW) into the Department of Education (DED) and the Department of Health and Human Services, and gave Title IX enforcement authority to DED. Department of Education Organization Act of 1979, 20 U.S.C. § 3411 (2000). The DED adopted the original HEW policies as its own. 20 U.S.C. § 3505(a) (2000). See also Establishment of Title 34, 45 Fed. Reg. 30,802 (May 9, 1980) (establishing Title 34 of the C.F.R.).

*University of Chicago*,<sup>90</sup> which gave private plaintiffs the right to sue to enforce Title IX,<sup>91</sup> and *Grove City College v. Bell*,<sup>92</sup> which made Title IX applicable only to educational programs and activities that directly received federal funds and, consequently, also effectively gutted Title IX with regard to athletics.<sup>93</sup> Within weeks of the 1984 *Grove City* decision, DED-OCR “closed files on active investigations, including twenty-three involving large universities, and narrowed or reinterpreted twenty-four more.”<sup>94</sup> Members of both parties in Congress failed in their attempts to pass legislation to overturn the effects of *Grove City* at least three times, in 1984, 1985, and 1987, before finally succeeding in 1988 after overriding a presidential veto.<sup>95</sup> These judicial, legislative, and executive branch actions forestalled the application of Title IX to athletics for most of the 1980s.

Mr. Suggs also discusses how, during this same time, college and university sports itself underwent “seismic changes”<sup>96</sup> stemming from a number of events: a 1984 U.S. Supreme Court ruling that the NCAA could no longer exercise its decades-long monopoly over the television broadcast of college football games;<sup>97</sup> the advent of ESPN and other cable television channels that had money to pay colleges and universities to televise various sporting events twenty-four hours per day, seven days per week;<sup>98</sup> and a number of scandals within college athletics, including rules violations, recruiting violations, inadequate educational outcomes for student-athletes, and the first-ever NCAA “death penalty” imposed on Southern Methodist University’s football program in 1987.<sup>99</sup> With all of these events, plus President Reagan’s 1988 veto of the Civil Rights Restoration Act of 1987, “newspapers also started asking hard questions about whether schools had done enough to comply with Title IX.”<sup>100</sup> At the same time that the public became aware of the applicability of the law to athletics, “college presidents and NCAA officials began talking about the responsibilities they had toward female athletes.”<sup>101</sup>

In 1992, the NCAA published its first Gender Equity Report and formed a Gender Equity Task Force “to study the status of, and problems facing, women in college sports.”<sup>102</sup> Through the work of this committee, the real problem with

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90. 441 U.S. 677 (1979).

91. *Id.* at 689–708. See SUGGS, *supra* note 1, at 84.

92. 465 U.S. 555 (1984).

93. *Id.* at 570–75. See SUGGS, *supra* note 1, at 88–89.

94. SUGGS, *supra* note 1, at 89.

95. *Id.* at 90–92. See also Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 1687–88 (2000) (making Title IX applicable to all of the programs and activities of a postsecondary institution when any part of the institution receives federal funds).

96. SUGGS, *supra* note 1, at 92.

97. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

98. SUGGS, *supra* note 1, at 92–93.

99. See *id.* at 93.

100. *Id.*

101. *Id.*

102. *Id.* at 94.

achieving equity, in Mr. Suggs's view, became clear: "[T]he key issue was what to do about football and its ravenous appetite for equipment and personnel."<sup>103</sup> Despite the problems posed by the size and expense of a typical football team, the committee recommended that member institutions work toward proportionality. Because "[t]his goal threatened to foment a revolt among the larger football-playing institutions,"<sup>104</sup> however, the NCAA instead endorsed a principle that stated simply that "all colleges ought to comply with the government's gender-equity regulations."<sup>105</sup> The NCAA did not act on the committee's recommendation to increase scholarship limits for women's sports, but did agree to add "emerging sports"—including "rowing, ice hockey, team handball, water polo, synchronized swimming, archery, badminton, bowling, and squash"—for women.<sup>106</sup> Mr. Suggs notes, with some irony, that "many of these had been recognized as varsity sports during the AIAW era, but did not 'emerge' during the first decade of the NCAA's involvement in women's sports."<sup>107</sup> Again, this raises the question of what women's college and university sports might have developed into on their own had the AIAW not continued the historical suppression of competition in women's sports. Might interest have continued to develop in these sports, thus obviating the need to develop *new* interest in these particular sports today?

#### HISTORY OF LEGAL CHALLENGES TO TITLE IX

In Chapter 7, Mr. Suggs presents a history of the legal challenges to Title IX, briefly discussing some of the cases from the early 1990s, including: *Franklin v. Gwinnett County Public Schools*,<sup>108</sup> which held that a private plaintiff could sue for monetary damages, in addition to injunctive and declaratory relief, for a Title IX violation;<sup>109</sup> *Favia v. Indiana University of Pennsylvania*,<sup>110</sup> one of the first lawsuits successfully brought by a female student-athlete whose team had been dropped;<sup>111</sup> and *Roberts v. Colorado State University*,<sup>112</sup> the first case in which a court had given the 1979 Policy Interpretation "great deference," even though the executive branch had not issued it through the normal rulemaking process.<sup>113</sup> To lawyers familiar with the details of these cases, Mr. Suggs's discussion will seem rather inadequate, as he does not delve into the specific situations at each institution that caused the courts to side with the plaintiffs.

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103. *Id.*

104. *Id.* at 95.

105. *Id.*

106. *Id.*

107. *Id.*

108. 503 U.S. 60 (1992).

109. *Id.* at 76. See SUGGS, *supra* note 1, at 105–06.

110. 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

111. See SUGGS, *supra* note 1, at 106–08.

112. 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom.* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).

113. *Roberts*, 814 F. Supp. at 1510. See SUGGS, *supra* note 1, at 107–08.

Although he provides more detail in his discussion of the most seminal Title IX case of the decade, *Cohen v. Brown University*,<sup>114</sup> Mr. Suggs puzzlingly omits any exploration of the litigants' motivations, which would have added an enlightening dimension to the discussion.<sup>115</sup> He leaves a number of questions unanswered, including:

- Why sue Brown University (Brown), of all possible defendants?<sup>116</sup> Mr. Suggs explains that "45 percent of Brown athletes were female. That was well in excess of the national average, [although] short of the undergraduate population at Brown, which was 51 percent female."<sup>117</sup> In fact, at the time, Brown offered "an exemplary array of sports opportunities for

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114. 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) (trial on the merits), *cert. denied*, 520 U.S. 1186 (1997). See SUGGS, *supra* note 1, at 108–24.

In *Cohen*, Brown University (Brown) had demoted two women's teams and two men's teams from university-funded varsity status to donor-funded varsity status as a cost-saving measure. The female student-athletes on the affected teams sued Brown to have their teams restored to university-funded varsity status. In applying the three-part test for effective accommodation, the federal courts determined that Brown failed to satisfy any of the three criteria. First, Brown did not satisfy Title IX on the basis of substantial proportionality because, at the time, women comprised 46.7% of the student body, but only 36.7% of student-athletes before the cutbacks and 36.6% after the cutbacks. Second, the courts concluded that Brown did not exhibit a continuing history of program expansion as described by the second prong because it had added only one women's varsity sport in the fifteen years preceding the lawsuit, despite the fact that, during this period, women had consistently comprised 48% to 49% of Brown's undergraduates, but no more than 39% of Brown's student-athletes. Finally, in cutting viable teams, the courts determined that Brown did not satisfy the interests and abilities of its female student-athletes, as described by the third prong. Thus, the courts ordered Brown to develop a Title IX compliance plan. See *generally* 809 F. Supp. at 991–93 (describing the federal district court's analysis of Brown's athletic program with regard to the three-part test for effective accommodation).

115. Jessica Gavora, for example, describes Brown as the unfortunate, but deliberate, target of attorneys and women's sports advocates who had hoped simply to pressure the university into settling the plaintiffs' claims and ultimately reaping for themselves hefty fees in the process. Brown, on the other hand, sought to maintain its institutional autonomy in the face of challenges brought by carpetbagging litigators. GAVORA, *supra* note 2, at 74.

116. Obviously, the plaintiffs, as Brown students, could sue only their university. But why did other women's advocacy groups jump in wholeheartedly to support them, taking direct aim at Brown, rather than directing their energies at more egregious violators of the law? In Jessica Gavora's view, "the targeting of Brown had been no accident." *Id.* at 75. Those supporting the student-athlete plaintiffs, including attorneys who had made careers out of pressuring educational institutions into making accommodations for female student-athletes in exchange for a promise not to sue, and a Brown alumna who served as director of advocacy of the Women's Sports Foundation, together "set out to make Brown an example of a new regime of Title IX enforcement." *Id.* at 71.

117. SUGGS, *supra* note 1, at 115. This percentage of female student-athletes includes university-funded and unfunded varsity teams for women and one unfunded coed varsity team. Here, Mr. Suggs also points out some facts missing from the courts' opinions, and accuses the district court judge of "creative accounting" when he calculated that women comprised only 37% of Brown's student-athletes. *Id.* at 111–12 & n.22.

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its female students,”<sup>118</sup> second only to the women’s athletic program at Harvard University.<sup>119</sup> Brown, as a member of the Ivy League, did not offer athletic scholarships and did not have a Division I-A football program to attack.<sup>120</sup> Brown simply did not seem a likely target for a major test of Title IX.

- Why did Brown litigate the case as it did? By arguing key issues and developing a thorough record at the preliminary injunction phase of the case, which has a lower threshold for finding in favor of maintaining the *status quo* (i.e., restoring the teams to their original status), Brown effectively foreclosed its ability to develop the record further at the trial on the merits, or to include new arguments in later stages of the case.<sup>121</sup>
- Why didn’t Brown merely restore the downgraded teams to their prior status pending trial? Although that move would have cost Brown the money that it had intended to save by downgrading the teams, that cost could not have exceeded the legal costs of its preliminary injunction activities.
- Why, before the trial on the merits, did Brown settle the “equal treatment” issues in the case,<sup>122</sup> leaving for trial only the “effective accommodation” issue,<sup>123</sup> thereby foreclosing the court from evaluating the entirety of Brown’s athletic program as the DED-OCR investigator’s manual requires?<sup>124</sup> Did Brown think that the equal-treatment issues would merely strengthen the plaintiffs’ contention that the university discriminated against women in its athletic program?

Mr. Suggs devotes much of his discussion of this case to the idea proffered by Brown at trial that women have less interest in sports than men, so the university could, within the bounds of the law, offer fewer participation opportunities to

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118. GAVORA, *supra* note 2, at 73.

119. *Id.* See also SUGGS, *supra* note 1, at 108–10.

120. SUGGS, *supra* note 1, at 108.

121. See, e.g., Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality*, 27 J.C. & U.L. 447, 477–78 (2000) (discussing Brown’s strategy in litigating the case).

122. “Equal treatment” issues involve a so-called “laundry list” of nine benefits attendant to athletics participation, listed at 34 C.F.R. § 106.41(c)(2)–(10) (2005), plus athletic financial assistance, listed at 34 C.F.R. § 106.37(c) (2005).

123. “Effective accommodation” issues involve the rates of participation of male and female student-athletes. 34 C.F.R. § 106.41(c)(1) (2005).

124. Note, though, that the DED-OCR Title IX investigator’s manual states that “[a]n investigation may be limited to less than [the entirety of an athletic program] where unique circumstances justify limiting a particular investigation . . . .” DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 7 (Valerie M. Bonnette & Lamar Daniel eds., 1990).

women.<sup>125</sup> Unfortunately, this entire discussion fails to make one point critical to understanding the result of the case: that is, that Brown had on its campus women interested in and capable of participating in athletics at the varsity level and, by downgrading their teams in the absence of proportionality between the percentage of female student-athletes and female undergraduates, Brown could not claim that it had fully and effectively accommodated the interests and abilities of its female students.<sup>126</sup> Here, Mr. Suggs misses an opportunity to explore why Brown thought “that it was satisfying the interests and abilities of women more than adequately,” given the obvious examples of unmet interest existing on its campus at the time it downgraded the teams.<sup>127</sup>

Mr. Suggs focuses his analysis in this section on the quest for proportional representation of women among student-athletes. His discussion emphasizes the facts and the legal analyses that lead to the (absolutely incorrect) conclusion that Title IX *requires* proportionality. By omitting the facts and legal analyses by which the courts in *Favia*, *Roberts*, and *Cohen* had determined that the educational institution defendants had failed to meet either the “history of continuing program expansion”<sup>128</sup> test or the “full and effective accommodation of interests and abilities”<sup>129</sup> test, Mr. Suggs leaves the absolutely incorrect impression that the courts emphasized “substantial proportionality” over the other two tests.<sup>130</sup> He reinforces this theme in the paragraphs that conclude Chapter 7:

Does the [1979] policy interpretation and the First Circuit’s understanding of it mandate quotas? By any measure it gives colleges powerful incentives to structure their [athletic] programs so that women get a high percentage of slots on varsity teams.

But if Brown officials were correct, and women truly are less interested in sports than men, then any college in the country ought to be able to accommodate the interests of female students by adding roster spots. And they should be able to stop long before they reach the proportionality standard.

If they cannot, that would prove Brown wrong at the outset, because it would demonstrate that women *are* as interested in sports as men.<sup>131</sup>

This nonsensical conclusion evidences either a thorough misunderstanding of the law, or a bias so deep that it prevents Mr. Suggs from seeing that the courts in

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125. SUGGS, *supra* note 1, at 112–17.

126. *See generally* Cohen v. Brown Univ., 809 F. Supp. 978, 991–93 (D.R.I. 1992). The federal district court explained that Brown failed the interests and abilities prong of the three-part test for effective accommodation because the university had “cut[] off varsity opportunities where there is great interest and talent, [while the university] still ha[d] an imbalance between men and women varsity athletes in relation to their undergraduate enrollments.” *Id.* at 992.

127. SUGGS, *supra* note 1, at 113.

128. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

129. *Id.*

130. *See* SUGGS, *supra* note 1, at 105–24.

131. *Id.* at 124.

these cases actually did undertake a thorough analysis of the facts and actually did weigh those facts against the law before arriving at their conclusions that, in the absence of proportionality, the defendant institutions could not cut women's teams. While an issue does exist regarding *whether* the courts should have relied so heavily on the three-part test contained in the 1979 Policy Interpretation, it cannot be doubted that the courts have attempted to apply that test properly and fairly.

#### THE POLITICS OF TITLE IX ENFORCEMENT

Mr. Suggs discusses Title IX enforcement and compliance efforts during the Clinton Administration in Chapter 8, and during the second Bush Administration in Chapter 10. Taken together, these chapters show that, three decades after Congress enacted Title IX, enforcement and compliance issues still raise questions and create controversy. Enforcement now has become a matter of politics more than anything else.

Mr. Suggs points out that “[t]he briefs submitted in the [*Cohen*] case show that a coalition of the angry was forming [in the early-to-mid 1990s]. Coaches, athletes, and a variety of new players were enraged by what they saw as a law penalizing individual men as a means of appeasing a group of women.”<sup>132</sup> And, even though Congress had settled the question of the applicability of Title IX to athletics with the passage of the Civil Rights Restoration Act of 1987, DED-OCR “had been extraordinarily passive on Title IX issues in athletics.”<sup>133</sup> The mid-to-late 1990s also saw the first cases filed by men, who sued their educational institutions for reverse discrimination when their teams were cut: *Kelley v. Board of Trustees of the University of Illinois*,<sup>134</sup> *Neal v. Board of Trustees of California State University*,<sup>135</sup> and *Miami University Wrestling Club v. Miami University*.<sup>136</sup> The results of these cases, uniformly decided in favor of the educational institutions, “attracted the attention of conservative groups who previously had had nothing to do with sports.”<sup>137</sup> And, by appointing Mexican American Legal Defense and Education Fund attorney Norma V. Cantu as assistant secretary of education for civil rights in 1993, and then stepping up Title IX enforcement efforts, President Bill Clinton merely “[f]ann[ed] the flames for conservatives.”<sup>138</sup>

Mr. Suggs recounts the many events that occurred during the Clinton Administration that altered the Title IX enforcement scheme. In 1994, Congress

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132. *Id.* at 126.

133. *Id.* at 128.

134. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994). See SUGGS, *supra* note 1, at 126.

135. No. CV-F-97-5009 REC, 1999 WL 1569047 (E.D. Cal. Feb. 22, 1999), *rev'd*, 198 F.3d 763 (9th Cir. 1999). In 2002, citing the law of the case doctrine, the Ninth Circuit denied the plaintiffs' appeal of a grant of summary judgment in favor of the defendant university. *Neal v. Bd. of Trustees of the Cal. State Univ.*, 51 Fed. Appx. 736 (9th Cir. 2002), *cert. denied*, 540 U.S. 874 (2003). See SUGGS, *supra* note 1, at 136–37.

136. 195 F. Supp. 2d 1010 (S.D. Ohio 2001), *aff'd*, 302 F.3d 608 (6th Cir. 2002). See SUGGS, *supra* note 1, at 135–36.

137. SUGGS, *supra* note 1, at 126–27.

138. *Id.* at 127.

passed the Equity in Athletics Disclosure Act (EADA),<sup>139</sup> thus requiring colleges and universities to report various statistics relevant to their men's and women's athletic programs.<sup>140</sup> In 1996, DED-OCR issued yet another Title IX clarification, ostensibly to help educational institutions find ways to comply with the law, but actually frustrating parties on all sides of the issue.<sup>141</sup> In 1997, to mark the twenty-fifth anniversary of Title IX, the National Women's Law Center accused twenty-five colleges and universities, representing a cross-section of NCAA Division I institutions, of failing to meet Title IX scholarship requirements—complaints that, although based on flawed data, nevertheless resulted in twenty-five DED-OCR investigations.<sup>142</sup> Also that year, the Equal Employment Opportunity Commission published guidelines on coaches' compensation.<sup>143</sup> In this part of his discussion, Mr. Suggs makes it clear that the scope of governmental regulation had expanded tremendously—and, concomitantly, institutional autonomy had decreased substantially—in the time since HEW issued that first set of “intentionally vague” regulations in 1975.<sup>144</sup>

In the discussion that concludes Chapter 8, Mr. Suggs catalogs the most common complaints about Title IX at the close of the twentieth century. He correctly takes issue with the popularly accepted notion that Title IX caused a drop in the total number of male college and university student-athletes, pointing out how sources disagree as to the actual effect of Title IX on men's participation opportunities.<sup>145</sup> He does point out, however, that NCAA Division I educational institutions, which have dropped an average of more than twenty male student-athletes per institution, have experienced the greatest losses of male student-athletes, compared to an average loss of only one participation opportunity per Division II or III institution.<sup>146</sup>

In the last paragraphs of the chapter, however, Mr. Suggs again reveals his biases. He identifies a “common complaint among athletics officials and Title IX opponents [about] the way colleges choose to add women's sports.”<sup>147</sup> He argues that men who have trained for years to participate in their sports lose opportunities to participate or to earn scholarships in college or university because educational institutions have opted instead to create women's teams in sports such as rowing, and then find women, perhaps with no prior experience in the sport, to fill out a roster.<sup>148</sup> Mr. Suggs neglects to mention, however, that creating these opportunities for women in colleges or universities has, in turn, created a demand for sports such as rowing at the high school level, leading to a new generation of

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139. Pub. L. No. 103-382, § 360B, 108 Stat. 3518, 3969 (codified in scattered sections of 20 U.S.C.).

140. SUGGS, *supra* note 1, at 132.

141. *See id.* at 129–32.

142. *Id.* at 132–33.

143. *Id.* at 134.

144. *See id.* at 135–41.

145. *See id.*

146. *Id.* at 139.

147. *Id.* at 140.

148. *Id.*

young women arriving at their colleges and universities with developed skills and interest in a previously unpopular sport.<sup>149</sup>

In Chapter 10, Mr. Suggs explores how the current Bush Administration has made some attempts to scale back the negative side-effects of stepped-up Title IX enforcement, particularly in the cuts to men's teams. In the 2000 election, nearly all of the presidential candidates of both parties supported the idea of equal opportunities for women in athletics, although the Republican candidates expressed the hope that women could achieve equality without reducing opportunities for men. During this time, the National Wrestling Coaches' Association (NWCA) filed suit against DED-OCR to challenge its policy interpretations,<sup>150</sup> and the Secretary of Education convened a presidential commission to seek public comment on, and develop recommendations for, reforming the legal and regulatory framework of Title IX.<sup>151</sup>

As with most of his case summaries, Mr. Suggs discusses the failed NWCA lawsuit only briefly. He mentions it merely as the apparent catalyst in the Bush Administration's decision to revisit the Title IX regulatory scheme. Mr. Suggs nevertheless does include comments from women's advocates who expressed displeasure at the administration's decision not to give "even a passing reference to underlying support for the regulations and policies" in the administration's legal briefs in the case.<sup>152</sup> Again, in failing to explore the parties' motivations for litigating the case as they did, Mr. Suggs misses an opportunity to provide some balance.<sup>153</sup>

Mr. Suggs devotes the vast majority of this chapter to the work of the blue-ribbon panel convened by DED in 2002 to review Title IX, strengthen compliance, and ensure fairness in enforcement.<sup>154</sup> He explores how controversy, once again, surrounded the commission's work. Women's groups contended that "[t]he very existence of the commission . . . was evidence of the [Bush] administration's lack of commitment to upholding the law."<sup>155</sup> Other groups complained about the

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149. "In fact, the growth at the collegiate level for women's rowing also has resulted in a concomitant growth among high schools participating in women's rowing." Bill Jurgens, *Rowing is Stroke of Genius for Schools*, NCAA NEWS ONLINE, May 23, 2005, [http://www2.ncaa.org/media\\_and\\_events/association\\_news/ncaa\\_news\\_online/2005/05\\_23\\_05/editorial/4211n05.html](http://www2.ncaa.org/media_and_events/association_news/ncaa_news_online/2005/05_23_05/editorial/4211n05.html). This, then, presents an example of how creating opportunities for women at the collegiate level can create interest and increase participation numbers for girls at the high school level.

150. Nat'l Wrestling Coaches Ass'n v. U.S. Dep't. of Ed., 263 F. Supp. 2d 82 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *rehearing and rehearing en banc denied*, 383 F.3d 1047 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005).

151. SUGGS, *supra* note 1, at 157-74.

152. *Id.* at 157.

153. Undoubtedly, the Bush Administration chose to litigate the case on procedural, rather than substantive, grounds as a safer way of having the case dismissed with minimum disruption to the existing legal framework. Support, or lack thereof, for the law and the current enforcement scheme should not have played any role at this stage of the litigation.

154. *See* SUGGS, *supra* note 1, at 158-74.

155. *Id.* at 158.

composition of the commission.<sup>156</sup> Mr. Suggs, however, takes issue with the commission's work. He criticizes DED for the "curious" list of questions presented to the commission for study.<sup>157</sup> He derides the manner in which the commission operated: "It was an interesting way to make policy: [sic] Athletics officials, lawyers, and academics flinging ideas at each other around a circle of tables in a dim hotel conference room, while an audience of advocates, reporters, and more lawyers looked on from the peanut gallery."<sup>158</sup> He provides select snippets of the commissioners' discussions and debates.<sup>159</sup> He characterizes the commission's final meeting as "a circus,"<sup>160</sup> and uses terms such as "sparring" and "arguing" to describe conversations, along with words like "heated" and "confused" to describe the atmosphere.<sup>161</sup> He paints a picture of discord far different from the civil, measured tone that emerged in the commission's final report.<sup>162</sup> Clearly, Mr. Suggs appreciated neither the process nor the result of this effort, and concludes his discussion with a brief recap of the "swirl of controversy"<sup>163</sup> that the report caused—a not altogether unpredictable outcome of yet another attempt to find a way to make the complex and controversial regulatory scheme work.

#### THE TRAGEDY AND TRIUMPH OF TITLE IX

Finally, in Chapters 11 and 12, Mr. Suggs arrives at the theme of his book. In Chapter 11, he discusses the "tragedy" of Title IX: that female student-athletes have been "sucked into" the mess of the "nakedly commercial" college and university sports enterprise.<sup>164</sup> In Chapter 12, he questions whether the law has resulted in any triumphs at all, before making only a passing reference to how the law has actually given women and girls the opportunity to participate in athletics on the same terms as men—the actual goal of Title IX and its athletic regulatory scheme.<sup>165</sup>

In discussing the "tragedy" of Title IX, Mr. Suggs presents a list of the ills that have since befallen women's sports and female student-athletes, including: physiological and emotional problems such as eating disorders, amenorrhea, early-onset osteoporosis, and knee-ligament damage;<sup>166</sup> graduation rates that, while still

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156. *See id.*

157. *See id.* at 159–60.

158. *Id.* at 161.

159. *See id.* at 161–63.

160. *Id.* at 165.

161. *Id.* at 167, 169.

162. U.S. DEP'T OF EDUC., SECRETARY'S COMM'N ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY (2003).

163. SUGGS, *supra* note 1, at 171.

164. *Id.* at 175.

165. *See id.* at 195.

166. *Id.* at 177, 185–86. Yet, eating disorders, for example, are hardly a phenomenon unique to college and university sports. In fact, "[a]norexia or bulimia in florid or subclinical form now afflicts 40 percent of [all] women at some time in their college career." Hara Estroff Marano, *A Nation of Wimps*, PSYCHOLOGY TODAY, Nov 1, 2004, at 62.

higher than those of male student-athletes and female non-athletes, do not meet some other, higher standard that he does not define;<sup>167</sup> a growing shortage of athletic participation opportunities for women of color;<sup>168</sup> and, worst of all, intense and troublesome competition.<sup>169</sup>

He then repeats the arguments presented in earlier chapters that the intense competition has given rise to a number of new and objectionable trends in girls' and women's sports: recruiters pressuring high school girls to make college and university decisions earlier and earlier in high school; girls competing year-round on club teams; girls competing for athletic scholarships; and girls specializing in one sport too early.<sup>170</sup> He discusses at great length two major "dangerous trends" identified by unidentified "coaches and outside critics of college sports"<sup>171</sup>—namely, "the prioritization of skill development at the expense of academic and social development, and the steady whitening of the sports population."<sup>172</sup> However, Mr. Suggs offers no credible evidence that directly ties these trends to Title IX and, in fact, completely ignores other possible causes of these trends.<sup>173</sup>

In discussing how young men and women sacrifice academic development for athletic development, Mr. Suggs presents statistics that show an academic achievement gap between student-athletes and the overall undergraduate population.<sup>174</sup> Yet, he neglects to explore other possible explanations for this achievement gap, including perhaps intense competition among colleges and universities to recruit a student body with the highest possible credentials to improve their position in various competitive rankings. Colleges and universities face a complex and intense set of pressures to excel not only on the playing field, but also in the pages of *U.S. News and World Report*, *The Princeton Review*, and other publications that, for commercial purposes, attempt to rank academic institutions on the basis of somewhat artificial criteria. Furthermore, any student

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167. SUGGS, *supra* note 1, at 177.

168. *Id.*

169. *Id.*

170. *Id.* And yet again, the responsibility for this unhealthy trend should be laid at the feet, not of Title IX, but of those most responsible for it—the parents. See Marano, *supra* note 166, at 70 (arguing that parents "have micromanaged their kids' lives because they've hitched their measurement of success to a single event whose value to life and paycheck they have frantically overestimated"—that is, admission to a prestigious college or university).

171. SUGGS, *supra* note 1, at 178.

172. *Id.* at 178–79.

173. At least one other author has identified one other significant reason for today's "sports culture run amok"—the adults. See, e.g., David Oliver Relin, *Who's Killing Kids' Sports?* PARADE MAGAZINE, Aug. 7, 2005, at 4. As the author states, "With pro scouts haunting the nation's playgrounds in search of the next LeBron [James] or Freddy [Adu], parents and coaches are conspiring to run youth-sports leagues like incubators for future professional athletes." *Id.* at 4. He continues, "Some adults . . . are pushing children toward unrealistic goals like college sports scholarships and pro contracts." *Id.* The article also goes on to discuss the "terrible imbalance between the needs kids have and the needs of the adults running their sports programs . . . Above all, kids need to have fun. Instead, adults are providing unrealistic expectations and crushing pressure." *Id.* at 4–5 (quoting Dr. Bruce Svare, director of the National Institute for Sports Reform) (internal quotation marks omitted).

174. See SUGGS, *supra* note 1, at 178–80.

who devotes a significant amount of time to any outside activity—whether athletics, extracurricular clubs and activities, or work—may earn lower grades in the classroom than students not similarly engaged (or distracted).

Similarly, the “whitening of sports” has not occurred simply because of Title IX. True, some of the emerging sports do attract more white students, but others attract more women of color.<sup>175</sup> The problem, as Mr. Suggs actually points out, results instead from socioeconomic differences.<sup>176</sup> Wealthier parents can better afford skills-building camps and resumé-building private (club) teams and, thus, can expose their children to the top recruiters, who focus their efforts not on school-by-school recruiting, but on club recruiting.<sup>177</sup>

Importantly, however, these phenomena affect both male and female student-athletes. It is, therefore, unclear why Mr. Suggs chooses to blame Title IX. His concluding thought in this chapter might provide a clue:

Chronicling these problems is not supposed to be an indictment of women’s sports, or a suggestion that women should not be participating in athletics. Instead, in adapting to the highly competitive, often ethically questionable world of men’s scholastic sports, women face certain challenges that they did not during the era when women’s sports were controlled by physical-education departments. Does that mean something is wrong with women, or with the men’s system?<sup>178</sup>

Clearly, Mr. Suggs intends his thesis to lead the reader to the conclusion that something is wrong with the men’s system, and women are worse off now that Title IX has allowed them to behave as badly as men.<sup>179</sup> But in his analysis, he fails to consider one other possibility: that, perhaps, the early women’s sports advocates, by artificially suppressing women’s natural desire to compete in athletics, also inhibited the ability of women to develop their own competitive, high-quality programs to meet their unique needs. Once faced with the Title IX mandate to remedy the legacy of these historical, forced, and artificial inequities, college and university administrators had limited options—the most obvious of which included either bringing men’s programs in line with women’s programs by dampening the hypercompetitive, commercial environment of college sports, or making women’s programs as similar as possible to men’s programs in all things, good and bad.

Finally, in Chapter 12, Mr. Suggs grudgingly admits that Title IX “has been extraordinarily but not completely successful.”<sup>180</sup> He then launches into a recap of the ills still plaguing college and university sports.<sup>181</sup> For example, despite the growth in women’s sports spurred on by Title IX and other societal forces, women

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175. *See id.* at 95.

176. *See id.* at 180–82.

177. *See id.* at 180–81.

178. *Id.* at 187.

179. For a work that explores this idea thoroughly and more persuasively, *see* PORTO, *supra* note 2.

180. SUGGS, *supra* note 1, at 188.

181. *See id.* at 188–95.

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still do not enjoy equal status in collegiate athletic programs primarily because of the iconic status of football.<sup>182</sup> Financial issues still affect decisions about what sports to field and how to compete successfully.<sup>183</sup> The NCAA continually struggles to improve the academic performances of student-athletes by adding more and more restrictions on academic eligibility.<sup>184</sup>

Amazingly, in discussing how to fix the law, Mr. Suggs actually suggests that “[a] simpler process would be to issue a new policy interpretation, essentially overriding the 1979 interpretation.”<sup>185</sup> His own research should have convinced him of the impossibility of this task.<sup>186</sup> Chapters 8 and 10, in particular, give more examples than necessary to come to the conclusion that none of the groups that have an interest in the state of college and university athletics, at this point, will cede any ground in an effort to reform the Title IX regulatory framework. Prior efforts at reform have proved stunningly unsuccessful. With his years of reporting on the law and its impact on college and university athletics in particular, Mr. Suggs either should have found a workable solution or conceded the futility of any efforts at reform.

This entire discussion misses the point of Title IX, however—a point that Mr. Suggs finally states, clearly, at the end of his work:

Women now have a wealth of opportunities to find sports that best suit them and offer all the benefits of an athletic lifestyle. With only a modicum of talent, a female athlete can play soccer in recreational leagues as a child, compete on varsity teams in high school and college, and find adult leagues in most cities for the rest of her life. The same holds true for many other sports.

This is the triumph of Title IX. Parents now have the same expectations of their daughters as they do of their sons. In most cases, little girls have the chance to learn the same lessons, dream the same dreams, and shoot for the same goals as little boys.

And any girl who expresses a desire to play college sports, and shows the willingness to work hard to be an athlete, will find herself a place on the team.<sup>187</sup>

Far from being a “triumph?” as Mr. Suggs titles his concluding chapter, this truly is a “triumph.”

#### CONCLUSION

Mr. Suggs has written a book that certainly adds to the story of Title IX, by presenting a historical overview of the development of women’s sports together with the political and legal wranglings over the development of the law and its

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182. *See id.* at 188–89.

183. *See id.* at 191–93.

184. *See id.* at 194–95.

185. *Id.* at 190.

186. *See id.*

187. *Id.* at 195.

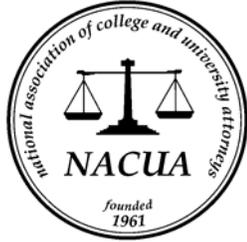
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regulatory framework. His ideas inspire a deeper look into the societal and cultural factors that led to the enactment and enforcement of Title IX, and raise interesting, albeit unanswered, questions about the factors that influenced the development of collegiate sports programs over the last century and a half. But he misses the mark when he makes the case for his central theme, that Title IX has ruined women's sports. Over the last thirty years, women's sports certainly have moved closer to the commercialized, competitive model of men's sports, and these changes have altered the nature of women's sports. Realistically, however, the most for which Title IX can be blamed is enabling women to behave as badly as men. A host of other factors, which Mr. Suggs leaves largely unexplored, have also had a tremendous impact on the complex world of college and university sports.

Certainly, the law has brought about some important triumphs, in giving women the opportunity to compete in and excel at athletics. And, certainly, it has brought about some tragedies, particularly in the cuts to men's sports. But for an explanation of the other ills plaguing college and university sports, Mr. Suggs should look beyond Title IX.





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