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ARTICLES

How Courts View Academic Freedom

Michael H. LeRoy 1

In this article, the author discusses a study he conducted in which he analyzed 339 First Amendment rulings from 1964 to 2014 involving First Amendment claims by professors and college instructors against their employers. Institutions won in 73.2% of these rulings. Faculty lost most First Amendment cases involving publishing, classroom activities, protest, social commentary, grants, "campus criticism," and retaliation. In this article, the author argues that the results show that Waters v. Churchill, 511 U.S. 661 (1994), helps institutions by allowing them as employers to limit speech that administrators believe is disruptive to the school. This study empirically supports the view that First Amendment precedents fail to protect the most controversial ideas expressed by faculty in higher education.

Ferguson, Fisher, and the Future: Diversity and Inclusion as a Remedy for Implicit Racial Bias

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This article examines a number of key issues posed by the Supreme Court's recent decision to once again examine the constitutionality of the affirmative admissions system used by the University of Texas at Austin. Its focus is, however, not on the constitutionality of racial preferences, but rather on the obligations imposed on institutions that use such preferences. The article makes two unique contributions to the literature. First, it notes and discusses the role of implicit bias in the current American political and social scene and connects implicit bias to the affirmative action debate. Second, it focuses on legal education as an exemplar of the obligations and opportunities inherent in the use of admissions preferences. This nation's colleges and schools of law are subject to two very specific accreditation obligations imposed by the American Bar Association: the need to engage in affirmative action that results in the admission of a diverse class, and the need to articulate and attain specific educational outcomes. As part of this discussion, the article notes both the disconnect between these two accreditation standards in the current standards

formulation and discusses ways in which law schools can use the insights posed by current social science to achieve positive educational outcomes.

Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges, New Strategies
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Academic programs with clinical components, such as teaching, health science, or social work, pose special challenges both for the student with disabilities and also for the institution. Clinical work typically tests different skills and requires distinct physical or behavioral competencies from classroom work. Students often need different accommodations, modifications, or auxiliary aids from those afforded during classroom coursework, and institutions struggle over whether proposed accommodations in fact work fundamental alteration in programs. Issues may arise when the student seeks admission, begins the clinical component, or fails to succeed in the clinical component. Further complicating this already difficult process, many clinical experiences are conducted at off-site locations and supervised by outside personnel inexperienced in addressing student disability issues. In this article, the authors review developing law related to clinical program admission and to the accommodation of disabilities before, during, and after a student clinical experience. The authors then offer a proposed framework and practical suggestions for addressing the significant challenges posed by clinical programs.

Trusting U.: Examining University Endowment Management
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As a result of the Great Recession, the endowments at the top American schools, posting seemingly limitless gains from the 1990s to the mid-2000s, faced significant losses across a variety of investments. This article focuses on the endowment management practices that resulted in this unprecedented growth and loss to endowment value on a national scale. This article examines the history of university endowments in America and the legal requirements of universities and their endowment managers. The article also furnishes data on the effect of the recent economic recession on university endowments, examining returns under a hypothetical alternative investment strategy that would have resulted in greater appreciation in market value and increased market stability between FY2004 and 2014 for half of the universities in the study sample, and also discusses the prevailing, though useless, cause of action by means of which donors may challenge a university's endowment spending, establishing a correlation between economic recessions and challenged gifts to

universities in the American courts. Finally, this article provides recommendations for universities and their endowment managers to navigate uncertain waters in the modern context and articulates a sensible, sustainable university endowment management standard.

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HOW COURTS VIEW ACADEMIC FREEDOM

MICHAEL H. LEROY*

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I. INTRODUCTION

Because public scholarship means pissing people off.[1]

I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."[2]

A. Context for Research Questions

Academic freedom for professors is an elusive concept.[3] Does this allow them to create a classroom climate that students perceive as harassment?[4] Does academic freedom mean that professors are privileged to ignore campus directives to issue "trauma trigger warnings" when they assign students upsetting materials?[5] Does academic freedom extend to a professor whose apoplectic blog incites followers to send rape wishes to a Ph.D. student at his university?[6]

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1. Scott Jaschik, *Regret Over Tweets on Race*, INSIDE HIGHER EDUC. (May 13, 2015), https://www.insidehighered.com/print/news/2015/05/13/professor-center-debate-over-her-tweet-white-male-students-expresses-regret?width=775&height=500&ifram%E2%80%A6 (quoting Prof. Tressie McMillan Cottom).

2. Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting)

3. *E.g.*, Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), http://chronicle.com/article/My-Title-IX-Inquisition/230489/ ("The more colleges devote themselves to creating 'safe spaces' — that new watchword — for students, the more dangerous those campuses become for professors."); Morton Schapiro, *The New Face of Campus Unrest*, WALL ST. J. (Mar. 18, 2015), http://www.wsj.com/articles/morton-schapiro-the-new-face-of-campus-unrest-1426720308 ("You better have a compelling reason to punish anyone—student, faculty member, staff member—for expressing his or her views, regardless of how repugnant you might find those views.").

4. Bonnell v. Lorenzo, 241 F.3d 800, 803–05 (6th Cir. 2001) (ruling for college that removed professor who caused complaints about constantly using classroom vulgarities, including "fuck," "cunt," and "pussy," and "butt fucking.")

5. Associated Press, *Trauma Warnings Move from Internet to Ivory Tower*, N.Y. TIMES (Apr. 26, 2014), http://www.nytimes.com/aponline/2014/04/26/us/ap-us-college-trigger-warnings.html?_r=0 (reporting that Oberlin College instructs faculty members to '"[u]nderstand triggers, avoid unnecessary triggers, and provide trigger warnings . . . [related to] racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege and oppression.'"). One faculty member believes that Oberlin's "imperative voice" and "massively long list of -isms," could eventually lead to litigation involving a faculty member. *Id.*

6. *E.g.*, Cheryl Abbate, *Gender Based Violence, Responsibility, and John McAdams* (Feb. 9, 2015), https://ceabbate.wordpress.com/2015/01/20/gender-based-violence-responsibility-and-john-mcadams/
(Abate received backlash online through e-mails, in which she was called names such as a "fag enabler," and online comments, in which online forum users claimed, among

My Article considers these types of imponderable scenarios in a comprehensive data analysis of First Amendment court rulings involving college and university faculty as plaintiffs. I derived a sample of 210 published court opinions from 1964 through 2014. The cases, which include appeals, yielded 339 First Amendment decisions. Schools won 73% of First Amendment rulings.[7]

My research provides an empirical perspective for a research literature that is dominated by doctrinal analysis.[8] My conclusions contribute to a wider debate about academic freedom.[9] This research also offers guidance to courts that are ruling in a growing number of campus speech disputes.[10]

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other things, that she "suck[s] cock"); Conor Friedersdorf, *Stripping a Professor of Tenure Over a Blog Post*, ATLANTIC (Feb. 9, 2015), http://www.theatlantic.com/education/archive/2015/02/stripping-a-professor-of-tenure-over-a-blog-post/385280/ (reporting on tenured professor fired for blog post that attacked a graduate student, and prompted others to verbally attack her).

7. Universities, four-year colleges, and community colleges constitute institutions of higher education for this analysis. For economy, I refer to them as schools, but this usage does not include elementary and high schools.

8. See Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010), for an excellent study to read in conjunction with my Article. While lacking the empirical perspective, this study delves deeply into cases from the 1960s. *See* Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 2D 17 (2005); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251 (1989); Mathew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15 (1994); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835 (1993); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006); Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351 (1988); *see also* Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376 (1979) (cited in 10 court opinions); Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299 (2002), for other seminal studies.

9. *See infra* Part V (faculty and campus officials should join in crafting principles of academic freedom that deal with 21st century issues of academic freedom); *see* William G. Bowen & Eugene Tobin, *Commentary: Scott Walker's Test of Academic Freedom*, CHI. TRIB. (June 22, 2015), http://www.chicagotribune.com/news/opinion/commentary/ct-scott-walker-tenure-university-wisconsin-perspec-0623-20150622-story.html.

10. *E.g.*, Keating v. Univ. of S.D., 569 Fed. Appx. 469 (8th Cir. 2014); Benison v. Ross, 765 F.3d 649 (6th Cir. 2014); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Frieder v. Morehead State Univ., 770 F.3d 428 (6th Cir. 2014); Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680 (7th Cir. 2014); Jackson v. Tex. S. Univ., 997 F. Supp. 2d 613 (S.D. Tex. 2014); Meyers v. Cal. Univ. of Penn., 2014 WL 3890357 (W.D. Pa. 2014); Oller v. Roussel, 2014 WL 4204836 (W.D. La. 2014); Simpson v. Alcorn State Univ., 27 F. Supp. 3d 711 (S.D. Miss. 2014).

My main conclusion is that faculty and courts define academic freedom quite differently, as evidenced by my primary finding that faculty lose seventy-three percent of First Amendment rulings. This statistic implies that many professors believe that *all* speech in their classrooms, publications, and public pronouncements is constitutionally protected.[11] My research shows, however, that courts view academic freedom more narrowly.

B. Organization of this Research Article

In Part II, I track the origins of academic freedom.[12] To frame this discussion, I highlight current examples of campus speech codes.[13] The timeline in Part II.A[14] begins in 1754 by denoting the first American college program that was not based on medieval or religious traditions.[15] I chronicle court opinions involving faculty dismissals from 1790 through 1955[16]— the pre-modern era of faculty speech disputes. Part II.B[17] explains the origins of academic freedom as articulated by the association that professors formed to protect their free speech.

This discussion flows into Part III, which analyzes court rulings on faculty speech.[18] In Part III.A I explain how faculty speech disputes were primarily handled without court involvement.[19] Part III.B analyzes how that picture changed as McCarthy-era laws affected professors and forced courts into the First Amendment arena.[20] I explain how Supreme Court precedents shifted, at first protecting faculty from loyalty oaths,[21] but later treating speech controversies more like regular employment disputes.[22] I provide illustrations to demonstrate how courts diminished academic freedom.[23]

Part IV is the heart of my analysis— an explanation of my data and reporting of eleven key fact-findings.[24] Part IV.A discusses how I created

11. *See* Leiter, *infra* note 33.
12. *See infra* notes 30–74.
13. *See infra* notes 30–32.
14. *See infra* notes 39–62.
15. *See infra* note 40.
16. *See infra* notes 47–60.
17. *See infra* notes 63–74.
18. *See infra* notes 75–136.
19. *See infra* notes 75–80.
20. *See infra* notes 81–136.
21. *See infra* note 81.
22. *See infra* notes 93–136.
23. *See infra* notes 100–105; 114–124; 132–136.
24. *See infra* notes 137–206.

the sample and identifies the limits of my methodology.[25] Part IV.B reports the characteristics of the sample,[26] while Part IV.C uses data tables to organize my fact-findings.[27]

Part V has my conclusions.[28] This discussion includes significant caveats. Part VI is an Appendix of all cases in the sample, and is organized by federal circuits and state courts.[29]

II. HOW PROFESSORS DEFINE ACADEMIC FREEDOM

Free speech is cherished in academe—but is also contracting. Campus codes regulate disrespectful language.[30] Some schools mandate civility[31] and decency.[32] By contrast, professors often prefer unbounded speech.[33] So does the American Association of University Professors (AAUP), the main group that advocates for academic freedom.[34]

Even permissive standards of academic freedom at colleges and universities have some speech limits. Some define academic freedom broadly but include vague limits.[35] Academic freedom can be more

25. *See infra* notes 137–150.

26. *See infra* notes 151–152.

27. *See infra* notes 153–206.

28. *See infra* notes 207–234.

29. Manuscript at 51–63.

30. *E.g.*, *Institute Policy on Acceptable Use of Electronic Information Resources*, CAL. INST. OF TECH., *available at* http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2005/02/Cal-Tech-Acceptable-Use-13-14.pdf (prohibiting communications that discriminate, harass, defame, offend, or threaten individuals or organizations).

31. *Community Standards Policy*, CARLTON COLL., *available at* http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2004/11/Carleton-Community-Standards-13-14.pdf (creating and sustaining a climate of "civility"); *SSU Statement on Civility and Tolerance*, SONOMA STATE UNIV., *available at* http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2014/01/Sonoma-Civility-and-Tolerance-13-14.pdf (requiring all members of the university community to communicate with each other in a "civil manner").

32. *Middlebury Coll. Handbook: General Conduct 14–15*, MIDDLEBURY COLL., *available at* http://www.thefire.org/fire_speech-codes/middlebury-general-conduct-14-15/ (prohibiting "flagrant disrespect for persons" and "flouting of common standards of decency").

33. *E.g.*, Brian Leiter, *University of Illinois Repeals the First Amendment of Its Faculty*, HUFF POST COLL. (Oct. 23, 2014), http://www.huffingtonpost.com/brian-leiter/university-of-illinois-re_1_b_5703038.html ("The First Amendment's protection of such speech is that government, including a state university, is prohibited from punishing the speaker for his expression or viewpoint.").

34. *See* American Ass'n of Univ. Professors (AAUP), *infra* notes 63-69.

35. *Report of the Committee on Freedom Expression*, UNIV. OF CHI., *available at* http://provost.uchicago.edu/FOECommitteeReport.pdf. The policy broadly protects academic freedom, as such: "Although the University greatly values civility, . . . concerns about civility and mutual respect can never be used as a justification for

restricted when government bodies define it.[36] Federal government adds another layer of regulation by broadly defining classroom and workplace harassment.[37]

In Part II, I trace two historical developments that have begun to collide in courts. Faculty members, over centuries, have enjoyed autonomy to set standards for their professional discourse. From the late 1700s to the early 1960s, courts rarely intruded in this domain. But courts have become more involved, prompted by campus speech disputes.[38] Part II is an important backdrop for my empirical results. The main result: Courts often rule for colleges and universities in faculty speech conflicts.

A. Early Disputes over Academic Freedom: The Individual Versus the

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closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community." *Id.* But it curtails this freedom when it says that "[t]he freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. . . . [T]he University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University." *Id.*

36. *E.g.*, The State University of New York's policy on academic freedom is:

> to maintain and encourage full freedom, within the law, of inquiry, teaching and research. . . . [F]aculty members may, without limitation, discuss their own subject in the classroom; they may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject. The principle of academic freedom shall be accompanied by a corresponding principle of responsibility. In their role as citizens, employees have the same freedoms as other citizens. However, in their extramural utterances employees have an obligation to indicate that they are not institutional spokespersons.

N.Y. Comp. Codes R. & Regs., tit. 8 § 335.27 (1994).

37. *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html#_t1b (last visited Ja. 31, 2016). Examples include: making sexual propositions or pressuring students for sexual favors, *see* Trejo v. Shoben, 319 F.3d 878, 883 (7th Cir. 2003) ("Students went on to explain they felt uncomfortable and awkward around Trejo and were avoiding contact with him by steering clear of his office and were refusing to enroll in his classes."); displaying or distributing sexually explicit drawings, pictures, or written materials, *see* Piarowski v. Ill. Comm. Coll., 759 F.2d 625, 627 (7th Cir. 1985) (faculty member challenged relocation of his stained glass exhibit of a "brown woman . . . before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing"); and performing sexual gestures or touching oneself sexually in front of others, *see Northwestern University Professor under Fire After Class Sex Toy Demonstration*, HUFF POST CHI. (May 25, 2011), http://www.huffingtonpost.com/2011/03/02/northwestern-university-p_n_830423.html (reporting that Northwestern University professor arranged for a live demonstration of woman brought to orgasm with a high-intensity vibrator in sexuality class).

38. Lauren DeLap, Note, *Look Ahead, Dixieland: An Examination of State University Discretion in Mascot Selection*, 64 ALA. L. REV. 881 (2013) (University of Mississippi's retirement of Colonel Reb in 2003).

School

Colleges and universities began as subjects of the crown and church. These authorities determined faculty credentials.[39] Early American colleges and universities, modeled after English counterparts, took on a more secular identity in 1754.[40] These nascent academies enjoyed much autonomy.[41]

Detailed information about college and university governance from the 1700s is scarce.[42] In this time, there were no academic freedom cases; however, college and university charters authorized boards of trustees to appoint and remove professors.[43] A few court opinions offer a glimpse of strained relationships between professors and their overseers. Some decisions recount these quarrels.[44] In others, professors sued after losing their jobs.[45] Unlike current faculty disputes over the First Amendment,[46] there was no constitutional jurisprudence relating to academic freedom.

Lacking this avenue, faculty members attacked the appointment process that muzzled them. The earliest opinion, *Bracken v. Visitors of William & Mary College*,[47] deferred to board discretion in denying tenure.[48]

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39. 2 T. MACAULAY, HISTORY OF ENGLAND 86-109 (Everyman's ed. 1906) (English universities were religiously oriented before the 1800s due to a requirement of ordination for faculty members).

40. Joe W. Kraus, *The Development of a Curriculum in the Early American Colleges*, 1 HIST. OF EDUC. Q. 64, 68 (1961) (describing how the College of Philadelphia— later University of Pennsylvania— instituted the first American college education program that was not based on medieval tradition nor had a religious objective).

41. J. Peter Byrne, *supra* note 8, at 267-68.

42. See GEORGE W. PIERSON, A YALE BOOK OF NUMBERS: HISTORICAL STATISTICS OF THE COLL. & UNIV. 1701-1976 (1983), http://oir.yale.edu/1701-1976-yale-book-numbers#D, for a rare source of this information. Faculty often served for more than 35 years. *Id.* at 435. Trustees tended to have shorter tenures, however, most served more than four years. *Id.* at 431.

43. City of Louisville v. President & Trs. of Univ. of Louisville, 54 Ky. 642, 702 (Ky. Ct. App. 1855) (reciting that majority of trustees "may appoint and remove the professors in either department of the university, at pleasure").

44. *See* State v. Senft, 20 S.C.L. 367 (S.C. App. L. & Eq. 1834) (involving a battle between faculty and their campus over a building for a medical college).

45. Head v. Univ. of Mo., 86 U.S. 526 (1873) (ruling that state legislature retained power to change university board of curators, and through the new body, terminate a faculty member).

46. *See infra* notes 86-88.

47. Bracken v. Visitors of Wm. & Mary Coll., 7 Va. 573 (Va. 1790).

48. *See* Field v. Girard Coll. Dirs., 54 Pa. 233 (1867) (involving the removal of a steward). College and university boards exercise discretion, and are not ceremonial figureheads or rubber stamps. The Supreme Court of Pennsylvania concluded that the school's charter, which authorized the creation of certain positions, could not be used to "convert this into a direction that appointees are to hold by any given tenure." *Id*. at 239. The purpose of a university's charter is "to furnish a rule for the guidance of the

Even without a specific reason, trustees were privileged to oust a professor due to antagonisms in their relationship. They "had a right to their likes and their dislikes; and they had an equal right to express them in a lawful manner."[49] Courts also declined to order schools to name faculty to vacant posts.[50] But courts did not put boards above the law. Dismissed faculty members could recover contractual damages for improper termination.[51]

Continuing into the twentieth century, courts remained deferential to university authorities.[52] A trickle of cases hinted at faculty terminations due to disagreements between instructors and administrators. In what may be the first court case explicitly involving academic freedom, the regents of West Virginia University removed Prof. James Hartigan for opposing policies of the university president.[53] The state supreme court ruled that the removal of a professor did not require notice of charges or a hearing.[54] In

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trustees— not to define the rights of their appointees." *Id.*; *see also* Cobb v. Howard Univ., 106 F.2d 860 (D.C. Cir. 1939) (refusing to overturn board's decision not to renew the appointment of a part-time law professor).

49. People of the State of N.Y. ex rel. Charles B. Kelsey v. N.Y. Post-Graduate Med. Sch. & Hosp., 29 A.D. 244, 250 (N.Y. App. Div. 1898).

50. *Id.*; *see also* People v. Regents of Univ. of Mich., 18 Mich. 469 (1869). The legislature passed separate laws empowering a board to enact ordinances for the University of Michigan, and to name officers and professors. Another law required the university to name a professor of homeopathy. Over thirteen years, the regents failed to name anyone for that position. The regents prevailed in arguing that a mandamus would contravene the law exclusively authorized them to appoint faculty.

51. Butler v. Regents of the Univ., 32 Wis. 124, 132 (1873) (involving claim for non-payment of salary after faculty member was dismissed); *but see* Graney v. Bd. of Regents of the Univ. of Wisc., 286 N.W.2d 138 (Wis. Ct. App. 1979) (concluding that board had implied power to terminate tenured employees for reasons of financial exigency).

52. Ward v. Bd. of Regents of Kan. State Agric. Coll., 138 F. 372, 376 (8th Cir.1905) (concluding "the interest of the college is committed to the sound discretion of the board of regents."). The court added: "If the regents are vested with the right to discharge a professor whenever in their judgment the best interest of the college require such action, then, if they act in good faith, the discharge cannot be 'wrongful.'" *Id.*; *see also* People ex rel. Kelsey, *supra* note 49 (refusing to issue writ to restore professor his former faculty position); Devol v. Bd. of Regents, 56 P. 737 (Ariz. 1899) (dismissing lawsuit over discharge of faculty member); Phillips v. Commonwealth, 98 Pa. 394, 402 (1881) (stating that the "number and character of the professorships to be created under the charter is left solely to the discretion of the trustees"); *see also* Vincenheller v. Reagan, 64 S.W. 278 (Ark. 1901) (reporting on state law that abolished academic position).

53. Hartigan v. Bd. of Regents of W. Va. Univ., 38 S.E. 698 (W. Va. 1901). For an article on the ambiguity of academic freedom, see W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L.REV. 301, 302 (1998) ("Courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.").

54. Hartigan, 38 S.E. at 700 ("[I]f Dr. Hartigan's right to notice depends upon his being a public officer, he had no right to notice, because he is not a public officer, but a mere employee of the board of regents, in a legal point of view, and cannot, as a matter

Brookfield v. Drury College, an instructor was removed after she spoke up in an apparent labor dispute with the campus president over the size of the faculty.[55] In *Darrow v. Briggs*, the Court dismissed an action by a professor who was fired for expressing "non-Christian" beliefs.[56] The University of Mississippi dismissed a professor over a pay dispute.[57] In an unusual win for a professor, a state supreme court ruled that a faculty union organizer was unlawfully terminated.[58] Professors lost cases when they theorized deprivation of academic freedom as a tort.[59] Rulings often turned on the nature of the academic appointment— whether the professor held a public office or was merely an employee.[60]

In sum, from the late 1700s until World War I, courts rarely ruled in disputes between professors and their schools. Institutional factors were likely responsible for the muted role of courts. Private universities were not bound by the First Amendment.[61] In any event, constitutional principles had not evolved to touch upon academic freedom.[62] When faculty disputes with schools erupted, courts resolved them by using common law doctrines in associations and contracts.

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of right, demand hearing, right of defense, and trial.").

55. 123 S.W. 86 (Mo. Ct. App. 1909).

56. 169 S.W. 118 (Mo. 1914). Where a college terminated a professor for his religious beliefs and teachings, the college president said, "When a teacher eating the bread of a Christian institution *teaches* doctrine non–Christian and antagonistic to a personal God, when a man makes use of his position to *spread his fad by attempting to proselyte* and force his belief upon students, he is either weak . . . or wrong". *Id.* at 121 (emphasis added).

57. Univ. of Miss. v. Deister, 76 So. 526 (Miss. 1917).

58. State ex. rel. Keeney v. Ayers, 92 P.2d 306 (Mont. 1939) (involving a professor who was organizing a labor union at Montana State University).

59. Clarke v. McBaine, 252 S.W. 428, 430-31 (Mo. 1923) (involving the University of Missouri's dismissal of a law professor following his role in organizing a no-confidence vote for the president). The professor published an article in the *St. Louis Post Dispatch* stating his side of the story; and the president published a rebuttal stating that the professor was dismissed for cause. The court dismissed the professor's libel suit. *Id.*; Gottschalck v. Shepperd, 260 N.W. 573 (N.D. 1935) (dismissed professor unsuccessfully sued university board on tort theories).

60. *See* State ex rel. Posin v. State Bd. of Higher Educ., 74 N.W.2d 79 (N.D. 1955) (ruling that dismissed faculty members may sue only for breach of contract).

61. *See infra* note 212 (more recent cases show that the First Amendment does not apply to private schools).

62. *See infra* note 83.

B. Academic Freedom as Defined by Professors: Faculty Association Versus the School

The failure of professors to define academic freedom also delayed First Amendment rulings on their speech disputes. If they had no formal sense of the concept, why would courts? The modern era for academic freedom is marked by the formation of the American Association of University Professors (AAUP) and its 1915 report on faculty expression.[63] In "Declaration of Principles," the association focused on professors who lost their jobs over academic freedom.[64]

The group did not advocate unlimited faculty rights. Instead, academic freedom was tied to professional duties and responsibilities.[65] Scholars were counseled to base their conclusions on accepted disciplinary methods. Professors were expected to represent their research "with dignity, courtesy, and temperateness of language."[66] As instructors, faculty members were also told to "set forth justly, without suppression or innuendo, the divergent opinions of other investigators."[67] Interestingly, the AAUP instructed professors to "observe certain special restraints" in classroom discussions with students who were in the first two years of their college education.[68] While the AAUP imposed limits on academic freedom, they also directed college and university leaders not to interfere with professorial thought, belief and expression.[69]

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63. *Appendix I, 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AM. ASS'N OF UNIV. PROFESSORS, *available at* http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

64. Academic freedom is "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." *Id*. at 292.

65. *Id*. at 298. In teaching a controversial subject, a university instructor was entitled to state his views, but was also expected to "set forth justly, without suppression or innuendo, the divergent opinions of other investigators. . . ." *Id*. The policy admonished instructors to "remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently." *Id*.

66. Am. Ass'n of Univ. Professors, *supra* note 63, at 292.

67. *Id*.

68. *Id*. The AAUP added that the "teacher ought also to be especially on his guard against taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions." *Id*. at 298–99.

69. *Id.* at 300 ("Lay governing boards are competent to judge concerning charges of habitual neglect of assigned duties, on the part of individual teachers, . . . [b]ut in matters of opinion, and of the utterance of opinion, such boards cannot intervene without destroying, . . . the essential nature of a university.").

From the AAUP's vantage, professors were the sole arbiters of academic freedom. They wished to exclude administrators, trustees, and lawmakers from regulating faculty speech.[70] This position was put to an early test in a wide variety of controversies— some over a professor's extramural speech[71] and others where professors criticized administrators.[72] Over time, the association persuaded most schools to adopt its "1940 Statement of Principles on Academic Freedom and Tenure."[73] These developments cultivated early First Amendment faculty cases by sensitizing professors to their professional speech norms.

The rise of the AAUP as tribune for academic freedom coincided with the modern era in higher education. College and university enrollments swelled due to public funding for returning World War II veterans.[74] Academic freedom flourished, with little evidence of conflict between schools and their faculties. But the McCarthy era, just a few years ahead, portended legislative threats to free speech in academe.

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70. Brief of Am. Ass'n of Univ. Professors as Amicus Curiae, Barenblatt v. U.S., 1958 WL 91977, at *15 (U.S. 1958) ("[Our universities are governed by laymen; our administrators, wrestling with budgets, have been known to please and appease prospective donors; our local communities have not refrained from telling the universities what to do.").

71. Jordan E. Kurland, *Ten Decades of AAUP Investigations*, ACADEME (Jan.-Feb. 2015), http://www.aaup.org/article/ten-decades-aaup-investigations#.VMbP-E0tG70. For example, the University of Pittsburgh did not renew the appointment of a history professor due to his activism for the New Deal and related causes— plus his outspoken critiques of religious organizations in class. In 1946, the AAUP investigated the University of Texas after trustees directed the president to dismiss professors whose communications offended Texas values. Yale University also had a serious controversy over academic freedom. Judith Ann Schiff, *Firing the Firebrand*, YALE ALUMNI MAGAZINE (May/June 2005), http://archives.yalealumnimagazine.com/issues/2005_05/old_yale.html (explaining why Prof. Jerome Davis was denied tenure).

72. State ex rel. Richardson v. Bd. of Regents of Univ. of Nev., 269 P.2d 265 (Nev. 1954) (ruling that a faculty member was not insubordinate when spoke as AAUP chapter leader. The discharged professor, who favored more stringent admissions standards, circulated an article that criticized the university's education department and president.).

73. *1940 Statement of Principles on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure; see Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. L. & PUB. POL'Y 263, 268-71 (2006-2007), for elaboration.

74. John Bound & Sarah Turner, *Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans*, NBER WORKING PAPER 7452, 1 (Dec. 1999), *available at* http://www.nber.org/papers/w7452.pdf (college enrollment increased from 1.3 million in 1939 to over 2 million in 1946).

III. JUDICIAL REGULATION OF ACADEMIC FREEDOM FOR PROFESSORS

As I explain here, the Supreme Court avoided faculty speech controversies until the 1950s. The following discussion reveals growing conflict between academe and many government units. The former quested for self-governance, while the latter sought to impose its irrational fear of Communist subversion and infiltration.

A. Institutional Governance of Academic Freedom

From 1954-2014, faculty members litigated at least 210 First Amendment controversies with colleges and universities.[75] These cases are probably a small fraction of disputes over academic freedom. Some are handled via AAUP enforcement procedures.[76] On occasion, the AAUP censures schools.[77] Still, no court has suggested that AAUP speech standards supplant judicial doctrines for the First Amendment. A few opinions have cited AAUP standards for academic freedom principles.[78] But federal appeals courts have also read AAUP standards as authority to limit academic freedom[79] or as private precepts apart from the First Amendment.[80]

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75. *See infra* Part III.B.

76. *See Bulletin of the Am. Ass'n of Univ. Professors*, AM. ASS'N OF UNIV. PROFESSORS, 4-15 (July-Aug. 2014), *available at* http://www.aaup.org/sites/default/files/files/Bulletin_AcademeJulyAugust14full.pdf (describing a tenure dispute and related speech issues at Northeastern Illinois University).

77. See *Censure List*, AM. ASS'N OF UNIV. PROFESSORS, http://www.aaup.org/our-programs/academic-freedom/censure-list, for list of censured schools.

78. *See generally* Krotkoff v. Goucher Coll., 585 F.2d 675, 679 (4th Cir. 1978) (observing that "because it was formulated by both administrators and professors, all of the secondary authorities seem to agree it [the 1940 statement] is the 'most widely-accepted academic definition of tenure.'"); *see also* Barnes v. Wash. State Cmty. Coll. Dist. No. 22, 529 P.2d 1102, 1104 (Wash. 1975) (Washington Supreme Court's reliance on AAUP standards).

79. Bonnell v. Lorenzo, 241 F.3d 800, 822 (6th Cir. 2001) (stating that the American Civil Liberties Union and AAUP "recognize that limitations must exist on college professors' speech in order to provide a learning environment free of harassment; however, such organizations maintain that the limitations must be narrowly drawn so as not to compromise the professors' rights to academic freedom."); *see also* Starsky v. Williams, 353 F. Supp. 900, 917 (D.Ariz. 1972) ("Calling Mr. Sumner a 'bastard,' etc., adds very little to the world of ideas. It communicates only vituperation, . . . and may be the exact kind of conduct meant to be avoided by the A.A.U.P. standard of 'appropriate' restraint.").

80. *See* Urofsky v. Allen, 216 F.3d 401, 411 (4th Cir. 2000) (en banc) ("Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights.").

B. From Self-Governance to Judicial Application of the First Amendment

The First Amendment might have been left out of faculty employment disputes if schools and the AAUP exclusively dealt with these matters.[81] During the McCarthy era, the AAUP published reports on the dismissal or non-reappointment of nineteen college and university faculty members.[82] As lawmakers took aim at professors, courts waded into First Amendment disputes in higher education.[83]

In *Sweezy v. New Hampshire*, the Supreme Court ruled that a faculty member's right to speak on matters of political controversy couldn't be subjected to a state's anti-subversive laws.[84] Justice Frankfurter's concurrence suggested that colleges and universities have autonomy to define academic freedom.[85] In another significant victory, *Keyishian v. Board of Regents of New York*, professors successfully challenged a New York law that required them to swear an oath against Communism.[86] In broad terms, the Court said: "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

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81. William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical View*, 53 LAW & CONTEMP. PROBS. 79, 93 (1990) ("Successful academic freedom claims did not develop naturally or easily as an incident of early twentieth century first amendment doctrine. Rather, they developed largely without benefit of the first amendment, generally under private auspices and in response to the vacuum of doctrine associated with the first amendment as hard law.").

82. Brief, *supra* note 70, at *2.

83. *See* Application of McGill, 174 N.Y.S.2d 784 (N.Y. Sup. Ct. 1958) (New York courts upheld the dismissal of a tenured professor because he used a pseudonym to publish articles in *The Communist*); Monroe v. Trs. of the Cal. State Colls., 491 P.2d 1105 (Cal. 1971) (California Supreme Court ordered reinstatement of a professor who was dismissed in 1950 for his violation of the state's loyalty oath law, which itself was declared unconstitutional in 1967); *see also* Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485, 496-97 (1952) (Black, J., dissenting) ("This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment.").

84. *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state's inquiry into content of lectures, under the guise of regulating subversive activities, violated First Amendment right to free speech).

85. *Id.* at 263 ("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 prevails '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.").

86. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967).

special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[87]

At this point, First Amendment jurisprudence for faculty stopped developing on an academic track. Speech rights for professors merged with the Court's growing regulation of speech for public employees. Over the next 40 years, the law did little to distinguish between the expressive elements for the occupation of professor, on the one hand, and high school teacher,[88] hospital nurse,[89] and assistant state's attorney, on the other.[90] The result is a one-size-fits-all First Amendment jurisprudence.[91]

Diagram 1 (*infra*) shows the Supreme Court's development of First Amendment rights for public employees. In each case, a public employer terminated an employee— as distinguished from withdrawing an offer[92] — due to a speech controversy.

87. *Id*. at 603.

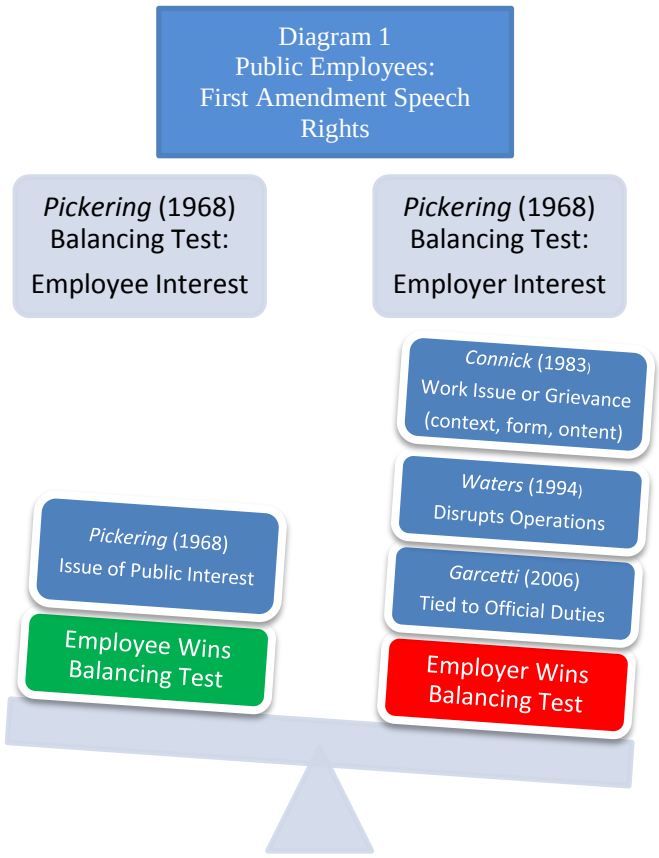
88. Pickering, *infra* note 93.

89. Waters, *infra* note 114.

90. Garcetti v. Ceballos, 547 U.S. 410 (2006)

91. *But see* Rabban, *supra* note 8, at 255 (observing that there are difficulties in "distinguishing constitutional academic freedom from general free speech principles.").

92. In rare cases, professors have had First Amendment disputes after accepting a job offer but before their appointments were finalized. In this limbo, the issue is whether they are employees. *E.g.*, Complaint, Salaita v. Kennedy, 2015 WL 364111 (N.D. Ill.) (No. 1:15-cv-00924); see Johns Hopkins Univ. v. Ritter, 689 A.2d 91 (Md. Ct. Spec. App. 1996), for ruling. The college recruited two professors after the department chair assured that the board of trustees would grant them tenure. When they arrived on campus, their interactions with colleagues caused upheaval. Due to this disruption, Johns Hopkins did not grant tenure. The Maryland appellate court found that the university's department chair could not make a hiring commitment for the board of trustees.



The diagram is ordered by chronology. In the first case, a high school teacher was fired after his letter in a local newspaper criticized the board for favoring sports over education.[93] *Pickering* sets forth a balancing test that later decisions refined. While the precedent recognizes that public teachers do not relinquish First Amendment rights in their employment, it enables a government employer to regulate the speech of its employees differently from citizens.[94] Courts must weigh the competing interests of public employees and their employers.[95]

93. Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, 391 U.S. 563 (1968).

94. *Id*. at 568.

95. *Id*. ("[T]o arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). Because Pickering's letter discussed a matter of public concern, the school district could not categorically deny First Amendment protection to the teacher's critical comments. *Id*. at 569. The Court also determined that the letter, while critical of the board, was not detrimental to the school system. Although it had factual

Diagram 1 reflects two main aspects of *Pickering*. Courts evaluate speech to see if it addresses a matter of public concern. If so, the disputed expression must be balanced against the employer's interests in limiting this speech.[96] A balancing test may be used even if the individual opposes the employer's policy preferences or makes a false statement.[97] *Pickering* recognizes, however, a public employer's interest in promoting efficient operations through its employees.[98]

How do courts apply *Pickering* to faculty disputes in higher education? The balancing test applies on a case-by-case basis. As my database shows, courts usually weigh these interests in favor of colleges and universities.[99] One example, *Brooks v. Univ. of Wisc. Bd. of Regents*,[100] illustrates this tendency. Neurologists filed a First Amendment lawsuit after their department chair closed their clinic.[101] Although the school cited financial reasons, faculty alleged that their vocal criticism of their department chair motivated the closure.[102] The majority discounted the public character of the professors' criticisms because their statements were vague.[103] Citing *Pickering*, however, the dissent weighed First Amendment interests differently.[104] The split vote in *Brooks* highlights the subjectivity in applying a *Pickering* balancing test.[105]

Fifteen years after deciding *Pickering*, the Court added more weight to a public employer's interests in *Connick v. Myers*.[106] Sheila Myers, an

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errors that put the district's referendum support in a bad light, its constitutional protection was undiminished. *Id*. at 569-70.

96. Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, 391 U.S. 563, 569–70 (1968).

97. *Id.*

98. *Id.*

99. *See infra* Fact Finding 3.

100. Brooks v. Univ. of Wisc. Bd. of Regents, 406 F.3d 476 (7th Cir. 2005).

101. *Id*. at 477.

102. *Id*. at 478.

103. *Id*. at 479–81 (noting that the plaintiffs did not specify what aspects of their speech caused the school to retaliate against them by closing the clinic).

104. *Id.* at 484 (Cudahy, J. dissenting) ("This case brings sharply to mind Pickering. . ., the very font of First Amendment law involving protests of public employees affecting matters of their employment. . . . Obviously, the teacher had a personal interest in the allocation of funds, but this did not detract from the public importance of his protest." Relating Pickering to the plaintiffs, Judge Cudahy observed that they were outspoken on a matter of public concern— the proper functioning of a public medical school. Pickering, *supra* note 93. He concluded: "If these public questions can be cast as mere office complaints, the First Amendment will shrink accordingly, and speech that ought to be protected will be diminished." *Id*. at 481–82.

105. Judge Cudahy believed that the professors' criticism raised issues that might directly impact the taxpaying public— for example, mismanagement of priorities and resources. *Id*. at 484.

106. Connick v. Myers, 461 U.S. 138 (1983). The case is depicted to the right in

assistant state's attorney, was fired after she circulated a survey to co-workers.[107] Her communications were partly a grievance about work conditions, and also criticism about the operation of a public workplace.[108] Grappling with the different layers of Myers' concerns, *Connick* examined the context, form, and content of her survey and grievance to determine their public value.[109]

By allowing courts three different ways to parse employee speech, *Connick* deepens a court's role as arbiter of protected speech. A case-in-point is *Urofsky v. Gilmore*,[110] involving a Virginia statute that barred professors at public colleges and universities from accessing sexually explicit materials on their school computers. Professors contended that this restriction impaired their right to further their research—for example, by accessing lascivious poetry.[111] Ruling *en banc*, the Fourth Circuit held that the law did not infringe First Amendment rights of faculty.[112] Its schism over *Connick*'s test for context-form-content shows the subjectivity of this approach.[113]

In 1994, the Court added to the *Pickering* balancing scale when it addressed disruptive speech in a public workplace. In *Waters v. Churchill*,[114] an obstetrics nurse was fired by her supervisor for voicing negative opinions to a co-worker about her department, causing that nurse to change her mind about transferring to the unit.[115] *Waters* expands the

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Diagram 1.

107. *Id*. at 140–42.

108. *Id*. at 141. Viewing the survey as an employee insurrection, Connick fired Myers for insubordination. *Id*. Reversing lower court rulings that favored Myers, the Court reasoned that the First Amendment does "not require a grant of immunity for employee grievances." *Id*. at 147. The Court also discussed expression that falls between a matter of public concern and an employee grievance. Without offering much guidance, the Court said that this type of speech enjoys more protection than obscenity, a category that has "so little social value . . . that the State can prohibit and punish such expression by all persons in its jurisdiction." Connick, *supra* note 106, at 147.

109. *Id*. at 147–48.

110. Urofsky v. Allen, 216 F.3d 401 (4th Cir. 2000).

111. *Id*. at 409 n.9.

112. *Id*. at 438–39.

113. *Id.* at 429–430. Judge Wilkinson was in the middle of this divide, concurring with the majority but opposing their view of Connick's content prong. *Id*. at 429–430. The statute's initial content restrictions were "stunning in their scope" because they swept within its ambit "research and debate on sexual themes in art, literature, history, and the law." Urofksy, *supra* note 80, at 429–430.. (citation omitted). At the same time, he criticized dissenters for minimizing the fact that the law authorizes deans, provosts and similar authorities to issue waivers to professors engaging in sexually-themed research. *Id*. at 432. This law preserved institutional self-governance. *Id*. at 433.

114. Waters v. Churchill, 511 U.S. 661 (1994).

115. The hospital based its termination on investigatory interviews. *Id*. at 667. The nurse said she raised issues of public concern by speaking against a cross-training

range of employee speech that falls within *Connick*'s government efficiency domain. The majority opinion also limits the public concern element in *Pickering* by declaring that "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."[116] Going further, *Waters* defers to administrative predictions of harm to efficient public services.[117]

In this Article's database, *Jeffries v. Harleston*[118] shows the pivotal effect of *Waters*. Prof. Jeffries made insulting references to Jews in a widely publicized speech.[119] The school removed him as department chair but retained him as a professor.[120] In 1993, Jeffries won damages and reinstatement to his department chair post,[121] and the appeals court affirmed most of this judgment.[122] In an unusual ruling that suggested a narrowing of *Pickering*'s public interest element, the Supreme Court vacated the appellate ruling and remanded it for reconsideration.[123] Applying the recently decided *Waters* case, the appellate court reversed itself.[124]

The Supreme Court further restricted the meaning of public interest in *Garcetti v. Ceballos*.[125] Richard Ceballos, like Sheila Myers, was an assistant state's attorney who was fired for speech that angered his elected boss.[126] But while Myers' speech clearly pertained to her work grievance, Ceballos was transferred for opposing the prosecution of a case that he believed had evidence fabricated by the police.[127] The Ninth Circuit concluded that Ceballos' oppositional memo stated a public concern that was akin to alleging official misconduct.[128]

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program that could diminish nursing care. *Id*. at 666.

116. *Id*. at 672.

117. *Id*. at 673 ("We have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern.").

118. Harleston v. Jeffries, 513 U.S. 996 (1994), vacating Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994).

119. Jeffries v. Harleston, 828 F. Supp. 1066, 1091 (S.D.N.Y. 1993) (describing CUNY's president as the "head Jew at City College" who consulted with his "Jews at the City College")

120. *Id*. at 1071.

121. *Id*. at 1098.

122. Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994).

123. Harleston v. Jeffries, 513 U.S. 996 (1994).

124. Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995) (concluding that CUNY reasonably believed that this speech could disrupt operations, and this belief outweighed the professor's First Amendment interests).

125. Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) .

126. *Id*. at 413.

127. *Id*. at 414.

128. *Id*. at 415.

The Supreme Court disagreed, concluding that Ceballos did not act as a citizen but rather as a subordinate.[129] As in *Waters*, *Garcetti* calibrated the balancing test in favor of public employers when speech disrupts their operations.[130] In broad terms, *Garcetti* rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."[131]

The impact of *Garcetti* appears in this study's cases. Ward Churchill was dismissed from his tenured faculty position at the University of Colorado after he published an essay that equated the victims of the 9/11 attack to Nazi war criminals.[132] He was not fired for this publication, but the story caused the university to investigate him for research misconduct.[133] This fact is important because his dismissal was couched in terms of his research duties as a tenured professor.[134] After an investigation found evidence to support charges of falsification and plagiarism, the university dismissed the professor.[135]

The university agreed with Churchill that the First Amendment protected his speech. But under the "official duties" prong of *Garcetti*, the university argued—and the appeals court agreed— that an employer may investigate an employee for speech-related misconduct without chilling his expressive rights. Thus, *Garcetti* allowed the chancellor to reframe the disciplinary case against Churchill as an investigation related to the official duties of a professor, while the campus administrator disingenuously said that Churchill's 9/11 essay was protected speech.[136]

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129. *Id*. at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.").

130. Garcetti, 547 U.S. at 422–23.

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker (citation omitted). When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.
>
> *Id.*

131. *Id.* at 426.

132. Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16, 22 (2010).

133. *Id*. at 22–23. A committee investigated Churchill under the university's misconduct rules. Eventually, this group voted 6–3 in finding that this research misconduct warranted dismissal. *Id*. at 23.

134. Grounds for dismissing a tenured professor included conduct below standards of professional integrity. *Id*. at 28.

135. *Id*. at 23.

136. *Churchill*, 293 P.3d at 22. With the Garcetti framework in the background, the state appeals court concluded that "Churchill's academic freedom did not include the right to commit research misconduct that was specifically proscribed by the

I close Part III by summarizing its main conclusions:

1. From the late 1700s through the early 1900s, professors had no institutional definition of academic freedom.

2. After professors founded the AAUP in 1915, they were largely successful in persuading colleges and universities to adopt their principles of academic freedom.

3. The McCarthy era, with its emphasis on government-imposed loyalty oaths, adversely affected professors; and as a result, the Supreme Court established First Amendment precedents that shielded faculty from ideological coercion.

4. Starting with *Pickering* in 1968, and continuing through *Garcetti* in 2006, the Supreme Court narrowed the speech rights of public employees while broadening the right of government employers to sanction employees for grievances or disruptive speech that affects efficiency.

5. The precedents *Pickering* through *Garcetti* spilled over to academe without noticeable adjustment for academic freedom as conceived by the AAUP or numerous schools that adopted these foundational standards for research, instruction, and dissemination of knowledge.

IV. FIRST AMENDMENT FACULTY CASES:

RESEARCH METHODS AND FACT FINDINGS

Part III tracked the development of academic freedom by professors, the emergence of First Amendment jurisprudence that protected this liberty during the McCarthy era, and the Supreme Court's subsequent speech precedents that favor public employers. The question is: How often do courts rule for faculty in speech disputes? I analyze data from 210 First Amendment cases in Part IV to answer this question and derive more specific findings.

A. Method for Creating the Sample

Identifying Cases: I created a database of First Amendment cases with professors and college instructors as plaintiffs. The sample was derived from Westlaw's internet service. My search explored federal and state sources. In every case, faculty alleged that a school violated their First Amendment right to free speech. The sample did not include cases

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University's policies and enforced through a system of shared governance between the administration and the faculty." *Id*. at 37.

involving college coaches and advisors who alleged a First Amendment violation.[137]

I began with a simple keyword search.[138] I read cases to see if they met the inclusion criteria. In valid cases, faculty alleged a violation of the First Amendment's prohibition against government abridgement of speech.[139] This approach produced a sample composed almost entirely of public institutions and their faculty members.[140]

Each valid case was added to a roster. As this catalogue grew, new cases were checked to avoid duplication. In these cases, the database was extended forward and back in time. Looking forward, all cases were KeyCited to find newer decisions that involved a professor or college instructor who alleged a First Amendment violation by his or her employer. Within each case, all precedents were checked for earlier First Amendment cases that were not in the sample.

Collecting Data: Next, relevant data were taken from each case. Variables included information about the (1) plaintiff,[141] 2) type of speech that led to an employment dispute between a faculty member and school,[142] (3) laws that a university or college allegedly violated,[143] (4) type of court (federal or state; trial or appellate),[144] (5) type of court order,[145] (6) winner

137. *E.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1177–78 (6th Cir. 2004) (ruling for school on First Amendment claim by coach who was fired for exhorting his team to "play like niggers on the court" and not to act like "niggers in the classroom"); Moore v. Watson, 838 F. Supp.2d 735 (N.D. Ill. 2012) (awarding attorney's fees to advisor to student newspaper who also was fired from job in publicity office).

138. The search terms were "First Amendment," and "professor," and "college or university," and "speech."

139. U.S. CONST., amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

140. See Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228 (Cal. Ct. App.1985), and Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *aff'd*, 412 F.2d 1128 (D.C. Cir. 1969), for exceptions. The First Amendment is not applicable to private actors, absent state action; and this likely explains why the database is almost entirely comprised of cases involving public institutions. *See infra* note 212.

141. I coded cases for the personal characteristics of the plaintiff— tenure status and gender.

142. In addition, I classified the faculty member's type of speech. This variable involved an element of subjectivity. If speech could be classified more than one way, I coded it in multiple sub-variables. For example, a faculty member's speech against the War in Vietnam could be classified as "political" and "protest" (separate sub-variables). Duke v. N. Tex. State Univ., 338 F. Supp. 990 (E.D. Tex. 1971). If the faculty member alleged that his academic appointment was not renewed due to speech, I also coded this as "retaliation." If this instructor also criticized his campus administration over regulating anti-war protest, I also coded this as "campus critic".

143. Another variable recorded laws that schools allegedly violated. While some cases dealt only with a First Amendment issue, many involved Due Process, contracts, and other claims.

144. Data coding also included the type of court. Variables included state or

of a court ruling,[146] (7) reasoning used by a court,[147] (8) relief, if ordered, and (9) year of ruling. Data for each case were entered into a spreadsheet and eventually analyzed using SPSS, a statistics program.

In the following data analysis, I ask questions about the winner— a term that I explain here. To begin, many cases had more than one court decision. I coded a winner for each round that a court ruled on a First Amendment claim. For an opinion to be coded as win-all for a professor, a court issued a permanent restraining order, awarded damages, or ordered other relief.[148] Or, faculty could win part of a ruling. These outcomes varied but typically included a pre-trial ruling that denied a school's motion to dismiss the faculty member's First Amendment claim. When a court refused to grant immunity to a public official— for example, a provost who sanctioned a faculty member— this procedural ruling was coded as a part-win for a professor. In short, a part win ruling kept the claim alive for further litigation and possible settlement negotiation, but did not conclusively decide the First Amendment issue.

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federal court; and whether a case came from a trial or appellate court. Because many cases had more than one round of litigation, variables were created to capture information for the first, second, third, and fourth court to rule on an issue. To illustrate, in Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1293901 (N.D. Tex. 2013), a federal magistrate judge ruled against a faculty member's First Amendment claim; and on appeal, a federal district judge affirmed this ruling. In this case, data were entered for the winner of the first round and second round ruling on the First Amendment. The second round decision appears in Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1296515 (N.D. Tex. 2013).

145. Rulings included dismiss complaint, deny motion to dismiss complaint, grant or continue injunction, award damages, order reinstatement, and remand matter to the institution for more procedure.

146. I used another variable to record the winner of the First Amendment issue, and separately, for the overall case. Winning a ruling was coded as (1) faculty member wins-all, (2) faculty member wins part, or (3) school wins-all. For example, a professor could lose her First Amendment argument, but her claim for Due Process could survive a motion to dismiss. This outcome would be coded as a total win for the school on the First Amendment and a partial win for the professor on the Due Process issue. *E.g*., Harris v. Ariz. Bd. of Regents, 528 F. Supp. 987 (D. Ariz. 1981). If a faculty member won damages or reinstatement, the case was coded as a total victory for the plaintiff. *E.g*., Jacobs v. Meister, 615 P.2d 982 (N.M. 1980) (awarding professor $80,000 in damages).

147. Examples include whether a court applied a Pickering balancing test, Waters' guidance on disruptive speech, or seventeen other reasons. If a court used more than one approach, codes were entered for each reason.

148. Only 1.9% of the cases resulted in a reinstatement order. *E.g*., Endress v. Brookdale Cmty. Coll., 364 A.2d 1080 (N.J. Super. Ct. App. Div. 1976) (ordering reinstatement, back pay, and damages); *see also* Aumiller v. Univ. of Del., 434 F. Supp. 1273 (D. Del. 1977) (ordering punitive damages, back pay, and reinstatement for a lecturer whose contract was not renewed after his statement in a newspaper that he is homosexual).

In some of the following data tables, I lumped faculty win-all and win-part in one group.[149] For some analyses, there were so few cases that a display of win-all and win-part would yield data cells with zeroes. This would obscure a big picture of the data. In other analyses, I asked broader questions that drew on the full database. These analyses were suitable for data tables showing faculty win rates.

The remaining category was "college wins," meaning that a court dismissed a faculty member's First Amendment claim. But many of these cases continued with different issues—for example, by ruling for a professor on a university's motion to dismiss a due process claim.[150]

B. Sample Characteristics

My sample contained 210 cases decided from 1964 through 2014. Most cases had multiple rulings due to appeals. In total, there were 339 First Amendment court rulings.[151] The database designates first court, second court, and so forth instead of using "trial" and "appellate" court. This treatment was necessary because in some cases a federal district judge ruled on an appeal from a magistrate's ruling. My analysis would be misleading if I labeled the district court— ruling at this point of reconsideration— as a federal appeals court. Adding to this potential for confusion, some cases were decided initially by a district court, then by a federal appeals court, and remanded to the district court with instructions. Again, it would be misleading to call the third court an appellate body. I chose, instead, numerical labels for courts that tracked the progression of litigation.[152] Next, I present my fact-findings.

C. Data and Fact Findings

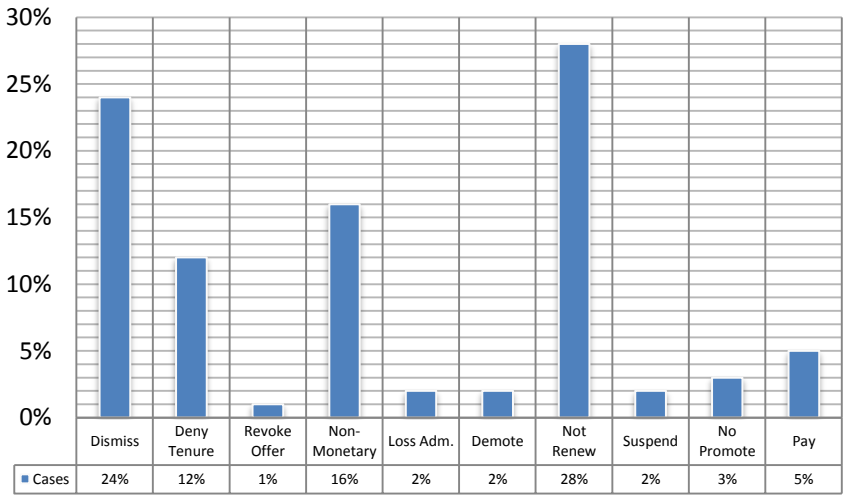
149. *See infra* Table B.

150. *E.g.*, Harris, 528 F. Supp. 987.

151. Among the 210 cases, 206 had a ruling for the first court. The other four cases were appeals that did not report the outcome of the lower court ruling, or involved a faculty member's first-time mention of a First Amendment violation. There were 138 second court rulings,10 third court rulings, and two fourth court rulings.

152. *See supra* note 146; *see also* Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011) (involving first court ruling); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 2749560 (S.D.N.Y. 2011) (ruling from same court to clarify and amend its first order). For an example of a third court ruling by a district court after a second court ruling by an appellate court, *see* Adams v. Trs. of the Univ. of N.C. Wilmington, 2013 WL 10128923 (E.D.N.C. 2013).

Table A: Fact Finding 1
Adverse Employment Actions in First Amendment Cases

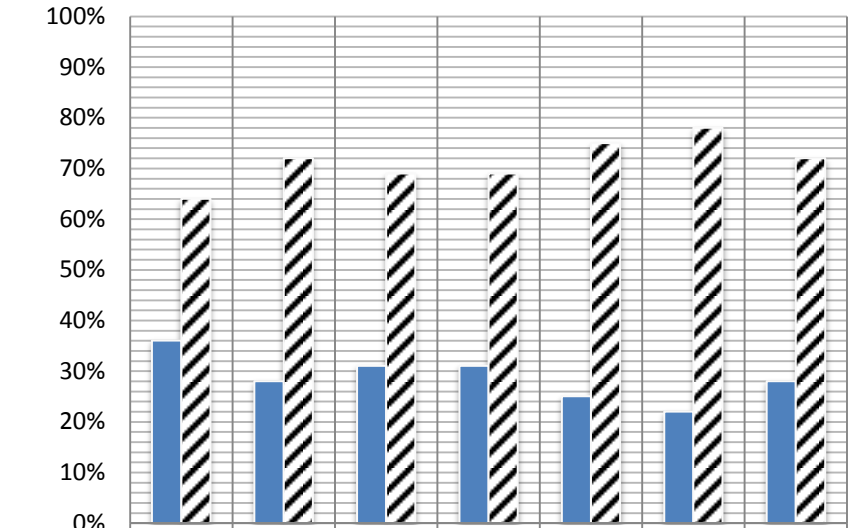


Fact Finding 1: The most common actions taken by schools against faculty were non-renewal of appointment (28%) and dismissal (24%). In some cases, the school characterized the instructor's loss of employment as non-renewal of an annual appointment, while the plaintiff said it was dismissal. In those cases, I entered data codes for both variables. In other words, there is some duplication for non-renewal and dismissal cases. Regardless, in non-renewal cases employment was not terminated during a contractual period. But in the dismissal category, terminations arose from a particular event and did not always coincide with the end of an appointment period.[153]

153. Fong v. Purdue Univ., 692 F. Supp. 930, 947 (N.D. Ind. 1988) (reporting on Purdue's February 15th dismissal hearing for tenured professor).

Non-monetary actions were the next largest category (16%). These cases included ordering a recalcitrant faculty member to enter grades for a course, where the professor said this amounted to compelled speech,[154] or creating a parallel course section that directed students away from a faculty member who published his views that African-Americans are inferior.[155]

Table B: Fact Finding 2
Winner by Types of Speech in First Court Cases



	Publish	Classroom	Protest	Social Comment	Grants	Campus Critic	Retaliation
Faculty Win	36%	28%	31%	31%	25%	22%	28%
College Wins	64%	72%	69%	69%	75%	78%	72%

Next, denial of tenure was tied to a First Amendment claim in twelve percent of the cases,[156] while revocation of a job offer occurred in just one percent of the cases.[157]

Fact Finding 2: Colleges and universities won two-thirds or more of cases involving publishing, classroom speech, protests, social

154. McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780, 781 (1st Cir. 1983).
155. Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991).
156. E.g., Blum v. Schlegel, 830 F. Supp. 712 (W.D.N.Y. 1993).
157. *E.g.*, Duke v. N. Tex. State Univ., 338 F. Supp. 990 (E.D. Tex. 1971) (reporting that professor said "motherfucker" in anti-war protest); Ollman v. Toll, 518 F. Supp. 1196 (D.Md. 1981) (discussing Marxist professor who said he was denied department head position because of his political beliefs).

commentary, grants, campus criticism, and retaliation. Table B reports data for categories of speech.[158] Some speech was classified more than one way.[159]

- Schools sanctioned faculty for speech connected to grants. In *Miller v. Bunce*, for example, a professor said his university retaliated for reporting grant fraud.[160] Schools won seventy-five percent of these cases.
- "Campus critic" cases included college instructors engaged in ordinary union activities[161] and department chairs who opposed campus reorganization plans.[162] Schools won seventy-eight percent of these cases—for example, *Ghosh v. Ohio Univ.*, where a professor complained that his department took away a summer course for which he had been scheduled, and offered a different course with more pay to a colleague.[163]
- When disputed speech was related to faculty publishing or classroom activities, schools usually won on First Amendment issues (sixty-four percent for publishing; seventy-two percent for classroom). Labels for these categories imply that administrators censored faculty members, but this was not generally the case. In *Fong v. Purdue Univ.*, a professor exploded in hostile confrontations with colleagues concerning his research publications.[164] The university said he was terminated for his aggressive confrontations, not his publishing.[165]

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158. Two small exceptions to this finding are omitted from Table B due to space constraints. Ten cases involved a school's allegation that a faculty member engaged in fraud. *E.g.*, Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16 (2010). Faculty members who denied charges of fraud won six (sixty percent) rulings. Also, only four cases involved political speech. *E.g.*, Ollman, 518 F. Supp. 1196. Faculty won two (fifty percent) rulings.

159. Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979). This case involved a professor's classroom announcement that he was a Communist. *Id.* at 810. The court held that this information did not "materially or substantially disrupt his classes." *Id.* The opinion reasoned "in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views." *Id.* at 811. This speech was coded for "classroom," but also for "political" because this speech related to the professor's party affiliation.

160. *E.g.*, Miller v. Bunce, 220 F.3d 584, *2 (5th Cir. 2000).

161. Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680 (7th Cir. 2014).

162. Schrier v. Univ. of Colo., 427 F.3d 1253 (10th Cir. 2005).

163. Ghosh v. Ohio Univ., 861 F.2d 720 (6th Cir. 1988).

164. 692 F. Supp. 930 (N.D. Ind. 1988).

165. *Id.* The case demonstrates that when faculty claimed a First Amendment violation related to their publications, there was more to the story. No cases involved censorship, as the category implies. A flavor of these publication rulings is captured in the district court's conclusion: "Neither the law, nor the university's policies can be read to impose an affirmative duty on the part of Purdue, to tilt all the windmills of all

> ● Social commentary cases included faculty statements that denigrated homosexuality and capitalism. In *Lopez v. Fresno City Coll.*, a college instructor was reprimanded after students complained that he allegedly said that "homosexuals are an abomination," called gays "faggots," and said "homosexuality is a sin."[166] A Marxian Economics professor was denied reappointment in *McDonough v. Trs. of Univ. Sys. of N. H.* after he gave all "A" grades because "[i]f everyone gets A's, it destroys the hierarchy. It confuses the capitalists when they are trying to figure out how much you're worth."[167] Schools won sixty-nine percent of these cases.

In the next data analysis, I divided the entire sample into two groups: pre- and post-cases for *Waters v. Churchill*,[168] decided on May 31, 1994. My purpose was to see if *Waters*' doctrine on disruptive speech[169] was associated with lower win rates for faculty.

Table C shows these rulings, which are arranged by first, second, and third courts.[170] Decisions are split in pre-*Waters* and post-*Waters* groups.[171] The far-left column presents pre-*Waters* statistics for first courts, followed to the right by first court rulings after *Waters*. For this analysis, it did not matter whether the case involved a finding of disruptive speech, nor did it matter if a court cited *Waters*. This is because many courts cited cases that were based indirectly on *Waters*.

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its employed geniuses, however correct their theories and research might ultimately turn out to be." *Id*. at 933.

166. 2012 WL 844911, *4 (E.D. Cal. 2012).

167. McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780, 781 (1st Cir. 1983).

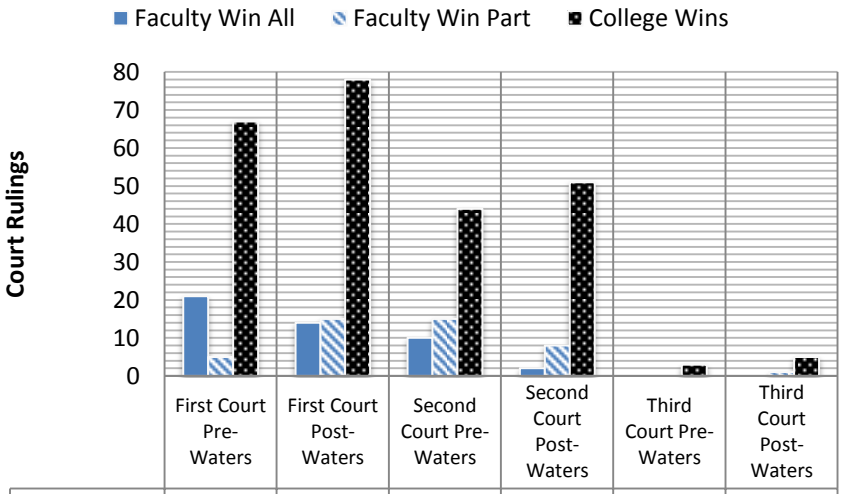
168. Waters v. Churchill, 511 U.S. 661 (1994).

169. *Id.* at 675 ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." Continuing, the opinion explained: "The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.").

170. There were too few rulings by a fourth court to show in the table.

171. By coincidence, about half of the cases (48.3%) were decided from 1964 to 1994. The remainders were decided after Waters through the present. Waters is therefore a natural dividing point in this database.

Table C: Fact Findings 3-7
First Amendment Win Rate for Faculty Drops After
Waters v. Churchill



	First Court Pre-Waters	First Court Post-Waters	Second Court Pre-Waters	Second Court Post-Waters	Third Court Pre-Waters	Third Court Post-Waters
Faculty Win All	21	14	10	2	0	0
Faculty Win Part	5	15	15	8	0	1
College Wins	67	78	44	51	3	5

Adding data in all cells, Table C has 339 First Amendment rulings. In the "College Wins" row, schools won 248 First Amendment rulings in first, second and third courts. In the row for "Faculty Win Part," professors and instructors partially won 44 First Amendment rulings, and won all in 47 rulings. Table C is the source for Fact Findings 3-7.

Fact Finding 3: **Colleges and universities won more than 73% of First Amendment rulings**. Again, summing across the columns for "College Wins," schools won 248 of 339 First Amendment rulings, yielding a win rate of 73.2%. Faculty had partial wins in 44 of 339 rulings (13%), and total wins in 47 of 339 rulings (13.8%).[172]

Fact Finding 4: In first court rulings, the win-all rate for faculty fell after *Waters*, from 22.6% to 13.1%. Faculty entirely won 21 of 93 rulings in the pre-*Waters* column (22.6%). Their win-all rate fell after

172. A separate analysis was run for cases involving contract claims. There were only seventeen cases— less than ten percent of the sample. The data were too thin from 1964 to 2014 to put in a table. Here are the results: Faculty won all in three cases (17.6%), and won part in 4 cases (23.5%). Schools won 10 cases (58.8%). Given the small sample, I cannot conclude that these results differed from those for First Amendment claims.

Waters to 14 of 107 rulings (13.1%).[173] However, the partial win rate for faculty increased from 5 of 93 pre-*Waters* rulings (5.4%) to 15 of 107 post-*Waters* rulings (14.0%). Meanwhile, the win rate for schools remained steady before *Waters* (67 of 93 rulings, 72.0%) and thereafter (78 of 107 rulings, 72.9%). Overall, *Waters* was not associated with a change in wins and losses between schools and faculty—but the precedent appeared to diminish win-all rulings for faculty while increasing their partial wins. In effect, faculty won fewer cases on summary judgment, and probably encountered longer litigation of First Amendment claims.

Textual analysis adds support to the finding that faculty won fewer speech cases after *Waters* was decided. Eighteen court opinions ruled in favor of schools while mentioning that faculty speech was disruptive.[174] Two speech themes emerged in these cases: a faculty member's personalization of sex topics, and hostile confrontations with co-workers or students. The former included discussions of a faculty member's sex life,[175] inappropriate advances,[176] lewd class discussions,[177] and assignment of a reading about a male instructor's sexual arousal.[178] Hostility cases involved faculty speech that was confrontational, degrading, or intimidating.[179]

In contrast, 23 opinions ruled for a faculty member while referencing disruptive faculty speech.[180] This statistic is misleading because after

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173. The drop in the win rate for faculty was not likely due to chance (χ^2 6.285; df=2, p<.043).

174. DePree v. Saunders, 588 F.3d 282 (5th Cir. 2009); Trejo v. Shoben, 319 F.3d 878, 883 (7th Cir. 2003); Bonnell v. Lorenzo, 241 F.3d 800, 803–05 (6th Cir. 2001); Jackson v. Leighton, 168 F.3d 903 (6th Cir. 1999); Scallet v. Rosenblum, 106 F.3d 391 (4th Cir. 1997); Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995); Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988); Ghosh v. Ohio Univ., 861 F.2d 720 (6th Cir. 1988); DePree v. Saunders, 2008 WL 4457796 (S.D. Miss. 2008); Marinoff v. City Coll. of N.Y., 357 F. Supp.2d 672 (S.D.N.Y. 2005); Scallet v. Rosenblum, 911 F. Supp. 999 (W.D. Va. 1996); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407 (C.D. Cal. 1995); Wirsing v. Bd. of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990); Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988); Landrum v. E. Ky. Univ., 578 F. Supp. 241 (E.D. Ky. 1984); Bradford v. Tarrant Cnty. Junior Coll., 356 F. Supp. 197 (N.D. Tex. 1976); Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228 (Cal. Ct. App.1985); Mills v. W. Washington Univ., 208 P.3d 13, 21 (Wash. App. 2009)(*rev'd on other grounds*).

175. Scallet, 911 F. Supp. 999 at 1007.

176. Trejo v. Shoben, 319 F.3d 878, 888 (7th Cir. 2003).

177. Bonnell v. Lorenzo, 241 F.3d 800, 803–04 (6th Cir. 2001).

178. Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1410 n.3 (C.D. Cal. 1995).

179. Maples v. Martin, 858 F.2d 1546, 1554 (11th Cir. 1988); Fong v. Purdue Univ., 692 F. Supp. 930, 955 (N.D. Ind. 1988); Mills v. W. Washington Univ., 208 P.3d 13, 21 (Wash. App. 2009).

180. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996) (en banc); Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994); Levin v. Harleston,

Waters only eight court opinions ruled in favor of instructors.[181] But in rare disruption cases with controversial ideas or expressions, courts found that schools violated the First Amendment rights of faculty.[182]

Fact Finding 5: In second court rulings, the win-all rate for faculty fell after *Waters*, from 14.5% to 3.3%. Before *Waters*, the faculty win all rate from second courts was 14.5% (10 of 69 cases). After *Waters*, this rate fell to 3.3% (2 of 61 cases).[183] Their partial win rate also fell from 21.7% (15 of 69 pre-*Waters* rulings) to 13.1% (8 of 61 post-*Waters* rulings).

Fact Finding 6: In second court rulings, the win rate for colleges and universities rose after *Waters* from 63.8% to 83.6%. Schools won 83.6% of second-round rulings (51 of 61 cases) after *Waters*. Before *Waters*, schools won 44 of 69 cases (63.8%). The best textual evidence of *Waters*' influence appears in three appellate rulings in a single case— the Second Circuit's affirmance of a judgment for a professor whose public speech had insulting references to Jews in *Harleston v. Jeffries*,[184] the

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966 F.2d 85 (2d Cir. 1992); Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); Kim v. Coppin State Coll., 662 F.2d 1055 (4th Cir. 1981); Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 218 (3d Cir. 1980); Appel v. Spiridon, 2011 WL 3651353 (D. Conn. 2011); Milman v. Prokopoff, 100 F. Supp.2d 954 (S.D. Iowa 2000); Bonnell v. Lorenzo, 81 F. Supp.2d 777 (E.D. Mich. 1999); Burnham v. Ianni, 899 F. Supp. 395 (D. Minn. 1995); Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993); Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990); Croushorn v. Bd. of Trs. of Univ. of Tenn., 518 F. Supp. 9 (M.D. Tenn. 1980); Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980); Hillis v. Stephen F. Austin State Univ., 486 F. Supp. 663 (E.D. Tex. 1980); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979); Aumiller, *supra* note 149; Duke v. N. Tex. State Univ., 338 F. Supp. 990 (E.D. Tex. 1971); Close v. Lederle, 303 F. Supp. 1109 (D.Mass. 1969).

181. Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc); Hardy, 260 F.3d 671; Appel, 2011 WL 3651353; Burnham v. Ianni, 899 F. Supp. 395 (D. Minn. 1995); Milman v. Prokopoff, 100 F. Supp.2d 954. Notably, the Burnham case contributed three opinions to this small total. In the post-Waters period, there was one significant ruling against a school that asserted a disruptive speech argument. In Hardy, a college instructor who taught a communication course devoted a class period to language that marginalizes minorities. Students offered words such as "girl," "lady," "faggot," "nigger," and "bitch." Hardy, 260 F.3d at 675. After their classmate complained, campus administrators fired Prof. Hardy. Distinguishing this case from Bonnell, the Sixth Circuit reasoned that this was "a classic illustration of 'undifferentiated fear' of disturbance on the part of the College's academic administrators." *Id.*

182. *See* Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992). The Second Circuit ruled that a professor engaged in constitutionally protected speech, even though this caused disruptive protests on campus, when he published that African-Americans are intellectually inferior to Caucasians. *Id.* Faculty members who criticized campus administrators engaged in protected speech, even though their communications unsettled operations. *See also* Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 218 (3d Cir. 1980).

183. This decline was not likely due to chance (χ^2 7.516, df=2; p<.023).

184. Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994).

Supreme Court's terse order to vacate this judgment in light of *Waters*,[185] and on remand, the Second Circuit's order to reverse the original judgment.[186]

Fact Finding 7: Prolonged litigation improved the win rate for colleges and universities. Faculty won less often in second rulings compared to first rulings— in cases before *Waters*[187] and after.[188] Specifically, the faculty win-all rate in first courts after *Waters* dropped 9.5 percentage points.[189] By contrast, there were fewer second rulings for faculty that reversed a school's win in a first ruling.[190] In other words, prolongation of litigation diminished faculty wins— and even if they won in a third court ruling, long delay mitigated their wins.[191]

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185. Harleston v. Jeffries, 513 U.S. 996 (1994).

186. Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995).

187. Bishop v. Aranov, 926 F.2d 1066 (11th Cir. 1991); Staheli v. Univ. of Miss., 854 F.2d 121 (5th Cir. 1988); Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982); Duke v. N. Tex. State Univ., 469 F.2d 829 (5th Cir. 1972); Close v. Lederle, 424 F.2d 988 (1st Cir. 1970); Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990); Jacobs v. Meister, 775 P.2d 254 (N.M. App. 1989); Staheli v. Univ. of Miss., 621 F. Supp. 449 (N.D. Miss. 1985); Hillis v. Stephen F. Austin State Univ., 486 F. Supp. 663 (E.D. Tex. 1980); Jacobs v. Meister, 615 P.2d 982 (N.M. 1980); Duke v. N. Tex. State Univ., 338 F. Supp. 990 (E.D. Tex. 1971); Close v. Lederle, 303 F. Supp. 1109 (D.Mass. 1969).

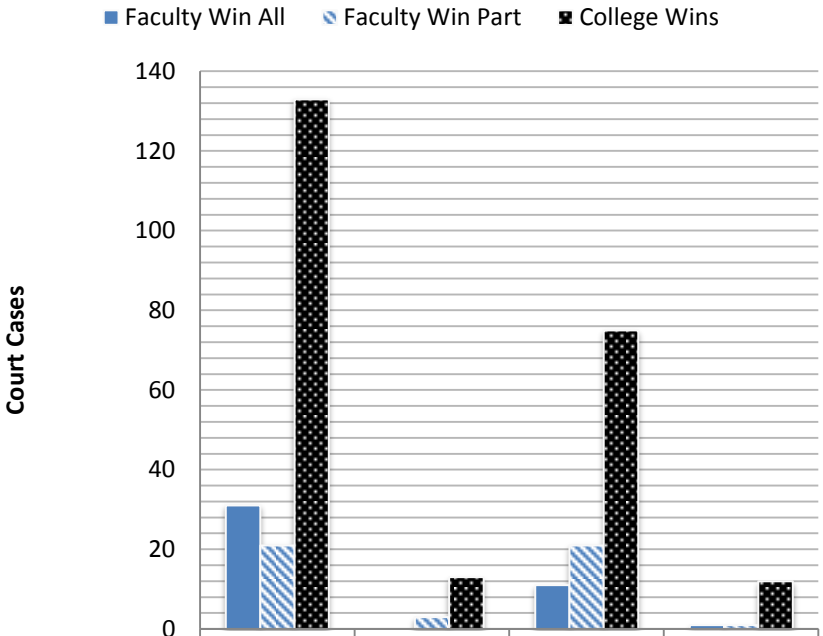
188. Keating v. Univ. of S.D., 980 F. Supp.2d 1137 (D.S.D. 2014); Bonnell v. Lorenzo, 241 F.3d 800, 803–05 (6th Cir. 2001); Urofsky v. Allen, 216 F.3d 401 (4th Cir. 2000); Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999); Harrington v. Harris, 108 F.3d 598 (5th Cir. 1997); Keating v. Univ. of S.D., 569 Fed. Appx. 469 (8th Cir. 2014); Bonnell v. Lorenzo, 81 F. Supp.2d 777 (E.D. Mich. 1999); Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998); Churchill v. Univ. of Colo. at Boulder, 285 P.3d 986 (Colo. 2012); Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16, 22 (2010); Churchill v. Univ. of Colo., 2009 WL 2704509 (2009); see also Gies v. Flack, 1996 WL 1671234 (S.D. Ohio 1996); Gies v. Flack, 495 F. Supp.2d 854 (S.D. Ohio 2007) (ruling for university that dean had misappropriated funds), where a professor who was removed from being dean and from teaching lost two court decisions that were rendered 11 years apart.

189. *See supra* Fact Finding 4, faculty win-rate of 22.6% in first court rulings [column 1] fell to 13.1% in second court rulings [column 2]).

190. *E.g.*, Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680 (7th Cir. 2014); D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974). The D'Andrea court ruled that a geography professor's critical statements about university finances resulted in retaliation, and his statements were protected under the First Amendment. Meade overturned a lower court ruling by concluding that a college instructor's letter, critical of the college's treatment of adjunct faculty members, raised matters of public concern. Rampey overruled a lower court by concluding that a faculty member's criticism of university administration was protected under the First Amendment.

191. *See* Jacobs v. Meister, 615 P.2d 982 (N.M. 1980). After an assistant professor's employment was not renewed in 1975, he sued in state court and a jury awarded him $80,000. *Id*. at 983-84. The New Mexico Supreme Court remanded the matter because the lower court erred by not giving the jury proper instructions for

Table D: Fact Finding 8
Federal Court Is Better Than State Court For Faculty Speech Claims



	Federal First Court	State First Court	Federal Second Court	State Second Court
Faculty Win All	31	0	11	1
Faculty Win Part	21	3	21	1
College Wins	133	13	75	12

Continuing with the statistical analysis, Table D shows results for the winner of First Amendment rulings in federal and state court at the first and second rounds of litigation.

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evaluating a First Amendment claim under Pickering. *Id*. at 984-85. On the First Amendment issue, this case was coded as faculty wins first court ruling and university wins second ruling. This was a rare case that had a third ruling. In Jacobs v. Meister, 615 P.2d 982 (N.M. 1980), the professor eventually prevailed on his First Amendment claim— nine years after the second court ruling, and 14 years after he lost his job due to criticism of the university administration. For a similar record of prolonged litigation, *see* Appel v. Spiridon, 463 F. Supp.2d 255 (D. Conn. 2006); Appel v. Spiridon, 2011 WL 3651353 (D. Conn. 2011); Appel v. Spiridon, 521 F.App'x 9 (2d Cir. 2013).

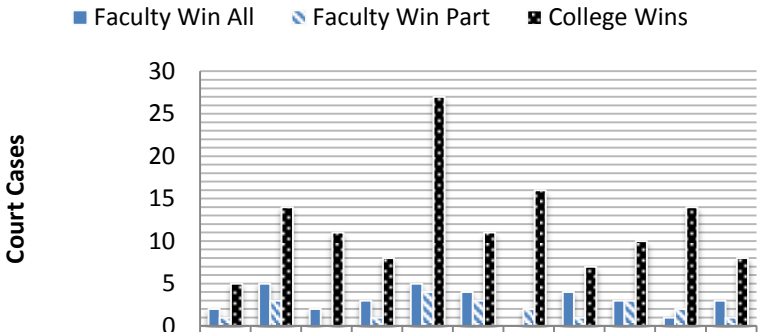
Fact-Finding 8: The win rate for faculty was higher in federal court than state court. In federal first round rulings, faculty had a win-all rate of 16.8% (31 of 185 rulings), and 11.4% for partial wins (21 of 185 rulings). Combining these outcomes, faculty won all or part of 28.2% First Amendment rulings. But in state first round rulings, faculty had no win-all rulings and 18.8% partial wins (3 of 16 rulings). Comparing these outcomes, faculty were 9.4 percentage points more successful in federal courts compared to state courts.

These results were basically repeated in second round rulings (two right-hand columns in Table D). In federal courts, faculty won all or part in 32 (11 plus 21 in column 3) of 107 rulings for a win rate of 29.9%. By contrast, in state courts faculty had a combined win rate of 14.2% (winning part or all in 2 of 12 rulings in column 4). The faculty win rate was 15.7 percentage points more for federal courts in second court rulings.

Table E and Table F show First Amendment wins by federal circuits for first round and second round rulings.[192] Fact Findings 9-11 are based on these tables.

192. Faculty members raised a First Amendment issue in a case in the D.C. Circuit. Therefore, the case was added to the sample. The district and appellate court, however, decided the lawsuit on other grounds. Thus, there are no First Amendment data for Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *aff'd*, 412 F.2d 1128 (D.C. Cir. 1969).

Table E: Fact Finding 9
First Rulings by Federal Circuits on First Amendment



	1st	2nd	3d	4th	5th	6th	7th	8th	9th	10th	11th
Faculty Win All	2	5	2	3	5	4	0	4	3	1	3
Faculty Win Part	1	3	0	1	4	3	2	1	3	2	1
College Wins	5	14	11	8	27	11	16	7	10	14	8

Fact Finding 9: In first court rulings, win rates for colleges and universities were highest in the Seventh, Third, and Tenth Circuits, and lowest in the Eighth, Ninth, First, and Second Circuits. Table E shows that schools had their highest win rates in the Seventh Circuit (88.9%),[193] Third Circuit (84.6%),[194] and Tenth Circuit (82.4%).[195] Schools

193. Schools prevailed in several first level cases. Brooks v. Univ. of Wisc. Bd. of Regents, 406 F.3d 476 (7th Cir. 2005); Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003); Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003); Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999); Keen v. Penson, 970 F.2d 252 (7th Cir. 1992); Eichman v. Ind. State Univ. Bd. of Trs., 597 F.2d 1104 (7th Cir. 1979); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972); Meade v. Moraine Valley Cmty. Coll., 2014 WL 411296 (N.D. Ill. 2014); Renken v. Gregory, 2005 WL 1962988 (E.D. Wis. 2005); Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F. Supp.2d 611 (N.D. Ill. 2004); Lim v. Trs. of Ind. Univ., 2001 WL 1912634 (S.D. Ind. 2001); Rubin v. Ikenberry, 933 F. Supp. 1425 (C.D. Ill. 1996); Colburn v. Trs. of Ind. Univ., 739 F. Supp. 1268 (S.D. Ind. 1990); Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988); Weinstein v. Univ. of Ill., 628 F. Supp. 862 (N.D. Ill. 1986).

194. Brown v. Armenti, 247 F.3d 69 (3d Cir. 2001); Edwards v. Cal. Univ. of Pa., 156 F.3d 488 (3d Cir. 1998); Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 218 (3d Cir. 1980); Gooden v. Pa., 2010 WL 5158996 (E.D. Pa. 2010); Gorum v. Sessoms, 2008 WL 399641 (D. Del. 2008); Keddie v. Pa. State Univ., 412 F. Supp. 1264 (M.D. Pa. 1976); Lasuchin v. Perrin, 1988 WL 95079 (E.D. Pa. 1988); Shovlin v. Univ. of Med. & Dent. of N.J., 50 F. Supp.2d 297 (D.N.J. 1998); Skehan v. Bd. of Trs. of Bloomsburg State Coll., 436 F. Supp. 657 (M.D. Pa. 1977); Stiner v. Univ. of Del., 243

were least successful in first court rulings in the Eighth Circuit (58.3%),[196] Ninth Circuit (62.5%),[197] First Circuit (62.5%),[198] and Second Circuit (63.6%).[199] The spread between high and low first courts was 30.6

F. Supp.2d 106 (D. Del. 2003).

195. Schrier v. Univ. of Colo., 427 F.3d 1253 (10th Cir. 2005); Clinger v. N.M. Highlands Univ., Bd. of Regents, 215 F.3d 1162 (10th Cir. 2000); Lighton v. Univ. of Utah, 209 F.3d 1213 (10th Cir. 2000); Bunger v. Univ. of Okla. Bd. of Regents, 95 F.3d 987 (10th Cir. 1996); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Duckett v. Okla. ex rel. Bd. of Regents of Univ. of Okl., 986 F. Supp.2d 1249 (W.D. Okla. 2013); Idaho State Univ. Faculty Ass'n for the Preservation of Free Speech v. Idaho State Univ., 2012 WL 1313304 (D. Idaho 2012); Sadwick v. Univ. of Utah, 2001 WL 741285 (D. Utah 2001); Loving v. Boren, 956 F. Supp. 953 (W.D. Okla. 1997); Thornton v. Kaplan, 937 F. Supp. 1441 (D. Colo. 1996); Gressley v. Deutsch, 890 F. Supp. 1474 (D. Wyo. 1994); Wirsing v. Bd. of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970).

196. Gumbhir v. Curators of the Univ. of Miss., 157 F.3d 1141 (8th Cir. 1998); Mumford v. Godfried, 52 F.3d 756 (8th Cir. 1995); King v. Univ. of Minn., 774 F.2d 224 (8th Cir. 1985); Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974); Heublein v. Wefald, 784 F. Supp.2d 1186 (D. Kan. 2011); Tonkovich v. Kan. Bd. of Regents, 1996 WL 705777 (D. Kan. 1996); Day v. Bd. of Regents of Univ. of Neb., 911 F. Supp. 1228 (D. Neb. 1995); Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981); Milman v. Prokopoff, 100 F. Supp.2d 954 (S.D. Iowa 2000); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979); Hibbs v. Bd. of Ed. of Iowa Cent. Cmty. Coll., 392 F. Supp. 1202 (N.D. Iowa 1975).

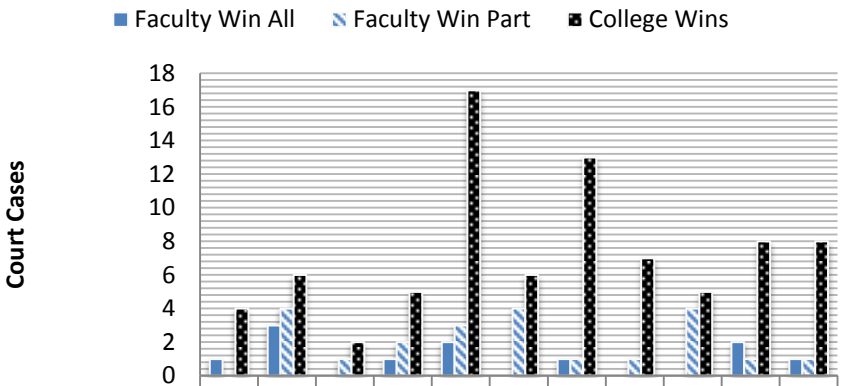
197. Rodriguez v. Maricopa Cnty. Cmty. Coll., 605 F.3d 703 (9th Cir. 2010); Lamb v. Univ. of Haw., 145 F.3d 1338 (9th Cir. 1998); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Piarowski v. Ill. Comm. Coll., 759 F.2d 625 (7th Cir. 1985); Haimowitz v. Univ. of Nev., 579 F.2d 526 (9th Cir. 1978); Bignall v. N. Idaho Coll., 538 F.2d 243 (9th Cir. 1976); Hong v. Grant, 516 F. Supp.2d 1158 (C.D. Cal. 2007); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407 (C.D. Cal. 1995); Pressman v. Univ. of N.C. at Charlotte, 337 S.E.2d 644 (1985); Harris v. Ariz. Bd. of Regents, 528 F. Supp. 987 (D. Ariz. 1981); Wolfe v. O'Neill, 336 F. Supp. 1255 (D. Alaska 1972).

198. Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986); McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780 (1st Cir. 1983); Alberti v. Carlo-Izquierdo, 818 F. Supp.2d 452 (D.P.R. 2011); Nelson v. Univ. of Me. Sys., 923 F. Supp. 275 (D. Me. 1996); Stitzer v. Univ. of P.R., 617 F. Supp. 1246 (D.P.R. 1985).

199. Ezuma v. City Univ. of N.Y., 367 F.App'x 178 (2d Cir. 2010); Flyr v. City Univ. of N.Y., 2011 WL 1675997 (S.D.N.Y. 2011); Jay Jian-Qing Wang v. Swain, 2011 WL 887815 (N.D.N.Y. 2011); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Isenalumhe v. McDuffie, 697 F. Supp.2d 367 (E.D.N.Y. 2010); Kalderon v. Finkelstein, 2010 WL 3359473 (S.D.N.Y. 2010); Shub v. Westchester Cmty. Coll., 556 F. Supp.2d 227 (S.D.N.Y. 2008); Ezuma v. City Univ. of N.Y., 665 F. Supp.2d 116 (E.D.N.Y. 2009); Marinoff v. City Coll. of N.Y., 357 F. Supp.2d 672 (S.D.N.Y. 2005); Radolf v. Univ. of Conn., 364 F. Supp.2d 204 (D. Conn. 2005); Harris v. Merwin, 901 F. Supp. 509 (N.D.N.Y. 1995); Meadows v. State Univ. of N.Y. at Oswego, 832 F. Supp. 537 (N.D.N.Y. 1993); Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993); Blum v. Schlegel, 830 F. Supp. 712 (W.D.N.Y. 1993); Vega v. State Univ. of N.Y. Bd. of Trs., 2000 WL 381430 (S.D.N.Y. 2000); Narumanchi v. Bd. of Trs. of Conn. State Univ., 1986 WL 15753 (D. Conn. 1986);

percentage points (comparing the Seventh and Eighth Circuits), suggesting that federal courts do not consistently rule on First Amendment issues.[200]

Table F: Fact Finding 10
Second Rulings by Federal Circuits on First Amendment



	1st	2nd	3d	4th	5th	6th	7th	8th	9th	10th	11th
Faculty Win All	1	3	0	1	2	0	1	0	0	2	1
Faculty Win Part	0	4	1	2	3	4	1	1	4	1	1
College Wins	4	6	2	5	17	6	13	7	5	8	8

Fact Finding 10: In second court rulings, schools were most successful in the Eighth and Seventh, and least successful in the Second and Sixth Circuits. In Table F, schools in the Eighth Circuit won 87.5% of First Amendment rulings at the second level.[201] The Seventh Circuit ruled for schools almost as often (86.7%).[202] Schools were less successful in the

Lieberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979).

200. This is a plausible interpretation, but not proven by the statistics. Courts could uniformly apply First Amendment tests across the circuits, but variation in win rates could be explained by regional differences in how campuses deal with speech controversies. The lower success rate for schools in the Eighth Circuit could mean that administrators take harsher actions in response to speech controversies.

201. Keating v. Univ. of S.D., 569 Fed. Appx. 469 (8th Cir. 2014); Gumbhir v. Curators of the Univ. of Miss., 157 F.3d 1141 (8th Cir. 1998); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996); Day v. Bd. of Regents of Univ. of Neb., 83 F.3d 1040 (8th Cir. 1996); King v. Univ. of Minn., 774 F.2d 224 (8th Cir. 1985);); Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981); Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504 (10th Cir. 1998); Russ v. White, 680 F.2d 47 (8th Cir. 1982);); Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974).

202. Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008); Brooks v. Univ. of Wisc.

Second Circuit (46.2%)[203] and Ninth Circuit (55.6%).[204] In second round rulings, the spread between the highest and lowest win rates for schools was 41.3 percentage points (comparing the Eighth and Second Circuit).

Fact Finding 11: Combining first and second court rulings in Table E and Table F, Seventh Circuit courts were the most favorable for schools, while courts in the Second Circuit and Ninth Circuit were the most favorable for faculty. This conclusion is based on Fact Finding 9 and Fact Finding 10.

Summary: After *Waters v. Churchill*, judgments against colleges and universities were less frequent.[205] However, this does not mean that *Waters* caused this change. Other factors, such as change in the composition of the judiciary or more restraint by schools over the past 20 years, could influence this difference. Still, the fact that post-*Waters* rulings shifted more faculty victories from "win all" to "win part" may signify that courts follow *Waters* and want to hear schools put on evidence of disruption to campus operations.[206] Considering that schools are better able to shoulder the costs of trials and appeals, this shift appears to be consequential.

Bd. of Regents, 406 F.3d 476 (7th Cir. 2005); Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003); Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003); Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999); Feldman v. Ho, 171 F.3d 494 (7th Cir. 1998); Colburn v. Trs. of Ind. Univ., 973 F.2d 581 (7th Cir. 1992); Keen v. Penson, 970 F.2d 252 (7th Cir. 1992); Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987); McElearney v. Univ. of Ill. at Chi. Circle Campus, 612 F.2d 285 (7th Cir. 1979); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972); Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F. Supp.2d 611 (N.D. Ill. 2004); Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988); Roth v. Bd. of Regents of State Colls., 310 F. Supp. 972 (W.D. Wis. 1970).

203. Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994); Ezuma v. City Univ. of N.Y., 367 F.App'x 178 (2d Cir. 2010); Kalderon v. Finkelstein, 495 F.App'x 103 (2d Cir. 2012); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Marinoff v. City Coll. of N.Y., 357 F. Supp.2d 672 (S.D.N.Y. 2005)

204. Hong v. Grant, 403 F.App'x 236 (9th Cir. 2010); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Lamb v. Univ. of Haw., 145 F.3d 1338 (9th Cir. 1998); Piarowski v. Ill. Comm. Coll., 759 F.2d 625 (7th Cir. 1985);); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407 (C.D. Cal. 1995); Wolfe v. O'Neill, 336 F. Supp. 1255 (D. Alaska 1972); Pressman v. Univ. of N.C. at Charlotte, 337 S.E.2d 644 (1985).

205. My research design does not permit an inference about causation. Probably, the before-and-after differences are due to other factors: ideological change over time in the judiciary, differences in how school administrators respond to speech issues, changes in student sensitivities to speech, stricter non-discrimination laws related to the classroom and workplace, and others.

206. Waters v. Churchill, 511 U.S. 661, 675 (1994) ("When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.").

V. CONCLUSIONS

Principles of academic freedom are broad and permissive.[207] Faculty and their schools widely endorse these precepts.[208] Nonetheless, *Pickering*, *Connick*, *Waters*, and *Garcetti* do not adequately protect academic freedom.[209] This conclusion is not novel.[210] However, my study provides the first empirical support for this conclusion.

How do courts view academic freedom? My study answers this question, albeit with important caveats. To begin, the First Amendment is not synonymous with academic freedom. Even with my study's emphasis on quantitative analysis, I cannot estimate their overlap.

Second, my fact-findings only pertain to public colleges and universities. This is not to say that private schools are immune from speech controversies. They are not.[211] But faculty at these schools lack the same constitutional protection of free expression.[212]

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207. AAUP, *supra* note 73.

208. Univ. of Chicago, *supra* note 35.

209. *See supra* Part III.B.

210. White, *supra* note 8, at 841.

> Here, then, are the salient features of a half-century of decided case law on the academic freedom rights of the nation's faculty members: Those rights have been articulated in precious few Supreme Court decisions— hardly more than a half-dozen significant cases in fifty years. Those rights have been diluted by lack of consensus over what academic freedom protects and who can invoke its protections.

Id. See also Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 21 (2007); Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115, 157-58 (2014) ("Garcetti, if applied to core academic speech, portends an ominous future for public college and university professorial expression."); Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti Versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405, 466 (2013) ("Though fixing the Garcetti problem for public employee speech mitigates the harm to academic freedom, it does not address the fundamental problem that speech in the public arena is very different from academic speech. Therefore, the Court should exempt academic speech from the public employee speech doctrine. . . ."); W. Stuart Stullar, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); *see also* Hilary Habib, Note, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDISC. L.J. 509, 543 (2013) ("As it stands under Garcetti, in most circumstances, professors are left with inadequate First Amendment protection, and their academic freedom is severely threatened.").

211. *E.g.*, Jaschik, *supra* note 1 (reporting on Prof. Saida Grundy's controversial tweets, such as "deal with your white sh*t [sic], white people. Slavery is a *YALL* thing." At the time, Prof. Grundy was about to start her job as a Sociology professor at Boston University.

212. When professors at private schools allege a First Amendment violation, they

My finding that schools win more than 70 percent of First Amendment cases is subject to a third caveat: The sample is not the universe of faculty speech disputes— far from it. Omitted cases involve faculty speech controversies that are covered by a collective bargaining agreement,[213] and others that are settled privately through negotiation.[214]

The settled cases might tell us more about the tensions around academic freedom than the First Amendment cases in this study. Hypothetically, a professor who teaches a course on feminism might demonstrate how society marginalizes women by isolating men in the

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argue that their school has a sufficient government nexus to implicate constitutional protection. Courts reject this reasoning. *E.g*., Spark v. Catholic Univ. of America, 510 F.2d 1277 (D.C. Cir. 1975); Blouin v. Loyola Univ., 506 F.2d 20 (5th Cir. 1975); Wahba v. N.Y. Univ., 492 F.2d 96 (2d Cir. 1974); Moor-Jankowski v. Bd. of Trs. of N.Y. Univ., 1998 WL 474084 (S.D.N.Y. 1998); Jones v. Kneller, 482 F. Supp. 204 (E.D.N.Y. 1979); *but see* Isaacs v. Bd. of Trs. of Temple Univ. of Com. Sys. of Higher Educ., 385 F. Supp. 473 (E.D. Pa. 1974) (finding state action where Pennsylvania appropriated substantial support to Temple). The AAUP sums up this situation: "Private universities are largely not subject to . . . constitutional requirements . . . and students, faculty, and staff at most private universities therefore do not enjoy a 'First Amendment' right of protection against discipline for speech-related infractions." Rachel Levinson, *Academic Freedom and the First Amendment*, AAUP (2007), http://www.aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007#3.

213. Typically, those disputes are eligible for arbitration. On rare occasion, the matter is so public that some details appear in the news. *E.g*., Associated Press, *Professor Linked to Alleged Terrorists Vows to Fight Dismissal*, First Amendment Center, Jan. 15, 2002, http://www.firstamendmentcenter.org/professor-linked-to-alleged-terrorists-vows-to-fight-dismissal. While the University of South Florida gave notice to terminate Prof. Sami Al-Arian due to alleged terror connections, he alleged that he was punished for expressing anti-Israel views. The matter was set for arbitration.

214. *E.g*., Kendi Anderson, *Bryan College, Professors Settle Law*suit, TIMESFREEPRESS.COM (Oct. 8, 2014), http://www.timesfreepress.com/news/local/story/2014/oct/08/bryan-college-professors-settle-lawsuit/269025/ (reporting settlement where some faculty refused to agree to college statement ruling out evolution); *East Georgia College Settles Lawsuit for $50,000 After Firing Professor Who Criticized Sexual Harassment Policy*, FIRE (Sept. 6, 2011), https://www.thefire.org/east-georgia-college-settles-lawsuit-for-50000-after-firing-professor-who-criticized-sexual-harassment-policy-2/; Scott Jaschik, *$600K for Fired Professor*, INSIDE HIGHER ED (Jan. 26, 2007), https://www.insidehighered.com/news/2007/01/26/cobbs. Some cases in my database settled after a court ruled. *E.g*., Michael Bragg, *Former Washington State U. Professor Agrees to Settlement in Free Speech Case*, SPLC, Nov. 13, 2014, http://www.splc.org/article/2014/11/former-washington-state-u-professor-agrees-to-settlement-in-free-speech-case; Harvey Rice, *Fired Mainland Professor Settles Lawsuit*, HOUS. CHRON. (Dec. 15, 2014), http://www.houstonchronicle.com/news/article/Fired-Mainland-professor-settles-lawsuit-5958998.php; *Fired Calif. Professor Exonerated in Settlement of Lawsuit Against San Jose College District*, ALLIANCE DEFENDING FREEDOM (July 22, 2010), http://www.adfmedia.org/News/PRDetail/153.

class— perhaps by refusing to call on them in discussions or respond to their questions, ignoring their e-mails, and not grading their work.[215] A college, on the other hand, would treat this as gender discrimination, and counteract the professor's pedagogy. The parties could compromise by creating an exclusive section for women and parallel section for all students, with no employee discipline and no First Amendment lawsuit.

So far, I have discussed caveats for cases that are not in the sample. I must add two more reservations about cases in my study. First, some faculty took minor disputes to court.[216] These cases had the outward appearance of academic freedom because they were grounded in the First Amendment—but they had nothing to do with the marketplace of ideas.

Second, schools seemed to use an internal *Pickering* analysis. Thus, they took less extreme measures in order to improve their odds in court—for example, by sequestering hostile professors instead of firing them.[217] Consistent with this theory, schools rarely terminated tenured faculty members.[218] In short, the high win rate for schools is partly due to a mix of cases where some faculty made mountains out of molehills, and others where schools took optimal instead of maximal actions.

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215. *See* McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780 (1st Cir. 1983).

216. In a mundane dispute over a performance review, a university denied a pay raise to a professor who refused to use a standard course evaluation. Wirsing v. Bd. of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990). The Wirsing case is in the database because the professor contended she had a First Amendment right to administer her own course evaluation. Similarly, a faculty member sued over a low performance rating because he operated his chemistry lab out of his home, a unique situation that disqualified him from grants. *See* Day, *supra* note 196. These were kooky First Amendment cases. In a related vein, faculty members escalated a trivial speech dispute into an epic legal battle. In Burnham, *supra* note 201, historians engaged in protracted litigation over their university's decision to remove their department photos showing them humorously posing with historical weapons after this public display terrified a colleague to the point of making her own complaint. This lawsuit was less about academic freedom and more about a dysfunctional history department.

217. *E.g.*, Duckett v. Okla. ex rel. Bd. of Regents of Univ. of Okl., 986 F. Supp.2d 1249 (W.D. Okla. 2013) (involving a tenured faculty member who was stripped of his duties and prohibited from entering the campus without permission). The professor alleged that the university took this action in response to his strident complaints that African-Americans were under-represented on the faculty. *Id.* The university countered that he was not excluded due to his advocacy but for shouting at colleagues that they are racists. *Id. See* Joint Status Report and Discovery Plan, Duckett v. Ross, 2014 WL 1028957 (W.D. Okla. 2014) (No. CIV-13-312-D).

218. *See* Sarah Kuta, *CU-Boulder Moves to Fire Professor Accused of Retaliating Against a Sexual Assault Victim*, DAILY CAMERA (Aug. 7, 2014) (for only the fourth time over 138 years, University of Colorado moved to fire a tenured professor). Terminations of tenured faculty members were uncommon in the sample. *E.g.*, Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988); Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16 (2010).

At the core of my study, only a few First Amendment cases dealt with controversial ideas. A key conclusion is that courts rarely rule on intellectual aspects of academic freedom. This implies that colleges and universities rarely interfere with the expression of objectionable and controversial ideas.

But rumblings in my database also reveal instances where schools suppressed unorthodox viewpoints. In these cases, courts were evenly divided. Sometimes, they applied the First Amendment to protect unpopular ideas.[219] But, just as often, courts sided with schools. These rulings devalued academic freedom. Courts minimized the thought provoking value of sexually-themed art.[220] Courts stood behind schools that shielded students from a professor who espoused the intellectual inferiority

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219. *E.g*., Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001) ("Hardy's speech was germane to the subject matter of his lecture on the power and effect of language. The course was on interpersonal communications, and Hardy's speech was limited to an academic discussion of the words in question."); *see also* Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990), involving a professor who was denied tenure several years after the school discontinued his course equating Zionism with Nazism due to protest and controversy. His dean decided not to approve him for tenure, citing his paucity of publications. *Id*. at 591. Dube contended, however, that the tenure decision was retaliation for his outspoken views on Zionism. *Id*. at 592-93. Ruling that his First Amendment claim was triable, the Second Circuit said: "[W]hile we recognize that courts should accord deference to academic decisions . . . for decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom." *Id*. at 598 (citations omitted). In another case, a professor with expertise in seismology alleged that his employment was terminated in response to pressure from an electrical power company after he voiced concern on a radio program that the siting of a new power plant was too close to an active fault line. *See* McCann v. Ruiz, 802 F. Supp. 606 (D.P.R. 1992). The professor prevailed before a jury, and was awarded $605,000.00 as compensatory damages and an additional $145,000.00 as punitive damages. *Id*. at 609. In 2015, eight months after my data collection ended, a federal district court ruled that controversial Twitter posts were protected by the First Amendment. Salaita v. Kennedy, 2015 WL 4692961, at *9 (N.D. Ill. 2015) (stating: "Dr. Salaita's has alleged facts that plausibly demonstrate he was fired because of the content of his political speech in a public forum. In other words, Dr. Salaita's tweets implicate every 'central concern' of the First Amendment.").

220. *See* Piarowski v. Ill. Cmty. Coll., 759 F.2d 625 (7th Cir. 1985). To justify its rejection of the instructor's First Amendment claim, the Seventh Circuit used subjective reasoning in stating that the "concept of freedom of expression ought not be pushed to doctrinaire extremes." *Id*. at 630. The court blurred the line between academe and the broader public domain, reasoning that "[i]f Claes Oldenburg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare." *Id*. While art in a public plaza has no claim to academic freedom, the Seventh Circuit did not explain how this example fit an academic setting, where controversial ideas are given more latitude.

of African-Americans.[221] But these rulings deprived students a rare opportunity to confront an authority figure who trades in contemptible ideas. One court backed a school that denied tenure to a professor whose conservatively oriented research attacked Fidel Castro.[222] Another court allowed Virginia to restrict faculty access to the Internet.[223] These were not cases where speech intimidated or abused students or co-workers[224]—again, they dealt with a faculty member's controversial, unconventional, or loathsome ideas. Courts eroded academic freedom by finding no First Amendment violations in these cases.

Ultimately, I conclude that First Amendment jurisprudence does not protect the most controversial ideas expressed by faculty in higher education. The *Pickering* balancing test and subsequent rulings in *Connick*, *Waters*, and *Garcetti* were meant for other work settings. Today, they tip the scales for schools in speech controversies.

My empirical findings counsel professors to be more realistic about the limits of First Amendment protection.[225] These findings are encapsulated in one court's idea that while a university depends on academic freedom to achieve its full realization, professors "fail to appreciate that the wisdom of a given practice as a matter of policy does not give the practice constitutional status."[226]

Faculty must think more deeply about strategies to preserve academic freedom. Courts are not suited for this task.[227] Faculty, in their employment relationships, should rely less on the First Amendment and negotiate

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221. Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991), *rev'd* in part by Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

222. Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F. Supp.2d 611 (N.D. Ill. 2004).

223. Urofsky v. Allen, 216 F.3d 401 (4th Cir. 2000).

224. Michael H. LeRoy, "*#AcademicFreedom: Twitter and First Amendment Rights for Professors*," 90 NOTRE DAME L. REV. ONLINE 158, 166 (2015).

225. *See* Leiter, *supra* note 33. See Tanaz Ahmed, *University of Illinois Censured for Pulling Professor's Job Offer over Anti-Israel Tweets*, USA TODAY (June 18, 2015), http://college.usatoday.com/2015/06/18/university-of-illinois-censured/ (reporting Prof. Katherine Franke's idea "speaking favorably about Palestinian rights or speaking critically about Israeli state policy seems to not get the full-range of first amendment protection"), for another overstated view of First Amendment protection appears; *see also* David Moshman, *Academic Freedom at the University of Illinois*, HUFFPOST COLL. (Sept. 2, 2014), http://www.huffingtonpost.com/david-moshman/academic-freedom-at-the-u_b_5745702.html (contending there is a strong First Amendment case against a university that withdrew a job offer due to controversial tweets).

226. Urofsky v. Allen, 216 F.3d 401, 411 (4th Cir. 2000).

227. *See* Byrne, *supra* note 8, at 253 ("The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles.").

stronger assurances of free expression in their contracts.[228] Within higher education, faculty leaders and university presidents should come together to craft principles of academic freedom that deal with 21st century issues—campus speech codes,[229] extramural speech in social media,[230] academic freedom for research that has political implications, professional speech that is tied to corporate funding[231]—and more. As politicians take aim at tenure while attacking intellectual culture in higher education,[232] faculty should mobilize for an academic bill of rights for professors.[233] At bottom, my research shows that the alternative to these proactive measures are court rulings that treat academe more like a government agency than a laboratory of experimentation.

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228. *See also* Joan DelFattore, *To Protect Academic Freedom, Look Beyond the First Amendment*, CHRON. HIGHER EDUC. (Oct. 31, 2010), http://chronicle.com/article/To-Protect-Academic-Freedom/125178/; Modern Language Association, *Ramifications of the Supreme Court's Ruling* in Garcetti v. Ceballos (Feb. 2010), http://www.mla.org/garcetti_ceballos.

229. *See* Laurie Essig, *Trigger Warnings Trigger Me*, CHRON. OF HIGHER EDUC. (Mar. 10, 2014), http://chronicle.com/blogs/conversation/2014/03/10/trigger-warnings-trigger-me/ ("Trigger warnings are a very dangerous form of censorship because they're done in the name of civility. Learning is painful.").

230. *Compare* N.Y. Comp. Codes R. & Regs, *supra* note 36, *with Appendix I, 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *supra* note 63.

231. *Compare* John Hardin, *The Campaign to Stop Fresh College Thinking*, WALL ST. J. (May 26, 2015), http://www.wsj.com/articles/the-campaign-to-stop-fresh-college-thinking-1432683566, *with* David Brock, *Fresh Thinking Includes Disclosure*, WALL ST. J. (June 5, 2015), http://www.wsj.com/articles/fresh-thinking-includes-disclosure-1433532786?KEYWORDS=%22academic+freedom%22.

232. *See* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 956 (Fall 2006). When university board members are elected, they can be subjected to political pressures that conflict with principles of academic freedom. *Id*. at 968, n.48.

233. *See* Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom*, 18 BERKELEY J. EMP. & LAB. L. 282, 313–314 (1997) (discussing the Leonard Law). The California statute prohibits a private school from disciplining a student for speech. The law provides:

> (a) No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.
>
> Cal. Educ. Code § 94367 (Deering 1996).

The law could be broadened to include faculty members as a protected group.

APPENDIX OF CASES INVOLVING FIRST AMENDMENT CLAIMS BY COLLEGE AND UNIVERSITY PROFESSORS AND INSTRUCTORS

The cases for this database are subdivided into federal and state groups. The federal cases are organized by federal circuits. These cases are followed by state court opinions.

A. Federal Courts

First Circuit

Alberti v. Carlo-Izquierdo, 818 F.Supp.2d 452 (D.P.R. 2011); Alberti v. Carlo-Izquierdo, 869 F.Supp.2d 231(D.P.R. 2012); Alberti v. Carlo-Izquierdo, 548 Fed. App'x. 625 (1st Cir. 2013).

Close v. Lederle, 303 F.Supp. 1109 (D. Mass. 1969); Close v. Lederle, 424 F.2d 988 (1st Cir. 1970).

Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986).

McCann v. Ruiz, 788 F.Supp. 109 (D.P.R. 1992); McCann v. Ruiz, 802 F.Supp. 606 (D.P.R. 1992).

McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780 (1st Cir. 1983).

Nelson v. Univ. of Me. Sys., 914 F.Supp. 643 (D. Me. 1996); Nelson v. Univ. of Me. Sys., 923 F.Supp. 275 (D. Me. 1996).

Silva v. Univ. of N.H., 888 F.Supp. 293 (D.N.H. 1994).

Stitzer v. Univ. of P.R., 617 F.Supp. 1246 (D.P.R. 1985).

Second Circuit

Appel v. Spiridon, 463 F.Supp.2d 255 (D. Conn. 2006); Appel v. Spiridon, 2011 WL 3651353 (D. Conn. 2011); Appel v. Spiridon, 521 Fed. App'x. 9 (2d Cir. 2013).

Blum v. Schlegel, 830 F.Supp. 712 (W.D.N.Y. 1993); Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994).

Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir 1990).

Ezuma v. City Univ. of N.Y., 665 F.Supp.2d 116 (E.D.N.Y. 2009); Ezuma v. City Univ. of N.Y., 367 Fed. App'x. 178 (2d Cir. 2010).

Flyr v. City Univ. of N.Y., 2011 WL 1675997 (S.D.N.Y. 2011).

Harris v. Merwin, 901 F.Supp. 509 (N.D.N.Y. 1995).

Isenalumhe v. McDuffie, 697 F.Supp.2d 367 (E.D.N.Y. 2010).

Jay Jian-Qing Wang v. Swain, 2011 WL 887815 (N.D.N.Y. 2011); Jay Jian-Qing Wang v. Swain, 486 Fed. App'x. 947 (2d Cir. 2012).

Jeffries v. Harleston, 828 F.Supp. 1066 (S.D.N.Y. 1993); Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994), Jeffries v. Harleston, 513 U.S. 996 (1994); Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995).

Kalderon v. Finkelstein, 2010 WL 3359473 (S.D.N.Y. 2010); Kalderon v. Finkelstein, 495 Fed. App'x. 103 (2d Cir. 2012);

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 233 F.Supp. 752 (W.D.N.Y. 1964); Keyishian v. Bd. of Regents of Univ. of State of N. Y., 345 F.2d 236 (2d Cir. 1965); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967).

Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 2749560 (S.D.N.Y. 2011).

Levin v. Harleston, 752 F.Supp. 620 (S.D.N.Y. 1990); Levin v. Harleston, 770 F.Supp. 895 (S.D.N.Y. 1991); Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

Lieberman v. Gant, 474 F.Supp. 848 (D. Conn. 1979); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

Mahoney v. Hankin, 593 F.Supp. 1171 (S.D.N.Y. 1984).

Marinoff v. City Coll. of N.Y., 63 Fed. App'x. 530 (2d Cir. 2003); Marinoff v. City Coll. of N.Y., 357 F.Supp.2d 672 (S.D.N.Y. 2005).

Meadows v. State Univ. of N.Y. at Oswego, 832 F.Supp. 537 (N.D.N.Y. 1993).

Narumanchi v. Bd. of Trs. of Conn. State Univ.; 1986 WL 15753 (D. Conn. 1986); Narumanchi v. Bd. of Trs. of Conn. State Univ., 850 F.2d 70 (2d 1988).

Radloff v. Univ. of Conn., 364 F.Supp.2d 204 (D. Conn. 2005).

Rehman v. State Univ. of N.Y. at Stony Brook, 596 F.Supp.2d 643 (E.D.N.Y. 2009).

Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980).

Shub v. Westchester Cmty. Coll., 556 F.Supp.2d 227 (S.D.N.Y. 2008).

Vega v. State Univ. of N.Y. Bd. of Trs., 2000 WL 381430 (S.D.N.Y. 2000); Vega v. Miller, 273 F.3d 460 (2d Cir. 2001).

Third Circuit

Aumiller v. Univ. of Del., 434 F.Supp. 1273 (D. Del. 1977).

Brown v. Armenti, 247 F.3d 69 (3d Cir. 2001).

Edwards v. Cal. Univ. of Pa., 156 F.3d 488 (3d Cir. 1998).

Eisen v. Temple Univ., 2002 WL 1565331 (E.D.Pa. 2001); Eisen v. Temple Univ., 2002 WL 32706 (E.D. Pa. 2002); Eisen v. Temple Univ., 2002 WL 1565331 (E.D. Pa. 2002).

Gooden v. Pa., 2010 WL 5158996 (E.D. Pa. 2010).

Gorum v. Sessoms, 2008 WL 399641 (D. Del. 2008); Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2010).

Keddie v. Pa. State Univ., 412 F.Supp. 1264 (M.D. Pa. 1976).

Lasuchin v. Perrin, 1988 WL 95079 (E.D.Pa. 1988).

Meyers v. Cal. Univ. of Pa., 2013 WL 795059 (W.D. Pa. 2014); Meyers v. Cal. Univ. of Pa., 2014 WL 3890357 (W.D. Pa. 2014).

Shovlin v. Univ. of Med. & Dent. of N.J., 50 F.Supp.2d 297 (D.N.J. 1998).

Skehan v. Bd. of Trs. of Bloomsburg State Coll., 436 F.2d 657 F.Supp. (M.D. Pa. 1977); Skehan v. Bd. of Trs. of Bloomsburg State Coll., 590 F.2d 470 (3d Cir. 1985).

Stiner v. Univ. of Del., 243 F.Supp.2d 106 (D. Del. 2003).

Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 218 (3d Cir. 1980).

Fourth Circuit

Adams v. Trs. of the Univ. of N.C. Wilmington, 2010 WL 10991020 (E.D.N.C. 2010); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011); Adams v. Trs. of the Univ. of N.C.-Wilmington, 2013 WL 10128923 (E.D.N.C. 2013).

Chitwood v. Feaster, 54 F.R.D. 204 (N.D. W.Va. 1972); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982).

Howze v. Va. Polytechnic, 901 F.Supp. 1091 (W.D. Va. 1995).

Kim v. Coppin State Coll., 662 F.2d 1055 (4th Cir. 1981).

Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Ollman v. Toll, 518 F.Supp. 1196 (D. Md. 1981); Ollman v. Toll, 704 F.2d 139 (4th Cir. 1983).

Scagnelli v. Whiting, 554 F.Supp. 77 (M.D.N.C. 1982).

Scallet v. Rosenblum, 1994 WL 723063 (W.D. Va. 1994); Scallet v. Rosenblum, 911 F.Supp. 999 (W.D. Va. 1996); Scallet v. Rosenblum, 106 F.3d 391 (4th Cir. 1997).

Shaw v. Bd. of Trs. of Frederick Cmty. Coll., 549 F.2d 929 (4th Cir. 1976).

Urofsky v. Allen, 995 F.Supp. 634 (E.D.Va. 1998); Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999); Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc).

Huang v. Rector and Visitors of Univ. of Va., 896 F.Supp.2d 524 (W.D.Va. 2012).

Fifth Circuit

Adamo v. Bd. of Sup'rs of La. State Univ., 1994 WL 202368 (E.D. La. 1994).

Anderson-Free v. Steptoe, 970 F.Supp. 945 (M.D. Ala. 1997); Anderson-Free v. Steptoe, 993 F.Supp. 870 (M.D. Ala. 1997).

Bradford v. Tarrant Cnty. Junior Coll., 356 F.Supp. 197 (N.D. Tex. 1976); Bradford v. Tarrant Cnty. Junior Coll., 492 F.2d 133 (5th Cir. 1974).

Cotten v. Bd. of Regents of Univ. Sys. of Ga., 395 F.Supp. 388 (S.D. Ga. 1974); Cotten v. Bd. of Regents of Univ. Sys. of Ga., 515 F.2d 1098 (5th Cir. 1975).

D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980).

DePree v. Saunders, 2008 WL 4457796 (S.D. Miss. 2008); DePree v. Saunders, 588 F.3d 282 (5th Cir. 2009).

Dorsett v. Bd. of Tr. for St. Coll. & Univ., 940 F.2d 121 (5th Cir. 1991).

Duke v. N. Tex. State Univ., 338 F.Supp. 990 (E.D. Tex. 1971); Duke v. N. Tex. State Univ., 469 F.2d 829 (5th Cir. 1972).

Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Fluker v. Ala. State Bd. of Ed., 441 F.2d 201 (5th Cir. 1971).

Foley v. Univ. of Hous. Sys., 324 F.3d 310 (5th Cir. 2003); Foley v. Univ. of Hous. Sys., 355 F.3d 333 (5th Cir. 2003).

Gentilello v. Rege, 2008 WL 2627685 (N.D. Tex. 2006); Gentilello v. Rege, 627 F.3d 540 (5th Cir. 2010).

Grace v. Bd. of Trs. for State Coll. & Univ., 1992 WL 111837 (M.D. La. 1992); Grace v. Bd. of Trs. for State Coll. & Univ., 805 F.Supp. 390 (M.D. La. 1992); Grace v. Bd. of Trs. for State Coll. & Univ., 8 F.3d 23 (5th Cir. 1993).

Griffin v. Sorber, 247 F.3d 241 (5th Cir. 2001).

Harrington v. Harris, 108 F.3d 598 (5th Cir. 1997); Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997).

Hillis v. Stephen F. Austin State Univ., 486 F.Supp. 663 (E.D. Tex. 1980); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982).

Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987).

Jackson v. Tex. S. Univ., 997 F.Supp.2d 613 (S.D. Tex. 2014).

Kaprelian v. Tex. Woman's Univ., 509 F.2d 133 (5th Cir. 1975).

Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1293901 (N.D. Tex. 2013); Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1296515 (N.D. Tex. 2013).

Marino v. La. State Univ. Bd. of Supervisors, 1997 WL 358141 (E.D. La. 1997); Marino v. La. State Univ. Bd. of Supervisors, 1998 WL 560290 (E.D. La. 1998).

Markwell v. Culwell, 515 F.2d 1258 (5th Cir. 1975).

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

Megill v. Bd. of Regents, 541 F.2d 1073 (5th Cir. 1976).

Miller v. Bunce, 60 F.Supp.2d 620 (S.D. Tex. 1999); Miller v. Bunce, 220 F.3d 584 (5th Cir. 2000).

N. Cent. Tex. Coll. v. Ledbetter, 566 F.Supp.2d 547 (E.D.Tex. 2006).

Oller v. Roussel, 2014 WL 4204836 (W.D. La. 2014).[234]

Richmond v. Coastal Bend Coll. Dist., 883 F.Supp.2d 705 (S.D. Tex. 2012).

Rushing v. Bd. of Supervisors of Univ. of La. Sys., 2011 WL 6047097 (M.D. La. 2011); Rushing v. Bd. of Supervisors of Univ. of La. Sys., 544 WL Fed. App'x. 287 (M.D. La. 2011);

Shoecraft v. Univ. of Hous.-Victoria, 2006 WL 870432 (S.D.Tex. 2012).

Simpson v. Alcorn State Univ., 2014 WL 2685133 (S.D. Miss. 2014).

Smith v. Coll. of the Mainland, 2012 WL 6020066 (S.D. Tex. 2012).

Staheli v. Univ. of Miss., 621 F.Supp. 449 (N.D. Miss. 1985); Staheli v. Univ. of Miss., 854 F.2d (5th Cir. 1988);

Stewart v. Bailey, 396 F.Supp. 1381 (N.D. Ala. 1975); Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977); Stewart v. Bailey, 561 F.2d 1195 (5th Cir. 1977).

Stone v. Bd. of Regents of Univ. Sys. of Ga., 620 F.2d 526 (5th Cir. 1980).

Schmelzer v. Alexander, 2005 WL 723660 (N.D. Tex. 2005).

Van Heerden v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll., 2011 WL 320921 (M.D. La. 2001).

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234. This case has a ruling in 2015. *See* Oller v. Roussel, 2015 WL 1529084 (5th Cir. 2015) (ruling for the university on professor's First Amendment claim). The sample does not include this case because cases were collected for 1964 to 2014.

Wagner v. Tex. A & M Univ., 939 F.Supp. 1297 (S.D. Tex. 1996).

Sixth Circuit

Benison v. Ross, 983 F.Supp.2d 891 (E.D. Mich. 2013); Benison v. Ross, 765 F.3d 649 (6th Cir. 2014).

Bonnell v. Lorenzo, 81 F.Supp.2d 777 (E.D. Mich. 1999); Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

Croushorn v. Bd. of Trs. of Univ. of Tenn., 518 F.Supp. 9 (M.D. Tenn. 1980).

Dvorak v. Wright State Univ., 1997 WL 1764779 (S.D. Ohio 1997).

Frieder v. Morehead State Univ., 2013 WL 6187786 (E.D. Ky. 2013); Frieder v. Morehead State Univ., 770 F.3d 428 (6th Cir. 2014).

Ghosh v. Ohio Univ., 861 F.2d 720 (6th Cir. 1988).

Gies v. Flack, 1996 WL 1671234 (S.D. Ohio 1996); Gies v. Flack, 495 F.Supp.2d 854 (S.D. Ohio 2007).

Hardy v. Jefferson Cmty. Coll., 2000 WL 33975576 (W.D. Ky. 2000); 260 F.3d 671 (6th Cir. 2001).

Hetrick v. Martin, 322 F.Supp. 545 (E.D. Ky. 1971); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973).

Jackson v. Leighton, 168 F.3d 903 (6th Cir. 1999).

Johnson-Kurek v. Abu-Absi, 423 F.3d 590 (6th Cir. 2005).

Kerr v. Hurd, 694 F.Supp.2d 817 (S.D. Oh. 2010).

Landrum v. E. Ky. Univ., 578 F.Supp. 241 (E.D. Ky. 1984).

Morreim v. Univ. of Tenn., 2013 WL 5673619 (W.D. Tenn. 2013).

Nuovo v. The Ohio State Univ., 726 F.Supp.2d 829 (S.D. Oh. 2010).

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

Savage v. Gee, 716 F.Supp.2d 709 (S.D. Ohio 2010); Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).

Yohn v. Coleman, 639 F.Supp.2d 776 (E.D. Mich. 2009).

Seventh Circuit

Brooks v. Univ. of Wisc. Bd. of Regents, 406 F.3d 476 (7th Cir. 2005).

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

Colburn v. Trs. of Ind. Univ., 739 F.Supp. 1268 (S.D. Ind. 1990); Colburn v. Trs. of Ind. Univ., 973 F.2d 581 (7th Cir. 1992).

Eichman v. Ind. State Univ. Bd. of Trs., 597 F.2d 1104 (7th Cir. 1979).

Feldman v. Bahn, 12 F.3d 730 (7th Cir. 1993); Feldman v. Ho, 171 F.3d 494 (7th Cir. 1998).

Fong v. Purdue Univ., 692 F.Supp. 930 (N.D. Ind. 1988); Fong v. Purdue Univ., 976 F.2d 735 (7th Cir. 1992).

Keen v. Penson, 970 F.2d 252 (7th Cir. 1992).

Lim v. Trs. of Ind. Univ., 2001 WL 1912634 (S.D. Ind. 2001); Lim v. Trs. of Ind. Univ., 297 F.3d 575 (7th Cir. 2002).

Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F.Supp.2d 611 (N.D. Ill. 2004).

McElearney v. Univ. of Ill. at Chic. Circle Campus, 612 F.2d 285 (7th Cir. 1979).

Meade v. Moraine Valley Cmty. Coll., 2014 WL 411296 (N.D. Ill. 2014); Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680 (7th Cir. 2014).

Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003).

Piarowski v. Ill. Cmty. Coll., 759 F.2d 625 (7th Cir. 1985).

Renken v. Gregory, 2005 WL 1962988 (E.D. Wis. 2005); Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).

Roth v. Bd. of Regents of State Coll., 310 F.Supp. 972 (W.D. Wis. 1970); Roth v. Bd. of Regents of State Coll., 446 F.2d 806 (7th Cir. 1972); Roth v. Bd. of Regents of State Coll., 408 U.S. 564 (1972).

Rubin v. Ikenberry, 933 F.Supp. 1425 (C.D. Ill. 1996).

Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003).

Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999)

Weinstein v. Univ. of Ill., 628 F.Supp. 862 (N.D. Ill. 1986); Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987)

Eighth Circuit

Burnham v. Ianni, 899 F.Supp. 395 (D. Minn. 1995); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996) (en banc); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc).

Cooper v. Ross, 472 F.Supp. 802 (E.D. Ark. 1979).

Day v. Bd. of Regents of Univ. of Neb., 911 F.Supp. 1228 (D.Neb. 1995); Day v. Bd. of Regents of Univ. of Neb., 83 F.3d 1040 (8th Cir. 1996).

Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974).

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FERGUSON, FISHER, AND THE FUTURE: DIVERSITY AND INCLUSION AS A REMEDY FOR IMPLICIT RACIAL BIAS

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INTRODUCTION

Virtually every discussion of race and racial justice in this nation now takes place in the long shadows cast by events like the death of Michael Brown in Ferguson, Missouri.[1] As one observer declared after the murder of nine people in a Charleston, South Carolina church, "America is living through a moment of racial paradox" within which "Black culture has become . . . mainstream. . . [but] the situation of black America is dire."[2] The Supreme Court, in turn, has been repeatedly criticized for "often rul[ing] against those most in need of its protection"[3] and, especially in matters of racial justice, having a "blinkered view" and "naive vision."[4] Its critics argue that it is a "Court [that] in closely-contested rulings, has weakened or even wiped out affirmative action's race-conscious policies designed to overcome and rebalance our history of discrimination in employment and admissions."[5]

It is then hardly surprising that the Court's decision to once again take up the contentious issue of affirmative action in college admissions was viewed with alarm by those who support admissions preferences.[6] As is invariably the case, the Court did not explain why it agreed to reexamine the admissions regime at the University of Texas at Austin in what is now styled as *Fisher II*.[7] It simply

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1. *See, e.g.*, Michael Eric Dyson, *Where Do We Go After Ferguson?*, N. Y. TIMES, Nov. 30, 2014, at SR1 (discussing "clashing perceptions [that] underscore the physics of race" within which "[t]he instrument through which one perceives race – one's culture, one's experiences, one's fears and fantasies – alters in crucial ways what it measures").

2. Lydia Polgreen, *From Ferguson to Charleston, Anguish About Race Keeps Building*, N.Y. TIMES, June 21, 2015, at A17.

3. Editorial, *Ten Years of an Activist Court*, N.Y. TIMES, July 5, 2015, at SR8.

4. Editorial, *Racial Equality Loses at the Court*, N.Y. TIMES, April 23, 2014, at A22.

5. Carla Seaquist, *Racist Police, Courts, Fraternities: Who Says We Don't Need Affirmative Action Anymore?*, HUFFINGTON POST (March 25, 2015, 12:04 PM), http://www.huffingtonpost.com/carla-seaquist/racist-police-courts-fraternities-who-says-we-don't-need-affirmative-action-anymore_b_6929038.html.

6. *See, e.g.*, Adam Liptak, *Supreme Court to Weigh Race in Admissions*, N.Y. TIMES, June 30, 2015, at A1 (in a "move [that] supporters of race-conscious admissions programs called baffling and ominous," the Supreme Court "agreed to . . . take a second look at the use of race in admission decisions by the University of Texas at Austin").

7. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), *reh'g en banc denied*, 771 F.3d 274, *cert. granted*, 135 S. Ct. 2888 (2015) (Fisher II). The policy at issue initially came to the Court in Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (Fisher I). It did not reach the merits, remanding the case to the Court of Appeals for the Fifth Circuit so that it could "apply the correct standard of strict scrutiny." *Id.* at 2415. The case originated in 2008 when Ms. Fisher filed suit. The District Court held that the policy was constitutional. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009). That decision that was affirmed, 631 F. 3d 213 (5th Cir. 2011), rehearing was denied, 644 F.3d 301 (5th Cir. 2011), and it was taken to the Court, resulting in Fisher I.

announced that the petition for a writ of certiorari had been granted,[8] presumably to undertake the inquiry suggested by the Question Presented crafted by counsel for Abigail Noel Fisher: to determine "[w]hether the Fifth Circuit's re-endorsement" of the Texas policy "can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment."[9]

That suggests that diversity will remain a constitutionally permissible goal. But supporters of affirmative action are at best skeptical. They believe the decision to take the case reflects a considered strategy by the Court's conservative members to find a way to end race-conscious admissions policies in higher education.[10] That sentiment is understandable given recent events and the manner in which the Court has approached many of these issues over the past several Terms. It is also incorrect and short-sighted. The real problem confronting diversity's supporters is not the potential demise of the Court's holding in *Grutter v. Bollinger* that this nation's colleges and universities have "a compelling interest in attaining student body diversity."[11] It lies rather, in what a victory for Texas might portend.

My thoughts on *Fisher II* in this Article will be somewhat unusual. My threshold assumption is that the Court will use the case to reaffirm *Grutter* and clarify what is required when a college or university decides to adopt an affirmative admissions policy as a means of attaining student body diversity. As I will explain, the decision to grant review was both logical and necessary. It is actually a welcome opportunity for the Court to give badly needed guidance to both sides in this debate about how best to go about implementing those policies. Indeed, I believe that for those who wish to preserve the diversity victory in *Grutter*, the best possible outcome will be to have their implementation feet held to the fire of intense judicial scrutiny in *Fisher II*. That said, there are substantial perils in this process given the lackadaisical manner in which virtually all institutions have approached their actual educational obligations once they have taken the steps required to admit a diverse group of students.[12]

I will also argue that this new round of litigation offers an important opportunity for affirmative action's proponents to do two interrelated things. The first is to recognize, account for, and undertake key obligations imposed by *Grutter*

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8. *See* Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015) ("Petition for a writ of certiorari . . . [is] granted."). The Court also noted that "Justice Kagan took no part in the consideration or decision of this petition." *Id.* Her recusal was due to her prior involvement in the case during her service as Solicitor General of the United States.

9. Petition for a Writ of Certiorari at i, Fisher v. Univ. of Tex.at Austin, 758 F.3d 633 (5th Cir. 2014) (No. 14-981) [hereinafter Fisher II Petition].

10. *See, e.g.*, Editorial, *Why another look at affirmative action?*, L.A. TIMES, (July 2, 2015, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-affirmative-action-texas-case-supreme-court-20150630-story.html. (Stating that among the four or more members of the Court who voted to grant the writ "[s]ome clearly hope that this time around the court will endorse" the "extreme view that 'a State's use of race in higher education admissions decisions is categorically prohibited by the equal protection clause' of the 14th Amendment.") (quoting *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring)).

11. 539 U.S. 306, 328 (2003).

12. *See infra* Part III-A, discussing the importance of programming for educational outcomes and rigorous assessment.

and *Fisher I*. The second is to seize the opportunities presented in the wake of *Fisher II* to strengthen their case for the value of diversity as a matter of educational policy by focusing our attention on implicit racial bias. The virtues of educational diversity identified by Justice Sandra Day O'Connor in her opinion for the Court in *Grutter* had solid social science foundations.[13] The evidence cited by the Court at that time did not, however, account for an important aspect of our national malaise, the corrosive impact of implicit racial bias and stereotyping.[14] Significant developments in this body of knowledge have the potential to bolster the Court's prior determination that diversity's "benefits are not theoretical but real."[15] This knowledge can, and should, be part of the dialogue as we reexamine these issues.

Part I of this Article sets the stage for this discussion by identifying what *Fisher II* is and is not about. In particular, I argue that supporters of affirmative action should set aside their fears that the Court will abolish affirmative action in higher education admissions systems and concentrate instead on what the Court will likely tell them about how such programs should be implemented. *Fisher II* is a case that verifies the maxim that "the devil is in the details." In this instance, that demon is the need for colleges and universities to do with care what the Supreme Court expected when it decided *Grutter*: namely, adopt "'means chosen to accomplish [their] asserted purpose [that are] specifically and narrowly framed to accomplish that purpose.'"[16]

Part II connects *Fisher II* to what I believe to be two important lessons posed by the differences between *Grutter* and the Court's first take on this issue in *Regents of University of California v. Bakke*.[17] The first is its focus on the reality that the case for affirmative action and diversity in *Grutter* turns on the premise that it will actually generate beneficial educational outcomes. *Bakke*, on the other hand, simply took higher educations' embrace of diversity at face value and spoke in vague terms of things that were "widely believed to be promoted by a diverse student body."[18] The second is to recognize and account for an important way in which *Grutter* expanded the case for diversity. *Bakke* focused almost exclusively on "[t]he atmosphere of 'speculation, experiment and creation'" that arises from "a diverse student body."[19] *Grutter* did more, extending the justifications for and

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13. *See infra* text accompanying notes 20–21.

14. As I note, see *infra* text accompanying note 359, the Court did receive a brief discussing implicit bias and the distinction between "'discrimination' [which] describes unequal treatment [and] 'prejudice' [which] has to do with thoughts and feelings." *See* Brief Amicus Curiae of the American Psychological Association at 5, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter APA Grutter Brief]. Justice O'Connor did not cite it or discuss the issues posed.

15. *Grutter*, 539 U.S. at 330.

16. *Id.* at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).

17. 438 U.S. 265 (1978).

18. *Id.* at 312.

19. *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1967)). *See also id.* at 313 (discussing the goal of "select[ing] those students who will contribute most to the 'robust exchange of ideas'") (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

acknowledged benefits of a diverse learning environment beyond the college years in ways that make its potential benefits all the more compelling.

Part III explores two aspects of the case for diversity. My goal is not to make that case. Rather, I explore its dimensions and, more importantly, discuss its implications. In each instance, the focus is on the evidence presented to the Court suggesting that the benefits of diversity are real. The social science foundations for Justice Sandra Day O'Connor's opinion for the Court in *Grutter* were important. They were also limited in two key respects. The first was its reliance on contact theory, a body of research that emphasizes the impact of "engaging and interacting with diverse peers."[20] The second was the failure to account for key aspects of how prejudice and stereotypes actually operate. In particular, the materials cited in *Grutter* did not acknowledge implicit bias, the "unwitting, unintentional, and uncontrollable" impulses that infect "normal, everyday human thought and activity" of even "the most well-intentioned people."[21] Careful attention to that phenomenon – and the development of interventions designed to deal with it – has the potential to go a long way toward explaining the promise of *Grutter* in an era where "racial discrimination [is pervasive] in a society that favors formal racial equality."[22]

Part IV reexamines all of this in the special and informative contexts provided by the obligations imposed on this nation's schools and colleges of law by their primary accrediting agency, the American Bar Association (ABA). Legal education is one of the very few segments of the higher education community where both the need for affirmative action and its use are routine. The ABA treats the use of affirmative action in pursuit of diversity as a duty, not an option,[23] and its current rules track closely the outcomes-based approach taken by Justice O'Connor in *Grutter*.[24] There are also aspects of how law schools are structured and operate that make them especially suitable venues for assessment and documentation. Taken together, these realities have important consequences and make legal education an especially apt exemplar of the obligations, challenges, and opportunities that lie ahead.

I. FISHER II: FICTIONS AND FACTS

Many observers suspect that the Court's decision to hear *Fisher II* does not bode well for the future of affirmative action in higher education admissions.

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20. Brief of the American Educational Research Association et al. at 7, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter AERA Brief]. Justice O'Connor cited this brief in her opinion. *See Grutter*, 539 U.S. at 330.

21. Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY (Eldar Shafir ed., 2013), at 13, 14 [hereinafter Hardin & Benaji].

22. Darren Leonard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U.J.L. & POL'Y 23, 28 (2014) [hereinafter Hutchinson].

23. *See infra* text accompanying note 399 (discussing the obligations imposed by ABA accreditation Standard 206, which addresses "Diversity and Inclusion").

24. *See infra* text accompanying notes 409–10 (discussing the current ABA accreditation Standard 302, which focuses on "Learning Outcomes").

Their focus and fear is the prospect that the four most conservative members of the Court – Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito – will use *Fisher II* as an opportunity to bring Justice Anthony Kennedy fully into their fold and craft a holding that rejects the use of race as a factor in the college and university admissions process.

That could prove to be the case. The Court will do what a majority of its members wishes, and it is abundantly clear that four of its members are adamantly opposed to the use of race as a factor in the admissions process. Justice Thomas stated in no uncertain terms in *Fisher I* that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[25] Justice Scalia repeated there the position he took in *Grutter*, that "[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."[26] Neither Chief Justice Roberts nor Justice Alito have written separately in a case where the constitutionality *per se* of a college or university affirmative action policy was the focus.[27] But their views are clear, captured most memorably in the declaration that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[28] Moreover, the group that hears *Fisher II* will not include Justice Elena Kagan, a recusal that significantly reduces the number of reliable pro-affirmative action votes. That magnifies the importance of Justice Anthony Kennedy, who, as one of the prophets of possible doom has observed, "has never voted to uphold an affirmative action program."[29]

That said, the issue actually before the Court is not the constitutional propriety of affirmative action and diversity. Rather, it is the manner in which the University of Texas has pursued that goal. The Question Presented in *Fisher II* was carefully framed. It focuses on whether the manner in which Texas proceeded

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25. *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring).

26. *Id.* at 2422 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)).

27. Chief Justice Roberts wrote separately in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), where he observed that "racial preferences may . . . do more harm than good." *Id.* at 1638–39 (Roberts, C.J., concurring). The focus there was not, however, the constitutionality of admissions preferences, but rather whether the people of Michigan could make the decisions that state institutions could not grant preferences on the basis of "race sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.* at 1629 (quoting MICH. CONST. art. I, § 26).

28. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). The two school districts in that case did ask the Court to recognize the "educational and broader socialization benefits flow from a racially diverse learning environment." *Id.* at 725. The Chief Justice rejected that request in his plurality opinion, stating that there was no need to resolve it since "the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity." *Id.* at 726.

29. Liptak, *supra* note 6. *See also* Scott Jaschik, *Supreme Court will once again consider affirmative action in college admissions*, INSIDE HIGHER ED, (June 30, 2015), https://www.insidehighered.com/news/2015/06/30/supreme-court-will-once-again-consider-affirmative-action-college-admissions (noting that while Justice Kennedy "has voted with the liberal wing on issues such as same-sex marriage, that is not the case when it comes to race").

"can be sustained under this Court's decisions,"[30] not on "whether there is a compelling interest in diversity," which "Ms. Fisher ha[s] no need to challenge."[31] It also recognizes the fact that the Court had previously reviewed the Texas policy and determined that "the Court of Appeals [for the Fifth Circuit] did not apply the correct standard of strict scrutiny."[32]

Writing for the Court in *Fisher I*, Justice Kennedy stated "we take [*Bakke* and *Grutter*] as given for the purposes of deciding this case."[33] That is, it remained the rule that colleges and universities could "consider[] racial minority status as a positive or favorable factor in [their] admissions process, with the goal of achieving the educational benefits of a more diverse student body."[34] He emphasized, however, that the rigors of strict scrutiny applied and concluded that the lower court had been unduly deferential in its assessment of how Texas implemented its constitutionally protected decision to make the pursuit of diversity part of its institutional mission.[35] The University, he stressed, "must prove that the means chosen . . . to attain diversity are narrowly tailored to that goal."[36] That is, there must be a "judicial determination that the admissions process meets strict scrutiny in implementation."[37] The current appeal tracks that history. It focuses exclusively and narrowly on "the use of racial preferences in admissions decisions where, as here, they are neither narrowly tailored nor necessary to meet a compelling, otherwise unsatisfied, educational interest."[38] That is, Ms. Fisher and her legal team accept that diversity is a compelling interest and are concerned only with the manner in which the University of Texas is trying to meet what it claims is an unmet goal, the need to enroll "a 'critical mass' of minority students."[39]

There are then only two questions actually before the Court in *Fisher II:* whether the particular approach adopted by Texas in the wake of *Grutter* is

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30. Fisher II Petition, *supra* note 9, at i.

31. Reply Brief at 7, Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014) (No. 14-981). *See also id.* at 8 ("A constitutional battle over the validity of a racial diversity interest may someday be fought."). Counsel for Ms. Fisher open the door slightly for that result when they argue that "[i]f *Fisher I* permits UT to prevail here, the Court will need to rethink its endorsement of Grutter's diversity interest given the diminished force of 'stare decisis when fundamental points of doctrine are at stake.'" Fisher II Petition, *supra* note 9, at 30 (quoting *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring)).

32. *Fisher I*, 133 S. Ct. at 2415.

33. *Id.* at 2417.

34. *Id.*

35. *See id.* at 2419 (stressing that "a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer'" (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

36. *Id.* at 2420.

37. *Id.* at 2419–20.

38. Fisher II Petition, *supra* note 9, at 2.

39. *Fisher I*, 133 S. Ct. at 2416. The assumption informing "critical mass" is that it is a positive good, given that "meaningful numbers" and/or "meaningful representation" means that "underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. As I note *infra* at text accompanying notes 73–74, there may be a downside to critical mass that must be taken into account.

"narrowly tailored" and whether the Court of Appeals correctly applied that standard on remand. That technical reality has provided scant comfort for affirmative action's champions, who suspect that something more is afoot.[40] But it is worth recalling that many of the same observers treated *Fisher I* as a case where "the future of affirmative action in higher education [is] hanging in the balance."[41] They made those claims even though the attorneys for Ms. Fisher denied – multiple times – that they were challenging the core holding in *Grutter*.[42] Those observors were wrong then and, I believe, are likely wrong again.

That does not mean that those who favor admissions preferences can rest easy. Indeed, the fact that *Fisher II* will focus on implementation is arguably an even more dire reality than the one envisioned by those who fear that affirmative action's days are numbered. I say that for many of the reasons that led me to previously characterize *Grutter* as "*Bakke* with Teeth."[43] Specifically, *Grutter* was a holding that imposed substantial obligations on institutions that opt to embrace diversity as part of their institutional mission and then employ race-conscious criteria as part of the admissions process. In particular, as I will discuss in greater detail in Part II-A, *Grutter* tied its approval of affirmative action in pursuit of diversity to a need to design and implement systems that will actually produce documented educational outcomes.

The stakes are magnified by a closely related doctrinal reality: the degree of scrutiny that courts must utilize when assessing whether a given college or university has made its case. The *Grutter* Court emphasized that all of the rigors traditionally associated with strict judicial scrutiny applied: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must

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40. *See, e.g.*, Liptak, *supra* note 6 (musing about the "consequences . . . if the court . . . did away with racial preferences in higher education"); Tamar Lewin & Richard Pérez-Peña, *Colleges Brace for Uncertainty as Court Reviews Race in Admissions*, N.Y. TIMES, July 1, 2015, at A14 (noting that the "decision to reconsider" the case "has universities around the country fearing that they will be forced to abandon what remains of race-based admission preferences").

41. Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 11, 2012, at A1.

42. *See, e.g.*, Brief for Petitioner at 26, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (expressly recognizing the Court's determination in *Grutter* "that universities have 'a compelling interest in obtaining the educational benefits that flow from a diverse student body'" (quoting *Grutter*, 539 U.S. at 343)); Reply Brief for Petitioner at 1, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (characterizing "defen[ses of] racial diversity in higher education as a compelling interest" as "tilt[ing] at self-created windmills" and stressing that "Petitioner has not contested the [core] holding of *Grutter*"); Transcript of Oral Argument at 8, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Fisher I Transcript] (pressed by Justice Stephen Breyer, Bert W. Rein, representing Ms. Fisher, stressed that "we have said, very carefully, we were not trying to change the Court's disposition of the issue in *Grutter*"). The Court subsequently expressly acknowledged that "the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding." *Fisher I*, 133 S. Ct. at 2419.

43. Ann M. Killenbeck, *Bakke, with Teeth?: The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1 (2009).

be specifically and narrowly framed to accomplish that purpose.'"[44] Justice O'Connor went to elaborate lengths to describe "the contours of the narrow-tailoring inquiry"[45] and list "the hallmarks of a narrowly tailored plan."[46] That stood in sharp contrast to *Bakke*, where the narrow tailoring analysis began and ended with a discussion of the flaws in a two-track admissions process[47] and of a "quota" system that "tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of seats in an entering class."[48]

Grutter and *Fisher I* are much more demanding. An institution that decides that diversity is "integral to its mission"[49] and wishes "to use race to achieve the educational benefits of diversity"[50] is not entitled to simply demonstrate that these decisions were made "'in good faith.'"[51] Rather, that college or university must prove that its affirmative admissions scheme "was not a quota, was sufficiently flexible, was limited in time, and followed 'serious, good faith consideration of workable race-neutral alternatives.'"[52] Emphasizing the need for "giving close analysis to the evidence of how the process works in practice,"[53] the *Fisher I* Court sent the case back to "the Court of Appeals [so that it could] assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[54]

On remand, a majority of the panel hearing the cases decided that the University had met its burden. Writing for himself and Judge Carolyn Dineen King, Judge Patrick E. Higginbotham stated that Texas – an elite, flagship institution[55] – had justified "its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race."[56] That phrasing was telling. It was calculated to track two of the lines set by the

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44. *Grutter*, 539 U.S. at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).

45. *Id.*

46. *Id.* at 334.

47. *Bakke*, 438 U.S. at 274–77 (documenting the different processes and standards).

48. *Id.* at 319.

49. *Fisher I*, 133 S. Ct. at 2419.

50. *Id.* at 2420.

51. *Id.* (quoting *Fisher*, 631 F.3d at 236).

52. *Id.* at 2421 (quoting *Grutter*, 539 U.S. at 339).

53. *Id.*

54. *Id.*

55. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 225 (5th Cir. 2001) (noting that diversity is "especially important at UT because [of] its 'mission and . . . flagship role'") (quoting Univ. of Tex. at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (June, 2004)). The mission in question, as embodied in the "Compact with Texans" required by state law – is to provide "superior and comprehensive educational opportunities" and to "contribute to the advancement of society." Its core values include: *"Leadership"*; "*Individual Opportunity* – Many options, diverse people and ideas, and one University"; and "*Responsibility* – To serve as a catalyst for positive change in Texas and beyond." Brief for Respondents at 5, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2241 (2013) (No. 11-345) (quoting U[niversity of] T[exas], *Compact with Texans*) [hereinafter UT Fisher I Brief].

56. *Fisher*, 758 F.3d at 660.

Court in *Grutter*. The first is the requirement that the admissions evaluation process be "holistic," that is "highly individualized . . . giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" and does not make "an applicant's race or ethnicity the defining feature of his or her application."[57] The second is that the institution give "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[58] That "does not require [the] exhaustion of every conceivable race-neutral alternative."[59] But it does mandate "sufficient consideration" of those that are "workable."[60]

The panel majority believed that Texas had met its burden. A key element in their analysis was their take on the Top Ten Percent Plan, which "guarantees Texas residents graduating in the top ten percent of their high school class admission to any public university in Texas."[61] That legislative mandate was adopted in the wake of *Hopwood v. Texas*,[62] which held that Justice Powell's opinion in *Bakke* was not controlling and that "any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[63] The Ten Percent Plan was a calculated attempt to increase minority enrollment, reflecting as it does "a fundamental weakness in the Texas secondary education system," the "de facto segregation of schools in Texas."[64] That "mechanical admissions program"[65] had the advantage of "increas[ing the number of] minorities in the [admissions] mix [but] ignore[d] contributions to diversity beyond race."[66]

Allowing the consideration of race in a supplemental holistic review, the majority concluded, allowed Texas "to look beyond class rank and focus upon individuals."[67] As a result, Texas could "reach [and admit] a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills."[68] Characterizing the Texas system as a "unique creature,"[69] the majority concluded it was narrowly tailored within the parameters imposed by the Supreme Court in both *Grutter* and *Fisher I*.

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57. *Grutter*, 539 U.S. at 337.
58. *Id.* at 339.
59. *Id.*
60. *Id.* at 340.
61. *Fisher*, 758 F.3d at 645.
62. 78 F.3d 932 (5th Cir. 1996), *reh'g denied*, 84 F.3d 720, *cert. denied*, 518 U.S. 1033 (1996).
63. *Id.* at 944.
64. *Fisher*, 758 F.3d at 650. At least one of the individuals involved in crafting the Ten Percent Plan disagrees, maintaining that the goal, and result, was "to plot a completely race-neutral response." Michael L. Olivas, *The Burden of Persuasion: Affirmative Action, Legacies, and Reconstructing History* (Book Review), 40 J.C. & U.L. 381, 392 (2014).
65. *Fisher*, 758 F.3d at 645.
66. *Id.* at 651.
67. *Id.*
68. *Id.* at 653.
69. *Id.* at 659.

Judge Emilio M. Garza disagreed. In particular, he took issue with what he believed was "the majority's failure to make a meaningful inquiry into the nature of 'critical mass.'"[70] Judge Garza stressed that "[h]ere, the University has framed its goal as obtaining a 'critical mass' of campus diversity."[71] The majority characterized "critical mass" as "the tipping point of diversity," the "minimum threshold at which minority students do not feel isolated or like spokespersons for their race."[72] But, as was the case when *Fisher I* was argued,[73] Judge Garza believed that the University had not provided a constitutionally appropriate definition of what that term meant.[74] Judge Garza rejected the University's approach. He emphasized that "[u]nder the rigors of strict scrutiny, the judiciary must 'verify that it is necessary for a university to use race to achieve the educational benefits of diversity.'"[75]

In particular, Judge Garza criticized two aspects of the University's ambiguous position about what constituted a critical mass. First, given the *Grutter* mandate that an affirmative admissions scheme "must be limited in time,"[76] he argued that "the University explains only that it will 'cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved . . . through a race-neutral policy.'"[77] This variation on the "I know it when I see it"[78] trope was unacceptable given the judiciary's obligation to "'verify" that the admissions program is "'necessary.'"[79] "It is not possible to perform this function," Judge Garza argued, "when the University's objective is unknown, unmeasurable, or unclear."[80]

Judge Garza also took issue with the University's argument that the supplemental admissions policy would "promot[e] the *quality* of minority enrollment – in short, diversity within diversity."[81] The University, he stressed,

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70. *Id.* at 667 (Garza, J., dissenting).

71. *Id.* at 666.

72. *Id.* at 656.

73. For example, during oral argument the Chief Justice asked "[w]hat is that number . . . [w]hat is the critical mass . . . you are working toward" and counsel for Texas responded "[y]our Honor, we don't have one." Fisher I Transcript, *supra* note 42, at 39. *See also id.* at 46 ("The compelling interest you identify is attaining a critical mass of minority students . . . but you won't tell me what the critical mass is.").

74. *See, e.g.*, *id.* at 667 (recognizing that "critical mass does not require a precise numerical decision" but criticizing Texas for "fail[ing] to objectively articulate its goal").

75. *Fisher*, 758 F.2d at 667 (Garza, J., dissenting) (quoting *Fisher I*, 133 S. Ct. at 2420)).

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

77. *Fisher*, 758 F.3d at 667 (Garza, J., dissenting).

78. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The focus here was on pornography and obscenity and, in Justice Stewart's words, a "court . . . faced with the task of trying to define what may be indefinable," *id.*, an observation that may ultimately prove to be telling given the myriad problems posed by the concept of "critical mass."

79. *Fisher*, 758 F.3d. at 667. (quoting *Fisher I*, 133 S. Ct. at 2420).

80. *Id.*

81. *Id.* at 669.

"has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law" because it "does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats."[82] Tellingly – for reasons I will explain in Part III-A – Judge Garza tied that missing evaluation dimension to educational outcomes identified by Justice O'Connor in *Grutter*: "whether the requisite 'change agents' are among [the group admitted], and whether these admittees are able, collectively or individually, to combat pernicious stereotypes."[83]

The focus in *Fisher II* will accordingly be on whether Texas can convince a majority of the Court that it needed to adopt what it characterizes as a very limited consideration of race in an attempt "to admit students who are more likely, because of their background, qualifications, and experiences, to enrich the educational experience for all students at [the] U[niversity of] T[exas]."[84] Was the addition of a holistic review within which race is considered actually necessary? Were appropriate alternatives considered? In particular, just what does Texas mean by a "critical mass"?

Lurking within each of these questions is the jurisprudential elephant in the room. The goal of the Texas program is an "enriched educational experience for all students," which requires a "critical mass" of minority students. Tellingly, and tracking *Grutter*, the university's attempts to explain its conception of critical mass focus on the end point: "[Texas] explains only that its 'concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.'"[85] That is, the proper focus "is a university's own first-hand assessment of the educational benefits flowing from student body diversity at a given point in time."[86] Those assessments, at least to date, have "looked to several data points . . . including hard data on minority admissions, enrollment, racial isolation in classrooms at UT, and reports of racial hostility on campus at UT, as well as direct feedback from students and faculty."[87]

I believe that that type of information can be helpful, but it is not dispositive. It allows one to sketch a static picture of the demographics of a college or university at a "given point in time." But it most assuredly does not reflect, at least in any meaningful way, actual educational outcomes that can be attributed to the presence, or absence, of "student body diversity [that] promotes learning."[88] And that, I believe, was ultimately what *Grutter* both contemplates and requires.

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82. *Id.*

83. *Id. See also Grutter*, 539 U.S. at 330 ("the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races") (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001)).

84. Brief in Opposition at 24, *Fisher II* (No. 14-981) [hereinafter Brief in Opposition].

85. *Fisher*, 758 F.3d at 667 (quoting *Grutter*, 539 U.S. at 330).

86. UT Fisher I Brief, *supra* note 55, at 41.

87. Brief in Opposition, *supra* note 84, at 24–25.

88. *Grutter*, 539 U.S. at 330.

II. BAKKE TO GRUTTER

There is a strong temptation to treat *Grutter* as a decision that simply revisited and reaffirmed *Bakke*. Justice O'Connor's opinion for the Court did indeed state that she and her colleagues were "endors[ing] Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions."[89] In that limited respect, it is correct to treat her opinion as an "unapologetic embrace" of *Bakke*.[90] The manner in which she wrote was nevertheless distinctive for two telling reasons that have significant implications for *Fisher II*: her emphasis on the need for actual educational outcomes, and the implications of her focus on the need to "'better prepare[] students for an increasingly diverse workforce and society, and better prepare[] them as professionals.'"[91]

A. Not Theoretical But Real: The Importance of Outcomes

The first significant difference between *Bakke* and *Grutter* is one I have already briefly noted: *Grutter* is *Bakke* with teeth. In particular, the *Grutter* Court's embrace of diversity as a compelling educational interest reflected its belief that there was "detailed evidentiary support for [the] claim that diversity had real, demonstrable, and positive effects."[92]

Justice Powell's opinion in *Bakke* treated the value of diversity largely as a matter of faith. His controlling opinion was predicated on "the assumption that diversity is a compelling interest because certain institutions thought it was a good idea" and accepted the argument that "minority students might bring . . . an unspecified 'something'" to such institutions.[93] That made *Bakke* an exercise in intuition. Various elite colleges and universities and their leaders spoke eloquently about an "atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – [that] is widely believed to be promoted by a diverse student body."[94] Justice Powell was willing to simply accept these beliefs and representations. That does not make them wrong. It does make the principle articulated in *Bakke* subject to the telling criticism that "race may be taken into account in university admissions, so long as it makes no perceptible difference, and nothing is done in an un-Harvard-like manner.'"[95]

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89. *Id.* at 325.

90. John C. Jeffries, Jr., *Bakke Revisited*, 2003 S. Ct. Rev. 1, 16.

91. *Grutter*, 539 U.S. at 330 (quoting AERA Brief, *supra* note 20, at 3).

92. Killenbeck, *supra* note 43, at 30.

93. *Id.* at 36.

94. *Bakke*, 439 U.S. at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)). The two main sources for Justice Powell were a brief article by the then President of Princeton University, *see id.* at 312 n. 48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY at 7, 9 (Sep. 26, 1977) [hereinafter Bowen, Admissions], and the Harvard College admissions statement. *See id.* at 321–24 (Appendix, Harvard College Admissions Program).

95. Daniel G. Maguire, *The Triumph of Unequal Justice*, 95 THE CHRISTIAN CENTURY 882, 882 (1978). For perspectives on whether the use of the Harvard model was wise, see Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL

Justice O'Connor's opinion in *Grutter* had echoes of this approach. She noted, for example, that the "educational judgment that such diversity is essential to [an] educational mission is one to which we defer."[96] That particular form of deference must, however, be understood for what it actually was: a statement that an individual college or university is free to adopt affirmative admissions measure if it wishes to do so. That is, as Justice Kennedy belatedly recognized in *Fisher I*, "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."[97] The qualification that followed is an important one. Institutions must provide "a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve its educational goals."[98]

Grutter articulated "a standard within which diversity is accepted as a compelling interest because the assumptions for which it stands are supported by positive evidence regarding actual outcomes."[99] Justice O'Connor made it quite clear that a key factor in her analysis was the recognition of "the educational benefits that flow from student body diversity."[100] These were, she emphasized, "not theoretical but real,"[101] documented by "expert studies and reports entered into evidence at trial"[102] and "bolstered by . . . *amici*."[103] That is, the value of diversity lies in what it actually accomplishes, not simply in what it promises. It is, at the risk of repetition, a constitutionally permissible goal precisely because its benefits are both "real" and "substantial."[104] Indeed, the key future vote of Justice Kennedy on this issue may well turn on the extent to which colleges and universities can demonstrate exactly how "racial diversity among students can further [their] educational task . . . supported by empirical evidence."[105]

The good news is that this emphasis made the case for diversity something more than an article of faith. The use of social science evidence by the Supreme Court to suggest or bolster a holding has been an important device over the years. The technique originated in *Muller v. Oregon*,[106] in which the Court noted "abundant testimony of the medical fraternity" as part of its determination that there was a sound policy basis for a state measure limiting the number of hours a woman may work.[107] The focus was the "Brandeis Brief," filed by future Justice

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L. Rev. 463, 470–73 (2005).

96. *Grutter*, 539 U.S. at 328.

97. *Fisher I*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330).

98. *Id.*

99. Killenbeck, *supra* note 43, at 36.

100. *Grutter*, 539 U.S. at 330.

101. *Id.*

102. *Id.*

103. *Id. See also id.* at 387–88 (Kennedy, J., dissenting) (stressing "acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence").

104. *Grutter*, 539 U.S. at 330.

105. *Id.* at 387–88 (Kennedy, J., dissenting).

106. 208 U.S. 412 (1908).

107. *Id.* at 421–23.

Louis D. Brandeis, which consisted of "three pages . . . devoted to a statement of the constitutional principles involved and 113 pages . . . devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women."[108]

Justice Brandeis subsequently described this as a judicial obligation "to determine, in the light of all the facts which may enrich our knowledge and understanding, whether [a given] measure . . . transcends the bounds of reason."[109] That tracks Judge Richard Posner observation that in many constitutional cases "[t]he big problem is not lack of theory, but lack of knowledge – lack of the very knowledge that academic research . . . is best designed to produce."[110] The technique is not universally embraced.[111] Thoughtful critics have argued "that social science evidence provides a weak and relatively unstable foundation for legal rules."[112] I disagree, at least in this instance. Rigorous studies that document actual educational outcomes provide appropriate foundations for the precise constitutional questions posed by affirmative admissions policies: is a group classification actually relevant, given the decisions that must be made and the goals that are sought?[113] Or is the use of the classification "in fact motivated by illegitimate notions of racial inferiority or simple racial politics"?[114]

Justice O'Connor's use of social science evidence in *Grutter* provides a basis for educators to insist that their belief in and use of admissions preferences is something more than simple "racial experimentation."[115] The evidence in question may well prove to be mixed,[116] and its embrace or rejection may be influenced by the views individual Justices bring to the debate. But its presence as part of the dialogue offers the opportunity to shift the terms of the discussion from the "theoretical" to the "real."[117]

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108. Edwin S. Corwin, *Social Planning Under the Constitution – A Study in Perspectives*, 26 AM. POL. SCI. REV. 1, 17 (1932).

109. Burns Baking Co. v. Bryant, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

110. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998).

111. *See, e.g.*, Carl Brent Swisher, THE SUPREME COURT IN MODERN ROLE 158 (1958) (criticizing the use of such materials in Brown v. Bd. of Educ., 347 U.S. 483 (1954) as "based on neither the history of the [Fourteenth A]mendment nor on precise textual analysis" but on the "highly evanescent grounds" of "psychological knowledge").

112. Steven L. Willborn, *Social Science in the Courts: The View from Michigan*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES, 143, 145 (Richard L. Wiener et al. eds., 2007) [hereinafter Social Consciousness].

113. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (characterizing "government action[s] based on race" as "a group classification long recognized as in most circumstances irrelevant and therefore prohibited").

114. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

115. *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting).

116. *See, e.g.*, *id.* at 364–65 (Thomas, J., dissenting) (discussing and citing "growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students").

117. *Id.* at 330.

That is not an outright blessing. Having relied on "social science data . . . [that] significantly extend[s] our understanding of just how *social* learning turns out to be,"[118] colleges and universities assume the obligation to document the effectiveness of the policies they have adopted. In particular, they labor under the expectations created by Justice O'Connor's characterization of the benefits that follow from diversity as "substantial."[119] Each institution must be prepared to defend its use of admissions preferences on the basis of real educational benefits that are directly attributable to actual diversity. In particular, they must document the cause-effect relationships that follow from the policies they have embraced.

Studies of this sort should avoid the problems inherent in surveys within which students (or faculty, for that matter) simply "self-assess." Virtually everyone wants "to be and appear to be good people."[120] In particular, "self-reports of any socially sensitive topic, including race, are subject to social desirability pressures."[121] Surveys linked specifically to diversity or racial climate at an institution that has made its commitment to affirmative action known pose risks, given that "[t]he more transparent or obvious the purposes of a questionnaire, the more likely respondents are to provide the answers they want others to hear about themselves rather than the ones that may be true."[122] That does not mean that surveys identifying how students "feel about their experience at the university"[123] or "how they feel in the classroom"[124] have no value. It does mean that they must be crafted and used with care.

These studies and assessments should also be longitudinal. They should identify the characteristics, strengths, and weaknesses of the students admitted before they begin their education. They should then document the changes these same students experience – positive or negative – during their time at the institution. Diversity is valued precisely because it is believed that it will have an impact. The assumption is that it will create benefits and outcomes that would not otherwise occur. If the goal is to produce beneficial educational outcomes, then "meaningful data must be collected both before and after exposure to the diversity experience in order to determine whether the experience itself produced the [desired] learning outcomes."[125]

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118. Nancy Cantor, *Introduction*, *in* DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 8, 8–9 (Patricia Gurin et al. eds., 2004) [hereinafter Cantor Introduction and Defending Diversity].

119. *Grutter*, 539 U.S. at 330.

120. SEYMOUR SUDMAN & NORMAN H. BRADBURN, ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN 6 (1982).

121. Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOC. 135, 138 (2000).

122. BRUCE W. TUCKMAN, CONDUCTING EDUCATIONAL RESEARCH 235 (4th ed. 1994) [hereinafter Tuckman].

123. Joint Appendix at 267a, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (Deposition of Dr. Bruce Walker (Oct. 7, 2008)) [hereinafter respectively Walker Deposition and Joint Appendix]. Dr. Walker was at the time Vice Provost and Director of Undergraduate Admissions.

124. *Id.*

125. Killenbeck, *supra* note 43, at 55.

The assessments must also provide context, in this instance, a means for differentiating between what occurs with and without diversity. It is a basic social science principle that "[*c*]*omparisons* need to be made between students who experience different types of education" given that "survey research done on a single group often leads to invalid conclusions about cause-and-effect relationships."[126] Too often, diversity assessments focus on diversity itself to the exclusion of other factors, "interpreting outcomes . . . as the effects of diversity alone."[127] In doing so, they tend to ignore the importance of determining "what type of response is 'normal.'"[128] Information derived from classes or situations where diversity is minimal or nonexistent can, accordingly, provide "an objective indicator revealing how people would ideally respond or behave in a given group setting."[129] Even here, care must be exercised:

> One of the problems in communicating the messages of [intervention] research is that experimental design in itself encourages disproportionate attention to be directed toward the critical manipulated variable as *the* cause of observed differences between experimental and control groups, no matter how remote in time or nature the outcome measures are from the intervention.[130]

Finally, the studies and assessments should be tied to the compelling interest that the Court has recognized: "the educational benefits that diversity is designed to produce."[131] *Bakke* spoke simply of the "robust exchange of ideas"[132] made possible by a "heterogeneous student body."[133] Justice O'Connor repeated a portion of this notion, stressing that "'classroom discussion is livelier, more spirited, and simply more interesting' when students have 'the greatest possible variety of backgrounds.'"[134] But she also enumerated a series of specific, measurable educational outcomes, including: promoting of cross-racial understanding; breaking down racial stereotypes; enabling students to better understand persons of different races; preparing students for an increasingly

126. Tuckman, *supra* note 122, at 235.

127. Evan P. Apfelbaum et al., *Rethinking the Baseline in Diversity Research: Should We Be Explaining the Effects of Homogeneity?*, 9 PERSPECTIVES ON PSYCHOL. SCI. 235, 236 (2014). The authors note that in a sample of "240 research articles on group diversity capturing the wide range of social, educational, and organizational contexts in which it is examined . . . 205 of the . . . articles interpreted their results as the effect of diversity alone." *Id.*

128. *Id.*

129. *Id.*

130. Martin Woodhead, *When Psychology Informs Public Policy: The Case of Early Childhood Intervention*, 43 AM. PSYCHOL. 443, 452 (1988).

131. *Grutter*, 539 U.S. at 330. *See also Parents Involved*, 551 U.S. at 725 (characterizing the interest as the "educational and broader socialization benefits [that] flow from a racially diverse learning environment").

132. *Bakke*, 438 U.S. at 313.

133. *Id.* at 314.

134. *Grutter*, 539 U.S. at 330 (quoting *Grutter*, 137 F. Supp. 2d at 849).

diverse workforce and society; and instilling the skills needed in a global marketplace.[135]

The extent to which these outcomes have been achieved are the sorts of "determination[s that] . . . trained educators make . . . all the time."[136] The evidence Texas has offered to date in support of their case – "hard data on minority admissions, enrollment and racial isolation at UT, as well as discussions with students about their experiences"[137] – does not actually focus on educational outcomes attributable to a diverse learning environment. That is perhaps understandable given the current focus of the litigation, which is much more about the overall design of the admissions policy than the extent to which the benefits associated with diversity have actually been realized.

That said, both *Grutter* and *Fisher I* contemplate the production of such evidence as part of the narrow tailoring inquiry. For example, Justice O'Connor made it clear that the implementation portion of the constitutional calculus requires that the entity adopting a race-conscious policy must show how the admissions policies are "specifically and narrowly framed to accomplish [their] purpose."[138] In a similar vein, Justice Kennedy spoke directly in *Fisher I* of the need to determine "whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[139]

Those purposes and educational outcomes are not documented by admissions and enrollment data, commonly described as "structural" or "numerical" diversity.[140] Simply increasing minority enrollments to the level of a critical mass poses two problems. The first is a significant constitutional difficulty: "[a] university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'"[141] Rather, "[t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."[142] The second is practical. The diversity interest recognized by Justice Powell in *Bakke* was intuitive and informal.[143] The one embraced in

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135. *Id.*

136. UT Fisher I Brief, *supra* note 55, at 41.

137. *Id.*

138. *Grutter*, 539 U.S. at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).

139. *Fisher*, 133 S. Ct. at 2421.

140. Professor Patricia Gurin and her colleagues, for example, describe three types of diversity, one of which is "structural diversity. . .the numerical representation of diverse groups." Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 332–33 (2002) [hereinafter Gurin et al.]. The other two are "informal interactional diversity" and "classroom diversity." *Id.* at 333.

141. *Fisher*, 133 S. Ct. at 2419 (quoting *Bakke*, 438 U.S. at 307).

142. *Id.* at 2418.

143. *See, e.g.*, *Bakke*, 438 U.S. at 312 n. 48 (characterizing "some of the benefits derived from a diverse student body" as "learning [that] occurs informally" but also cautioning that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through' diversity actually occurs") (quoting Bowen, Admissions, *supra* note 94, at 7, 9).

Grutter was more structured and nuanced. It focused on the extent to which diversity fosters positive learning outcomes. That reformulation of the diversity rationale imposes important and special obligations to articulate the expected benefits and document that they have been realized.

Texas may well have such evidence in hand, or at least be planning to acquire it. That evidence may well meet the requirements associated with quality social science findings that are tied directly to the sorts of concrete educational outcomes the Court discussed in *Grutter*. And it may well have been gathered in the sound, longitudinal ways I have discussed.

As matters currently stand, however, the record does not reflect such findings, with two possible exceptions.[144] The first is the University's reliance on student anecdotal evidence about "how they feel."[145] Once again, such information helps to provide perspectives. But it is most certainly not the sort of rigorous and reliable findings that can tell us whether a diversity program is generating actual educational outcomes. That will be especially true if there are no baselines for establishing a before and after matrix, and no comparison groups to determine if diversity did, or did not, actually matter.

The second is the University's attempt to document the demographics in individual classes as part of its argument that "there was jarring evidence of racial isolation at UT."[146] The proposal that led to the creation of the policy now at issue stated that "there is a compelling educational interest for the University not to have large numbers of classes in which there are no students – or only a single student – of a given underrepresented race or ethnicity."[147] Texas thus emphasized at numerous points over the course of the litigation that classroom demographics mattered,[148] in particular as part of its efforts to determine if its minority enrollments had reached a critical mass.[149] Texas now appears to have abandoned

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144. My focus here is on the evidence that Texas gathered as it crafted the admissions scheme, rather than the social science findings provided to the Court about diversity in general in *Fisher I*, materials likely to be replicated as *Fisher II* is briefed.

145. Walker Deposition, *supra* note 123, at 267a–68a ("We talk to them all the time about how they feel about their experience at the university, how they feel in the classroom" and "have students who tell us they feel isolated in the classroom, that they are the only, or the majority of students tell us that there is no diversity in the classroom.").

146. UT Fisher I Brief, *supra* note 55, at 43.

147. UNIVERSITY OF TEXAS AT AUSTIN, PROPOSAL TO CONSIDER RACE AND ETHNICITY IN ADMISSIONS at 25 (June 25, 2004), *reprinted in* Supplemental Joint Appendix at 24a, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2241 (2013) (No. 11-345) [hereinafter Supplemental Joint Appendix].

148. *See, e.g.*, UT Fisher I Brief, *supra* note 55, at 43–44 (arguing that "[i]f '[a] compelling interest exists in avoiding racial isolation' . . . then surely a university may take into account blatant racial isolation in its classrooms") (quoting *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring)); *Fisher*, 631 F.3d at 225 (noting that as part of the plan developmental process Texas "commissioned two studies to explore whether [it] was en rolling a critical mass of underrepresented minorities").

149. *See, e.g.*, Walker Deposition, *supra* note 123, at 266a. When asked if "the university ha[s] any means of measuring . . . progress towards critical mass," Dr. Walker responded "Yes . . . there is one window . . . through which we can see how we're doing . . . the classroom." *Id. See also id.* ("[W]e have far too many classrooms

any attempt to tie the justifications for and potential benefits of its diversity policy to individual class demographics.[150] The enrollment data and class numbers will nevertheless be useful as part of the debate about critical mass. That information does not, however, help when the focus shifts to educational outcomes attributable to diversity.

B. Preparing for Work and Citizenship: Beyond the College Years

A second and potentially very significant difference between *Bakke* and *Grutter* is found in Justice O'Connor's decision to look beyond the college years. This was not a complete departure from Justice Powell's opinion in *Bakke*. He noted, for example, that "[p]hysicians serve a heterogeneous population" and that by "enrichi[ng] the training of its student body" medical schools could "better equip [their] graduates to render with understanding their vital service to humanity."[151] He also made passing references to "'leaders'" and the "'nations's future.'"[152] That discussion was, however, exceedingly brief and offered no empirical support for the proposition that diversity "better equip[s students] to render with understanding their vital service[s] to humanity."[153]

Justice O'Connor made the "long view" a much more integral part of her argument for the value of diversity. She emphasized "the overriding importance of preparing students for work and citizenship."[154] "Education," she stressed, is "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[155] She stressed that "student body diversity . . . 'better prepares students for an increasingly diverse workforce and

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where there's still no or only one minority student."). As the Court of Appeals noted the first time it had Fisher before it, "UT commission two studies to explore whether the University was enrolling a critical mass of underrepresented minorities." *Fisher*, 631 F.3d at 225. The first

> focus[ed] on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of its undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes . . . had either one or zero African-American students, and 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.

Id.

150. For example, in response to a question from Justice Scalia about whether Texas "want[s] not just a critical mass in the school at large, but class by class," Gregory Garre, representing Texas, responded:

> No, Your Honor, and let me try to be clear on this. The university has never asserted a compelling interest in any specific diversity in every single classroom. It has simply looked to classroom diversity as one dimension of student body diversity.

Fisher I Transcript, supra note 55, at 34.

151. *Bakke*, 438 U.S. at 314.

152. *Id.* at 312–13 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

153. *Id.* at 314.

154. *Id.* at 331.

155. *Grutter*, 539 U.S. at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

society, and better prepares them as professionals.'"[156] The "real" benefits of diversity, she noted, included the attainment of "the skills needed in today's increasingly global marketplace [which] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[157] And she emphasized the need to promote "[e]effective participation by members of all racial and ethnic groups in the civic life of our Nation," stressing the role of diverse colleges and universities as "the training ground for a large number of our Nation's leaders."[158]

The case for diversity embraced in *Grutter* involved, accordingly, a quest for post-graduation skills and perspectives that are instilled as part of "the diffusion of knowledge and opportunity through [diverse] institutions of higher education."[159] A portion of the evidence marshaled for these educational outcomes came from the same sources that documented general learning outcomes: a friend of the Court brief,[160] a book reporting the results of a major study,[161] and two books that collected individual social science studies.[162] I will discuss these materials in more depth in Part III-A. It is enough for current purposes to note that these sources contained information on, for example, "the ways in which diversity at colleges and universities affects lives, policies, and issues beyond the walls of the university."[163]

Another set of sources came in the form of information and perspectives gleaned from a series of briefs filed by businesses[164] and, in particular, "former high-ranking officers and civilian leaders of the United States military."[165] The two businesses' briefs stressed both operational and economic benefits for companies that are able to hire "the most qualified and talented diverse students . . . possible."[166] Such hires bring "cross-cultural competenc[ies] [that] directly affect[the] bottom line."[167] In particular, these businesses stressed the

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156. *Id.* at 330 (quoting AERA Brief, *supra* note 20, at 3).

157. *Id.*

158. *Id.* at 332.

159. *Id.* at 331.

160. *See* AERA Brief, *supra* note 20.

161. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) [hereinafter Bowen & Bok].

162. *See* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang et al. eds., 2003) [hereinafter Compelling Interest]; DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield ed., 2001) [hereinafter Diversity Challenged].

163. Jeffrey F. Milem, The Educational Benefits of Diversity: Evidence from Multiple Sources, in Compelling Interest, *supra* note 162, at 126, 129.

164. *See* Brief for Amici Curiae 65 Leading American Businesses, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter 3M Brief]; Brief of General Motors Corporation as Amicus Curiae, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter GM Brief].

165. *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter Military Leaders' Brief].

166. 3M Brief, *supra* note 164, at 9.

167. GM Brief, *supra* note 164, at 12. *See also id.* at 14 ("a business' lack of

need for "entrants into the managerial levels of the business world [who] come equipped with the abilities to work creatively with persons of any race, ethnicity, or culture and to understand views influenced by those traits."[168]

> The perspectives offered were a mixture of "practical experience"[169] and [a]bundant research [that] has verified [the] conclusion that racial and ethnic diversity is institutions of higher education assist students in developing the skills that . . . are so essential in the success in business world: (1) understanding the views of persons from different cultures and (2) addressing issues from multiple perspectives.[170]

These corporations also made it clear that they looked to colleges and universities to provide this sort of education: "Businesses are primarily commercial, not educational, entities, incapable of replicating the safe academic environments that foster the 'robust exchange of ideas which discovers truth out of multiple tongues.'"[171]

The brief filed by former military leaders was more pointed and, at least in terms of volume of discussion in the opinion, more significant.[172] It highlighted a long and troubling history of intentional invidious discrimination in the military that required positive intervention, the end result of which is that "[t]oday, the military is one of the most integrated institutions in America."[173] That produced, in turn, a need for "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse ranks [which] is essential to the military's ability to fulfill its principal mission to provide national security."[174] This requires both "qualified minority officer candidates"[175] and white officers capable of understanding "what the black man and woman in the service [is] thinking."[176] This meant, Justice O'Connor stressed, that "[t]o fulfill its mission, the military 'must be selective in admissions for training and education for the

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sensitivity to culturally based beliefs may disaffect an entire market and result in decreased sales").

168. *Id.* at 12.

169. 3M Brief, *supra* note 164, at 5.

170. GM Brief, *supra* note 164, at 17–18.

171. *Id.* at 21 (quoting *Keyishian*, 385 U.S. at 603). *See also id.* ("Only schools, not businesses, offer a forum for cross-cultural contact among a society of equals, free of hierarchy.").

172. Several individuals have argued that the military brief played a significant role in the decision. *See, e.g.*, Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 893–94 (2004) (noting that while the military brief "had no direct relevance to the law school program" it provided "persuasive" evidence of the value of diversity); Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 946–47 (2004) (noting that the military brief "tied race-sensitive admissions to national security" and bolstered the case for diversity as "help[ing to] develop a cadre of African-American leaders").

173. Military Leaders' Brief, *supra* note 165, at 12.

174. *Id.* at 5.

175. *Id.* at 29.

176. *Id.* at 16 (quoting BERNARD C. NALTY, STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY 317 (1986)).

officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.'"[177]

Grutter's emphasis on matters that lie beyond the college and university years is important for two reasons. As a practical matter, it broadens the range of educational outcomes associated with diversity and the contexts within which they are realized. More importantly, a focus on day-to-day, post-graduate life ties the diversity debate more tightly into one of the nation's most important problems: the need to deal with "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought [that] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[178]

III. DIVERSITY AND INCLUSION: FROM THEORY TO FACT?

I believe it is one thing to seek "enhanced classroom dialogue[,] . . . lessening of racial isolation and stereotypes"[179] and the "promot[ion of] learning outcomes."[180] It is quite another to effectively "'prepare students for an increasingly diverse workforce and society.'"[181] *Grutter* did a good job marshaling evidence in support of the former. It was less effective in doing the latter. In particular, it did not account for the realities posed by implicit bias, the "unwitting, unintentional, and uncontrollable" impulses that infect "the normal, everyday human thought and activity" of even "the most well-intentioned people."[182] This is an important insight, given its implications for Justice O'Connor's expansion of the argument for diversity beyond the confines of classroom and campus.

My goal in this Part is to outline what social scientists claim that their work tells us about the educational value of diversity. The qualification is intentional. The bitter divide between the supporters and opponents of affirmative action on the normative side of the debate actually spills over into the social sciences. Professor Mitchell Chang, for example, is a supporter of these policies who has conducted research "suggest[ing] that the benefits associated with racial diversity may be even more far-reaching than previously documented."[183] He also contends that "[i]t is nearly impossible to find a published study grounded in the field of higher education research that rejects Justice Powell's diversity rationale."[184] Professors Abigail and Stephen Thernstrom, in turn, are opponents of affirmative action who

177. *Grutter*, 539 U.S. at 331 (quoting Military Leaders' Brief, *supra* note 165, at 29).

178. Adarand Constrictors, Inc. v. Pena, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting).

179. *Fisher I*, 133 S. Ct. at 2418.

180. *Grutter*, 539 U.S. at 330.

181. *Id.* (quoting AERA Brief, *supra* note 20, at 3).

182. Hardin & Banaji, *supra* note 21, at 14.

183. Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 344 (2009) [hereinafter Denson & Chang].

184. Mitchell James Chang, Quality Matters: Achieving Benefits Associated With Racial Diversity 9 (Oct., 2011) [hereinafter Quality Matters].

have published studies of their own[185] and reviewed those of others.[186] Based on their work and expertise, they contend that "[i]n reality . . . research on race and diversity in the educational context indicates that diversity as generated by race-based admissions simply does not lead to those purported benefits."[187]

Their respective claims are carefully qualified. Professor Chang's statement about the studies available speaks in terms of the "rationale" for affirmative action, not its actual results. The Thernstrom rhetoric in turn can plausibly be read to reject simply the structural consequences of "race-based admissions," as opposed to outcome associated with proactive programming.

The truth likely lies somewhere in between. The question I want to explore is whether there is a body of evidence that supports granting admissions preferences in the name of diversity. The answer is yes. But the collateral reality is that such materials provide only a necessary first step for any institution that wishes to adopt or retain such preferences in the current legal environment.

A. *Grutter*: The Benefits of Contact Are Real

The prominence and protected place of the diversity rationale in the affirmative action debate is a relatively recent development. It has been thirty-seven years since Justice Powell accepted diversity as a compelling interest for constitutional purposes in *Bakke*. But his opinion was controversial and did not command widespread support. Critics found the rationale "weak"[188] and "totally disappointing."[189] As one of the individuals who represented the University of California observed, *Bakke* "makes a good deal of intuitive sense [b]ut its justification on a principled, constitutional level is more problematic."[190]

Many of affirmative action's most ardent supporters accordingly continued to press their case for admissions preferences as "a strategy for justice."[191] In

185. *See, e.g.*, STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE (1997).

186. *See, e.g.*, Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River* (Book Review), 46 U.C.L.A. L. REV. 1583 (1999).

187. Brief of Abigail Thernstrom et al. at 4, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2414 (2013) (No. 11-345) [hereinafter Thernstrom Brief].

188. Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. REV. BOOKS, Aug. 17, 1978, at 20, 22 (stating that "the argumentative base of" the Powell opinion "is weak" because "it does not supply a sound intellectual foundation for the compromise the public found so attractive").

189. Guido Calabresi, *Bakke As Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 427 (1979).

190. Paul J. Mishkin, *The Use of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 924 (1983).

191. Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL. 37 (1997). He states that "[t]he diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably entailed in a system of preferential treatment." *Id.* at 37. *See also* JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 228 (1979) (arguing that "[n]one of America's traditional victims [are] winners in the Bakke case" and that the "real winners [are] the country's economically and educationally privileged"); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1243 (2010) (arguing for the need for a system

particular, they argued that "blacks and Hispanics are the fortuitous beneficiaries of [rulings] motivated by other interests that can and likely will change when different priorities assert themselves."[192] And they looked with disdain on the notion that the ability of underrepresented minorities to find a place at the academic table somehow depends on the extent which their presence "sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief."[193]

The Supreme Court, however, has refused to characterize any of the interests associated with the normative case for affirmative action as "compelling" for constitutional purposes.[194] For four members of the current Court, the *nicest* thing they can say about affirmative action is that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[195] A fifth, Justice Anthony Kennedy, has made what is at best a cautious and limited case for "a moral and ethical obligation to fulfill [this Nation's] historic commitment to creating an integrated society,"[196] even as he condemns "crude measures [that] threaten to reduce [individuals] to racial chits."[197]

Colleges and universities are not likely to argue that their admissions preferences have been implemented with a view toward "the compelling interest of remedying the [present] effects of [their own] past intentional discrimination."[198] Sound recruitment strategies do not include luring underrepresented minority students to campus by touting "the present continuing manifestations of past discrimination."[199] This leaves the diversity rationale as the only viable game in town as both a legal and practical matter.

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within which "remediation diversity can be accepted, and social justice achieved"); Colin S. Diver, *From Equality to Diversity: The Detour From Brown to Grutter*, 2004 U. ILL. L. REV. 691, 717 (2004) (declaring that diversity's "moral claim" is "not . . . trivial" but nevertheless "pales in significance when set against the corrective justice claim on which the remedial justification rests").

192. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003).

193. Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 8 (1979).

194. *See, e.g.*, Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007) (stressing that the only two compelling interests supporting the use of race as a decision-making criterion are "remedying the effects of past intentional discrimination" and the interest in "diversity in higher education"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275–76 (1986) (rejecting a "role model" justification for minority preferences); *Bakke*, 438 U.S. at 307–11 (rejecting "societal discrimination" and "improving the delivery of health-care services to communities currently underserved" as compelling interests).

195. *Parents Involved*, 551 U.S. at 748 (plurality opinion of Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito).

196. *Id.* at 797 (Kennedy, J., concurring).

197. *Id.* at 798.

198. *Id.* at 720 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

199. Podberesky v. Kirwan, 956 F.2d 52, 56 (4th Cir. 1992). The University of Maryland, to its credit, admitted its undeniable history of intentional discrimination and created the "Banneker scholarship program, which is a merit-based program for which only African-Americans are eligible." Podberesky v. Kirwan, 38 F.3d 147, 152 (4th

There is nothing necessarily wrong with that. Elements of what we now recognize as "the educational benefits of a diverse student body"[200] have been part of the higher education calculus for a considerable period of time. In an important joint statement issued in 1997, sixty-two of the nation's most prestigious institutions declared that "[f]or several decades – in many cases, far longer – our universities have assembled their student bodies to take into account many aspects of diversity."[201] During that same period the then-President of Harvard, Neil L. Rudenstine, argued that the intellectual principles supporting diversity could be traced back over three centuries and that Harvard itself had valued and practiced diverse admissions going back to the Civil War.[202]

The problem in the wake of *Bakke* and before *Grutter* was the need to tie general statements about the desire to create "a truly heterogen[e]ous environment that reflects the rich diversity of the United States"[203] to actual evidence documenting individual educational accomplishments and outcomes. The University of Michigan recognized early in the development of its defense strategy in *Grutter* and *Gratz* that its case would be immeasurably strengthened if it could show that "education and learning are socially shared activities that depend in large part on the quality and effectiveness of the mix of people and ideas in the environment."[204] That realization tracked a collateral development: the response by the higher education community and leading social scientists to what was characterized as the "Hopwood Shock": the realization that "no consensus existed on the benefits of diversity" and that "[t]he research had not been done to prove the academic benefits and the necessity of affirmative action policies."[205]

Several national conferences were convened and initiatives were undertaken with a view toward "increas[ing] the sophistication with which society addresses the key issues of fairness, merit, and the benefits of diversity as they pertain to higher education."[206] Those efforts did two things. First, they focused attention on an existing body of knowledge documenting the importance of the concepts of

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Cir. 1994), *cert. denied*, 514 U.S. 1128 (1996). However, its focus on "high achieving African-American students" and allocation of a substantial number of scholarships to "non-residents of Maryland" meant that it was "not narrowly tailored to correct[] the conditions" that arguably justified it. *Id.* at 158–159.

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

201. *On the Importance of Diversity in University Admissions*, ASSOCIATION OF AMERICAN UNIVERSITIES (April 14, 1997), https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=1652.

202. Harvard University, The President's Report 1993-1995, at 3–6 (1996).

203. *Bakke*, 438 U.S. at 323 (quoting Harvard College Admissions Program).

204. Cantor Introduction, *supra* note 118, at 8.

205. Gary Orfield, *supra* note 162, at 1, 3–4. *See also* Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 74 (1998) ("the unfinished homework in the affirmative action debate concerns the development of an articulated vision – supplemented by a strong evidentiary basis – of the educational benefits of diversity in higher education.").

206. Kenji Hakuta et al., *Preface*, *in* Compelling Interest, *supra* note 162, at xiii, xv. The history and strategies are described in this Preface and in the Orfield Introduction, *supra* note 205.

"identity" and "discontinuous intellectual growth."[207] Second, they generated a series of studies that addressed directly the central question posed by the affirmative action litigation: are there in fact specific, positive educational outcomes associated with diversity?

Many of these materials played a direct role in *Grutter*. As indicated, Justice O'Connor cited three books and a friend of the court brief as evidence that the benefits of diversity are "real."[208] Much of this material drew on "contact theory," a body of research that emphasizes the value and impact of "engaging and interacting with diverse peers."[209] An integral part of this is the recognition that "[h]igher education is more than lectures, lab exercises, and reading lists. The highest quality education is achieved through interaction among students and faculty."[210] Many students "reach college without sustained contact with people of other races."[211] Thus, "contact between students of different racial and ethnic backgrounds"[212] matters, given that "unconscious racial and ethnic stereotyping and prejudice are pervasive and persistent in our society"[213] and "research shows . . . that these implicit attitudes and responses can be ameliorated when students from diverse racial and ethnic backgrounds live and work with each other intensively, both in and out of the classroom."[214]

Drawing on the work of Erik Erikson[215] and Jean Piaget,[216] one of the key experts in the Michigan cases, Patricia Y. Gurin, captured the significance of this established body of work for college and university diversity:

> [I]dentity develops best when young people are given a psycho-social moratorium – a time and place in which they can experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life.

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207. Faye J. Crosby & Amy E. Smith, *The University of Michigan Case: Social Scientific Studies of Diversity and Fairness, in* Social Consciousness, *supra* note 112, at 121, 126 [hereinafter Crosby & Smith].

208. *See supra* note 20 and accompanying text.

209. AERA Brief, *supra* note 20, at 7.

210. Brief of the American Sociological Association et al. as Amici Curiae at 20, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

211. *Id.* at 21. Texas, for example, argued strenuously that there is "well-known de fact segregation throughout much of Texas's secondary school system" and that it "produces clusters of overwhelmingly majority-minority schools." UT Fisher I Brief, *supra* note 55, at 33.

212. APA Grutter Brief, *supra* note 14, at 3.

213. *Id.* at 15.

214. *Id.*

215. *See, e.g.*, ERIK H. ERIKSON, YOUTH: CHANGE AND CHALLENGE (1963); ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (2d ed. 1963); ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE: SELECTED PAPERS (1959).

216. *See, e.g.*, JEAN PIAGET, THE EQUILIBRATION OF COGNITIVE STRUCTURES: THE CENTRAL PROBLEM OF INTELLECTUAL DEVELOPMENT (1985); JEAN PIAGET, THE STAGES OF COGNITIVE DEVELOPMENT, IN MEASUREMENT AND PIAGET (Dennis Ross Green et al. eds., 1971)

Ideally, the moratorium will involve confrontation with diversity and complexity, lest young people passively make commitments that follow their past, rather than being obliged to think and make decisions that fit their talents and feel authentic.[217]

One of the key strengths in these materials is that they are not tied to conceptions of race or racial justice. Rather, they reflect generally accepted understandings of how all individuals progress through a series of developmental stages.[218] In particular, they focus on the potential significance of encountering new ideas, information, and individuals during the college years, a time when "students from varied backgrounds [come] together to create a diverse and complex learning environment."[219] This requires that the college "social milieu [be] different from the home and community background . . . diverse and complex enough to encourage intellectual experimentation and recognition of varied future possibilities."[220] If it is, developmental theory suggests that an impact on what Professor Gurin described as "learning outcomes"[221] and "democracy outcomes"[222] can occur "in institutions explicitly constituted to promote late-adolescent development."[223]

This strength is also a potential weakness. These approaches are constrained by the reality that they are tied to the "transition to adulthood," a time during which "events . . . were more meaningful than those in other periods."[224] This makes this body of research valuable if the focus is undergraduate education, in particular the experiences of "typical" students who matriculate directly from or shortly after high school. Such materials have less force when the focus shifts to graduate and professional education. They also tend to reflect an emphasis on what is known as

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217. Expert Report of Patricia Gurin, *in* THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION (John A. Payton ed., 1999), *reprinted in* 5 MICH. J. RACE & L. 363, 368 (1999) [hereinafter Gurin Report].

218. *But see*, Thernstrom Brief, *supra* note 187, at 10 (arguing that "this 'contact hypothesis' has been discredited by more than half a century of research and is no longer accepted by any reputable social scientist"). They argue that "contact" will succeed "[o]nly under very specific conditions, ones that are unlikely to be met when racial preferences are used." *Id.* This may well be true if a given college or university practices only structural diversity. It is a less tenable objection if these institutions practice what I characterize as "principled diversity." *See infra* text accompanying note 300.

219. Gurin Report, *supra* note 217, at 369.

220. *Id.*

221. Gurin et al., *supra* note 140, at 336–39. She describes these outcomes as, among other things, "effortful, mindful, and conscious modes of thought," *id.* at 337, a "stronger sense of individuality and a deeper understanding of the social world," *id.*, "opportunities to identify discrepancies between students with distinctive pre-college experiences," *id.* at 338, and "multiple and different perspectives." *Id.*

222. *Id.* at 339–41. She describes these as the orientations that students will need to be citizens and leaders in the post collegiate world: perspective-taking, mutuality and reciprocity, acceptance of conflict as a normal part of life, capacity to perceive differences and commonalities both within and between social groups, interest in the wider social world, and citizen participation. *Id.* at 341.

223. *Id.* at 334.

224. Abigail J. Stewart & Joseph M. Healy, Jr., *Linking Individual Development and Social Change*, 44 AM. PSYCHOL. 30, 39 (1989).

"structural diversity," a concept that focuses largely on "the numerical representation of diverse groups."[225]

That sort of diversity has been a frequent focus for both litigation[226] and research.[227] Structural diversity is important. The simple presence of students from a variety of backgrounds, races, and ethnicities matters: "a diverse student body is a necessary condition for interactions among diverse groups."[228] Viewed in this manner, structural diversity can be "a catalyst for promoting a more hospitable racial climate."[229] But, as numerous researchers have emphasized, "necessary [it is] not sufficient" if it is actually to lead to "a more comfortable and less hostile environment for all."[230]

The research shows that "the educational benefits associated with diversity are not guaranteed, but conditional."[231] The interactions must be controlled and meaningful,[232] and "institutional support may be an especially important condition for facilitating positive contact effects."[233] More tellingly, it is extremely important to do this with care, especially at institutions that have made support for diversity central to their identity.[234] Some individuals come to the diversity table

225. Gurin et al., *supra* note 140, at 332–33.

226. *See, e.g.*, Smith v. Univ. of Washington Law School, 233 F.3d 1188, 1191 (9th Cir. 2000) ("Law School . . . use[s] race as a criterion in its admission process so that it could assure the enrollment of a diverse student body"); Johnson v. Bd. of Regents of the Univ. of Georgia System, 106 F. Supp. 2d 1362, 1371 (S.D. Ga. 2000) ("[t]he record shows that UGA is plying a 'diversity = proportionalism' rationale"); Podberesky v. Kirwan, 764 F. Supp. 364, 367 (D. Md. 1991) (Banneker Scholarship program "aimed at increasing the representation of historically underrepresented racial groups at public higher education institutions in Maryland").

227. *See, e.g.*, Anthony Lising Antonio, *The Influence of Friendship Groups on Intellectual Self-Confidence and Educational Aspirations in College*, 75 J. HIGHER EDUC. 446 (2005); L. Flowers & Ernest T. Pascarella, *Does College Racial Composition Influence the Openness to Diversity of African-American Students?*, 40 J. C. STUDENT DEV. 405 (1999); Gary R. Pike & George D. Kuh, *Relationships among Structural Diversity, Informal Peer Interactions and Perceptions of Campus Environment*, 29 REV. HIGHER EDUC. 425, 427 (2006) [hereinafter Pike & Kuh].

228. Pike & Kuh, *supra* note 227, at 427.

229. Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY IN HIGHER EDUC. 204, 207 (2008) (hereinafter Hurtado et al.). *But see*, Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007) (major study documenting that "in the short run . . . ethnic diversity tend[s] to reduce social solidarity and social capitol" based on census data "suggest[ing] that in ethnically diverse neighborhoods . . . [t]rust (even of one's own race) is lower, altruism and community cooperation rarer, friends fewer"). As Hardin and Banaji observe, Putnam's research "show[s] the unsavory result that ethnic diversity may actually increase social distrust." Hardin & Banaji, *supra* note 21, at 13.

230. Hurtado et al., *supra* note 229, at 207.

231. Quality Matters, *supra* note 184, at 10.

232. *See, e.g.*, Denson & Chang, *supra* note 183, at 343 (emphasizing the positive role of "workshops of classes geared toward diversity").

233. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 766 (2006).

234. As some scholars in the field have noted, there is a real danger of "diversity

with pre-existing antipathies toward particular groups and "[t]he deeply prejudiced both avoid intergroup contact and resist positive effects from it."[235] In others, "[t]he human mind automatically and unintentionally reacts to different groups in divergent ways, a process that can have unfortunate consequences."[236] Still others respond even more negatively when larger numbers of the groups they dislike are present,[237] a reality that may have great bearing given the importance ascribed to "critical mass" in these debates.[238] The proverbial bottom line is, as Gurin has emphasized, that simply "[t]alking about these topics can blow up if you don't do it right."[239]

Perhaps the most important outcome in the wake of *Grutter* and *Gratz* was the extent to which it generated a veritable diversity assessment cottage industry. In the period leading up to those cases the group of social scientists that focused on these issues was relatively small. Much of their work sounded in contact theory.[240] But over the course of the 1990s the number of individuals doing focused research increased. They began to develop a "broad range of social science evidence"[241]

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burn-out." *See, e.g.*, Marcia B. Baxter Magolda, *Facilitating Meaningful Dialogues About Race*, About Campus, Nov.-Dec. 1997, 14, 18 ("I hear students whisper to confidants that they are 'sick of diversity discussions,' and my graduate students share that their undergraduate staff and students complain about attending diversity workshops.").

235. Thomas F. Pettigrew, *Intergroup Contact Theory*, 29 ANN. REV. PSYCHOL. 65, 80 (1998).

236. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012), at 9, 10 [hereinafter Implicit Bias Across the Law].

237. *See* Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans' Racial Attitudes*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 750, 751 (2014) (noting that "decades of survey research are consistent with the proposition that minority group size is associated with prejudice").

238. *See id*. at 759 (noting that the studies performed provide "insight into how Whites may react to . . . demographic shift[s] and highlights potential for perceived threat and intergroup hostility"). The focus in this study was on demographics writ large, rather than on classroom interactions and/or diversity in a postsecondary setting. It is nevertheless important to note and account for the reality that "exposure to the changing racial demographics of the United States and, most notably, the impending 'majority-minority' U.S. population leads White Americans to express greater racial bias." *Id*. at 758.

239. Quoted in Peter Schmidt, *'Intergroup Dialogue' Promoted as Using Racial Tension to Teach*, CHRON. HIGHER EDUC. DAILY NEWS, June 16, 2008, *available at* http://chronicle.com/daily/2008/07/3829n.htm. So, for example, "[a]t least in some situations, it appears that attempts to control automatic stereotyping may actually set people on a path toward stereotyping, especially under conditions where control is difficult to achieve." Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1333 (2008) [hereinafter Stewart & Payne]. College classes in general, and campuses in particular, are of course classic examples of environments where "control" may well be "difficult to achieve."

240. *See, e.g.*, Gurin Report, *supra* note 217.

241. *See, e.g.*, Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sources*, *in* Compelling Interest, *supra* note 162, at 126.

and, in a limited number of instances, generate diversity focused surveys[242] and studies.[243]

Since that time researchers have published hundreds of studies, papers, and commentaries, focusing on these issues.[244] Indeed, in 2008 the American Psychological Association initiated a scholarly publication devoted exclusively to issues of diversity, the *Journal of Diversity in Higher Education*. Thus, the *Fisher I* Court had available to it, directly through the parties and amicus briefs, a substantial body of social science information and research on both sides of the debate. The Court did not actively discuss that supporting evidence, with the single exception of Justice Thomas, who spoke in passing of "the *educational benefits* allegedly produced by diversity"[245] and "the putative educational benefits of diversity."[246] But it did receive a significant number of briefs on both sides of the diversity debate attesting to the large and growing body of studies attempting to document, and dispute, both premise and results.

The good news for diversity's proponents, then, is that there is a substantial body of evidence they can draw on as they develop their admissions policies and educational programs within the constitutional parameters outlined by the Court. The bad news is that none of this actually matters if the question is whether a

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242. *See, e.g.*, Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* Diversity Challenged, *supra* note 162, at 143, 172 (reporting the results of a Gallop Poll of law students at Harvard and Michigan showing "that large majorities have experienced powerful educational experiences from interaction with students of other races") [hereinafter Orfield & Whitla].

243. Mitchell J. Chang, *The Positive Educational Effect of Racial Diversity on Campus*, *in* Diversity Challenged, *supra* note 162, at 175, 182 (reporting the findings of a longitudinal study showing "that socializing with someone of another race is positively related to . . . educational outcomes)").

244. *See, e.g.*, Brief for the American Psychological Association as Amicus Curae at 3, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2414 (2013) (No. 11-345) (noting that the brief provided "scientific conclusions . . . grounded in 79 peer-reviewed studies reflecting the contemporary social science research on campus diversity" and that "[n]early all of these studies have been conducted or published since . . . Grutter"); Brief of the American Educational Research Association et al. as Amici Curiae at 5, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2414 (2013) (No. 11-345) (stating that "[t]he literature has expanded considerably since Grutter") [hereinafter AERA Fisher I Brief].

245. *Fisher*, 133 S. Ct. at 2424 (Thomas, J., concurring).

246. *Id*. at 2426. Justice Thomas did take a proactive stand on one major dispute in the social science literature when he claimed that "the University's discrimination has a pervasive shifting effect." *Id*. at 2431. This statement reflected his agreement with the "mismatch" theory, which postulates that "large racial preferences . . . systematically put minority students in academic environments where they feel overwhelmed." RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP AND WHY UNIVERSITIES WON'T ADMIT IT 4 (2012). The theory predates *Bakke*. *See, e.g.*, Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377, 395 (1970) (discussing the problems posed by admitting students "to a 'better' school" than those that "would admit [them] under normal standards"). *But see*, AERA Fisher I Brief *supra* note 244, at 26 ("Recent research also undermines the so-called mismatch hypothesis proposed by opponents of race-conscious admissions.").

specific affirmative action admissions policy at a *specific* college or university is both constitutional and educationally sound. As Justice O'Connor stressed in *Grutter*:

> Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . [S]trict scrutiny must take "'relevant differences' into account.'" . . . Indeed . . . that is its "fundamental purpose." Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government decisionmaker for the use of race in that particular context.[247]

In *Fisher II*, for example, the decisionmaker is the University of Texas and the "particular context" is the actual need for and professed goals of an affirmative admissions system designed to meet the specific educational needs of the students at that institution, not at the ones where the published studies were conducted. For Texas, and for every other institution that actively seeks diversity, the decision to do so must be principled, by which I mean three things. It must reflect a considered judgment that diversity is part of that institution's mission.[248] It must be pursued for educational reasons pertinent to the students enrolled at Texas and the programs they are actually enrolled in.[249] And it must be proactive, that is, "positive steps [must be taken] to see that there is *substantial* and *meaningful* interaction between students of different racial and ethnic groups."[250]

This requires more than attaining a critical mass of previously underrepresented students.[251] That is simple structural diversity, which is at best a necessary precondition to the sorts of deliberate and carefully controlled interventions that will make possible the attainment of positive educational outcomes. As Chang emphasizes, "attending to the quality of student's own cross-racial interactions and the quality of the institutional context for diversity is critically important."[252]

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247. *Grutter*, 539 U.S. at 327 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1993)).

248. *See Fisher I*, 133 S. Ct. at 2419 (stressing that the compelling interest recognized in *Grutter* protects a judgment that diversity is "integral to [an institution's] mission").

249. *Id.* (stressing the need for "a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve [the institution's] educational goals").

250. Killenbeck, *supra* note 43, at 49.

251. Some people disagree, at least in terms of whether such programming is required to comply with the Constitution. Professor Evan Caminker, for example, while still Dean of the Michigan Law School, expressed support for such programming even as he noted that the Law School's "admissions program passed constitutional muster despite the absence of [proactive programming.]" Evan Caminker, *Post-Admissions Educational Programming in a Post-Grutter World: A Response to Professor Brown*, 43 HOUS. L. REV. 37, 50 (2006). I disagree, and it is entirely possible that the manner in which the Court resolves *Fisher II* will foreclose that option.

252. Quality Matters, *supra* note 184, at 18.

It also requires that the program be implemented and pursued with longitudinal assessments of actual educational outcomes as an integral part of its construction. As I have stressed, the theory is that diversity has an actual, hopefully positive, effect on actual students. Those effects must be postulated and then measured over time, based on pre- and post-diversity profiles of the students in question. A survey that asks students at a given point in time how often they studied with individuals of a different race,[253] and/or whether diversity "affected their ability to work more effectively and/or get along better with members of other races,"[254] may tell us something about the extent to which they "have experienced powerful educational experiences from interaction with students of other races."[255] But it tells us very little about whether the behaviors and attitudes in question were actually shaped by the time the students spent at the institution, as opposed to simply reflecting values and habits acquired long before.[256]

Institutions practicing principled affirmative action must accordingly be willing to devote the time and resources necessary to collect appropriate data, over time. The information they collect should provide a profile of the students both when they enter and after they graduate, keyed to the educational benefits the institution expects to be associated with diversity. For example, one of the outcomes many of diversity's proponents champion is the extent to which it promotes "critical thinking."[257] Recent research seems to support that conclusion, showing that "[t]he cognitive effect of diversity experiences appears to be sustained during 4 years of college and may even increase in magnitude over time."[258] The authors cautioned, however, "that [individual] students' characteristics may often shape the developmental influence of postsecondary education" and "that purposefully programming exposure to diversity into the undergraduate experience may not yield the same benefits to all students."[259]

The studies that have been presented to the Court help inform the debate about whether diversity is a compelling educational interest in the abstract. They cannot provide the sort of institution-specific perspectives required to document the value of diversity as an educational matter for that institution and its students.

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253. Orfield & Whitla, *supra* note 242, at 158.

254. *Id*. at 159.

255. *Id*. at 172.

256. Controlling for this is especially important given the findings of some studies documenting the importance of pre-enrollment experiences and attitudes. *See, e.g.*, Elizabeth J. Whitt et al., *Student's Openness to Diversity and Challenge in the Second and Third Years of College*, 72 J. HIGHER EDUC. 172, 188 (2001) ("[T]he most significant positive influence on a student's openness to diversity and challenge during the first three years of college was the student's openness before college.") [hereinafter Whitt et al.].

257. *See, e.g.*, Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates*, 77 J. HIGHER EDUC. 430, 449 (2006) (study documents that "students who have higher levels of [cross-racial interaction] tend to report significantly larger gains . . . in critical thinking ability").

258. Ernest T. Pascarella et al., *Effects of Diversity Experiences on Critical Thinking Skills Over 4 Years of College*, 55 J. C. STUDENT DEV. 86, 90 (2014) [herinafter Pascarella, Critical Thinking].

259. *Id*. at 91.

Ultimately, a complete answer in *Fisher II* to the question of whether the Texas policy is narrowly tailored will require that Texas secure that information. But it is critically important to look beyond the narrow confines of that case and recognize that each institution that uses preferences is vulnerable, and that each must be prepared to document that its educational intuition is backed up by the achievement of actual educational outcomes.

B. Unappealing Truths: Implicit Bias, Neuroscience, and Diversity

One of the recurring themes in the current national dialogue is the disconnect between views expressed "by confident commentators who tout America's successful retreat from its racist past"[260] and the reality that "[m]assive racial disparities in America persist – in the criminal justice system, in economic advancement, in property ownership, and beyond."[261] Recent events notwithstanding, "hostile acts of race discrimination in the United States have steadily declined during the past century."[262] Most Americans are accordingly shocked when they occur.[263]

Traditional understandings of human behavior and the sources of prejudice emphasized conscious choices. In his classic work, *The Nature of Prejudice*, Gordon Allport stated that "prejudice contains two essential ingredients . . . an *attitude* of favor or disfavor" that is "related to an overgeneralized (and therefore erroneous) *belief*."[264] Traditional social science research focused on gathering information about overt beliefs and attitudes. Within that regime, "[t]he most commonly used technique to determine the extent of racial prejudice has been the survey in which respondents are asked directly to express their racial attitudes."[265] That reflected the reality that "[a] quarter century ago, most psychologists believed that human behavior was primarily guided by conscious thoughts and feelings."[266]

This posed two problems. One was methodological. In general, people want "to be and appear to be good people."[267] This means that "[t]he more transparent or obvious the purposes of a questionnaire, the more likely respondents are to

260. Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, *in* Implicit Bias Across the Law, *supra* note 236, at 1 [hereinafter Levinson, Introduction].

261. *Id*.

262. Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some*, 69 AM. PSYCHOL. 669, 680 (2014) [hereinafter Greenwald & Pettigrew].

263. Luciana Lopez, Harriet McLeod, & Alana Wise, *Families of South Carolina Church Massacre Victims Offer Forgiveness*, YAHOO! NEWS, June 19, 2015, http://news.yahoo.com/white-suspect-arrested-killing-nine-black-u-church-000635210.html

264. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 13 (25th ed. 1979).

265. Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 547 (1980).

266. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE xiv (2013) [hereinafter BLIND SPOT].

267. SEYMOUR SUDMAN & NORMAN H. BRADBURN, ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN 6 (1982).

provide the answers they want others to hear about themselves rather than the ones that may be true."[268] It is not, therefore, surprising that "people tend to report only a slight preference for white Americans over black Americans."[269]

The more serious difficulty is that traditional understandings and techniques do not account for the reality "that prejudice can operate unwittingly, unintentionally, and unavoidably."[270] A growing body of studies "consistently reveal[s] a disquieting but potent truth: despite cultural progress in reducing overt acts of racism, the effects of implicit racial attitudes and stereotypes are powerful and pervasive."[271] This divorce between general support for equality and the reality of persistent stark problems "reveals the complexity of America's racial challenges and the legal system's unwitting complicity in the persistence of racial disparities."[272] The United States is "a country that for all its progress has yet to completely shed the burden of hatred and division."[273] This should not come as a great surprise. We have known for quite some time that there are "unappealing truths about the nature of the brain and mind that originate from its bounded rationality and largely unconscious operation."[274] It is accordingly important to recognize that "human mental machinery can be skewed by lurking stereotypes, often bending to accommodate hidden biases reinforced by years of social learning."[275] These are especially pronounced when the focus is "social judgment, including, but not limited to, ethnicity and race."[276]

Systematic attention to this reality has increased in recent years, as "new techniques . . . opened up the black box of cognition, marrying the insights of traditional psychology with a functional analysis of the biology of brain activity."[277] This emerging body of knowledge includes two distinct but interrelated fields. The first is "implicit social cognition," which involves "a new generation of discoveries about automatic, nonconscious, or implicit preferences and beliefs."[278] The second is "cognitive neuroscience," defined as "the study of thought and behavior informed by the discoveries of neurosciences about the physical nature of the brain process."[279]

Two types of cognitive constructs factor into these discussions. The first are "implicit attitudes," defined as "introspectively unidentified (or inaccurately identified) traces of past experiences that mediate favorable or unfavorable feeling,

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268. Tuckman, *supra* note 122, at 235.

269. Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 431 (2007) [hereinafter Lane et al.].

270. Hardin & Banaji, *supra* note 21, at 14.

271. Levinson, *Introduction*, *supra* note 236, at 2.

272. *Id.* at 1.

273. Peter Baker, *After Charleston Shooting, a Sense at the White House of Horror, Loss and Resolve*, N.Y. TIMES, June 19, 2015, at A18.

274. Lane, *supra* note 269, at 427–28.

275. Levinson, *supra* note 236, at 2.

276. Hardin & Bannaji, *supra* note 21, at 5.

277. Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61, 62 (2010) [hereinafter Goodenough & Tucker].

278. Lane, *supra* note 269, at 429.

279. Goodenough & Tucker, *supra* note 277, at 62.

thought, or action toward social objects."[280] Attitudes, sometimes characterized as "preferences," describe the way we think about things. Attitudes are "favorable or unfavorable dispositions toward social objects, such as people, places, and policies."[281] Explicit attitudes are the product of deliberation and choice. Implicit attitudes, in turn, are "automatically triggered" and "can influence behavior without our awareness."[282]

The second construct is "implicit stereotypes," which "are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category."[283] Stereotypes are just what the term implies: beliefs about people that assign specific qualities to an individual based on that person's membership in a group. They are also pervasive, as "stereotyping by social category is so widely practiced as to deserve recognition as a universal human trait."[284]

Attitudes and stereotypes are central facets of the diversity debate. *Grutter*, for example, spoke expressly of the ability of an affirmative "admissions policy [that] promotes 'cross-racial understanding,' helps break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[285] As part of this, one of the "unappealing truths" that must be taken into account in the quest for diversity is the extent to which "nonconscious stereotypes or shortcuts embedded in the human mind cause the individual to evaluate members of different social groups in a disparate manner."[286] This insight is especially important if, as is too often the case, an institution pursues simple structural diversity under the assumption that "'unplanned, casual encounters . . . can be subtle and yet powerful sources of improved understanding and personal growth.'"[287]

The pervasiveness and potential impact of implicit bias is then a source of concern. Fortunately, the same work that has facilitated identification of the phenomenon has generated a reasonable understanding of its sources and methods for its detection. In turn, this work suggests strategies and interventions that may reduce implicit bias. Interestingly, these studies have also called into question a series of traditional assumptions about both human behavior and the brain.

The traditional view was that "[o]nce a stereotype is so entrenched that it becomes activated automatically, there is really little that can be done to control its influence."[288] The thinking was that "[r]ealistically, there is little that will be done

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280. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995) [hereinafter Greenwald & Banaji].

281. *Id*. at 7.

282. Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 164 (2008).

283. Greenwald & Banaji, *supra* note 280, at 15.

284. BLIND SPOT, *supra* note 264, at 89.

285. *Grutter*, 539 U.S. at 330 (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001)).

286. Hutchinson, *supra* note 22, at 37.

287. *Bakke*, 438 U.S. at 312 n. 48 (quoting Bowen, ADMISSIONS, *supra* note 94, at 9).

288. John A. Bargh, *The Cognitive Monster: The Case Against the Controllability*

about such nonconscious effects in the real world – mainly because, in the words of Hall of Fame baseball pitcher Bob Feller, "'You can't hit what you can't see.'"[289] Initial research on implicit bias seemed consistent with this, suggesting that "automatic biases were likely to be very rigid and require arduous learning processes to change."[290] Indeed, some studies suggested a "'backfire' effect[]," that is, an actual increase in stereotyping.[291]

That has given way to a growing consensus that "implicit preferences and beliefs . . . despite their seemingly uncontrollable nature, are malleable"[292] and "[d]espite their prevalence and magnitude . . . are not impervious to change."[293] The predicates for potential change are both personal and situational.[294] In particular, they are subject "to social influence,"[295] with the research showing "that changes in social organization . . . predict corresponding changes in implicit prejudice."[296] Various factors – virtually all of which are the hallmarks of student body diversity – come into play, including "the context surrounding the stimulus"[297] and "promotion of counter-stereotypes."[298] In particular, positive changes are associated with "effortful practice,"[299] a characteristic central to what I have characterized as principled diversity.[300]

Individuals who study implicit bias have developed ways to detect it and interventions designed to ameliorate it. Detection and measurement techniques avoid using the self-report approach.[301] Instead, they focus on "the outcome[s] of a measurement procedure that is causally produced by psychological attributes in an automatic manner."[302] The focus is "on obtaining evidence for the causal

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of Automatic Stereotype Effects, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 378 (Shelly Chaiken & Yaacov Trope eds. 1999).

289. *Id*.

290. Stewart & Payne, *supra* note 239, at 1333.

291. *Id*.

292. Lane, *supra* note 274, at 429.

293. *Id*. at 437.

294. *See e.g.*, Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 257 (2002) (discussing the focus on both individual "motives" and "social context").

295. Hardin & Banaji, *supra* note 21, at 15.

296. *Id.* at 21.

297. Stewart & Payne, *supra* note 239, at 1333.

298. *Id.*

299. *Id*. *See also* Robyn K. Mallett & Timothy D. Wilson, *Increasing Positive Intergroup Contact*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 382 (2009) [hereinafter Mallett & Wilson]. They stress that given inherent "anxiety about inter-racial interactions" one key factor in such programming is "to improve the quality of th[e] interaction." *Id*. at 383.

300. See *supra* text accompanying note 218.

301. *See* Robert J. Snowden & Nicola S. Gray, *Implicit Social Cognition in Forensic Settings*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 522, 522-523 (Bertram Grawronski & B. Keith Payne eds., 2010) [hereinafter Handbook] (discussing the shortcomings in self-reports given the human tendency to harbor bias "but choose to state a quite different proposition").

302. Jan De Houwer & Agnes Moors, *Implicit Measures; Similarities and*

relation between the to-be-measured attribute and the measure."[303] The most important of these is the Implicit Association Test (IAT), which "provides a measure of strengths of automatic associations"[304] The IAT "infers . . . associations from performances that are influenced by those associations in a manner that is not discerned by respondents."[305] The Race IAT, for example, "assesses implicit attitudes toward African Americans (AA) relative to European Americans (EA)."[306] It asks individuals to distinguish African-American faces from European American faces and "pleasant-meaning from unpleasant-meaning words."[307] The measures it produces are "based on the relative speeds of responding" and the strength of the associations observed reveal "implicit attitudinal preferences."[308]

Various interventions, in turn, can be used to alter attitudes and beliefs.[309] One of the most useful involves what the research characterizes as "counter-stereotypical exemplars," a process in which individuals are shown images of (for example) "admired African American[s] and disliked European American[s]."[310] A variation on this approach involves having individuals "imagine a positive interaction with a Black person [and] a negative interaction with a White person."[311] Post-exposure testing using the Race IAT can then identify whether the interventions had any impact of implicit attitudes. Initial studies showed "modest . . . reduction, but not elimination, of implicit biases."[312] More recent work, this time focusing on first year, first semester college students "demonstrated a simple way of correcting Whites' negative expectations about inter-racial interactions and increasing the positivity of those interactions."[313]

Another approach especially suitable in the context of student body diversity involves creating situations in which individuals work together toward a common goal. The underlying theory is that "the recategorization of former out-group members as in-group members should result in more positive attitudes toward them."[314] In particular, "group membership is internalized as a social identity and

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Differences, *in* HANDBOOK, *supra* note 301, at 176–77.

303. *Id*.

304. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

305. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952 (2006).

306. *Id.*

307. *Id.*

308. *Id.* at 953.

309. *See, e.g.*, Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765 (2014) [hereinafter Lai].

310. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 802 (2001).

311. Lai, *supra* note 309, at 1770.

312. Greenwald & Krieger, *supra* note 305, at 964.

313. Mallett & Wilson, *supra* note 299, at 380.

314. Samuel L. Gaertner et al., *Reducing Intergroup Bias: The Benefits of Recategorization*, 57 J. PERSONALITY & SOC. PSYCHOL. 239, 240 (1989).

subsequent group functioning . . . shifts from individual to collective self-definitions."[315] The net result is that "positive intergroup attitudes [are] fostered by linking the self to outgroups through common ingroup membership. . . ."[316]

In one experiment white students used computer models to form groups. Those who "formed a group including several Black individuals and practiced associating themselves and the Black group members subsequently scored lower on a prejudice IAT than participants in a control condition."[317] The conclusion was "that practicing counterstereotyping and conditioning a link between the self and outgroup members significantly reduced implicit prejudice."[318] In another, "non-Latino American [students] freely took part in a cooperative cultural activity with a Latino American (Mexican American) peer."[319] The study found that "freely working . . . on a . . . cultural task reduced implicit . . . prejudice" and "led to more positive intergroup attitudes half a year later."[320]

A final representative approach has special salience in the light of current events. A long line of studies and experiments have documented the connection between negative stereotypes and reflexive responses in stress situations.[321] In particular, researchers have focused on "speculation that officers use race when making the decision to shoot."[322] They developed various controlled experiments to test whether an individual would be more likely to reflexively shoot based on the race of the individual posing the threat. In one, involving "a simple videogame . . . participants shot armed Blacks more quickly than armed Whites, and decided not to shoot armed Whites more quickly than armed Blacks."[323] In another, participants were asked to "categorize[] pictures of either handguns or hand tools following the presentation of White or Black faces."[324] The studies found "that the presence of racial information systematically biases . . . the

315. Lowell Geartner et al., *Us Without Them: Evidence for an Intragroup Origin of Positive In-Group Regard*, 90 J. PERSONALITY & SOC. PSYCHOL. 426, 427 (2006).

316. Anna Woodcock & Margo J. Monteith, *Forging Links with the Self to Combat Implicit Bias*, 16 GROUP PROCESSES & INTERGROUP REL. 445, 446 (2012) [hereinafter Woodcook & Monteith].

317. *Id.* at 457.

318. *Id.* at 456.

319. Tiffany N. Brannon & Gregory M. Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking Interest in an Out-Group's Culture*, 24 PSYCHOL. REV. 1947, 1949 (2013).

320. *Id.* at 1955.

321. *See, e.g.*, B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001) (noting interest in "the relationship between automatic and controlled cognition" in the context of the Amidou Diallo shooting) [hereinafter Payne].

322. Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 210 (2005).

323. *Id*. at 126.

324. David M. Amodio et al., *Neural Signals for the Detection of Unintentional Race Bias*, 15 PSYCHOL. SCI. 88, 89 (2004).

identification of weapons" with "non-Black participants . . . faster to identify guns when they were primed by Black versus White faces."[325]

Subsequent work has focused on interventions, including, the impact of "training."[326] In one especially interesting study involving 75 undergraduates, researchers "used different versions of a newspaper article to link Blacks or Whites [as suspects] to the concept of danger and crime."[327] The study group was divided into "novices" and "experts," with the results showing that "novices were highly sensitive to the manipulation of stereotype[s]" while "expert[s] . . . were essentially unaffected by the newspaper manipulation."[328]

As is to be expected, this body of work has its limits. Critics have, for example, argued that "the IAT provides little insight into who will discriminate against whom, and provides no more insight than [other] explicit measures. . . ."[329] That may or may not be the case.[330] What is clear is that this body of work needs to be supplemented with precisely the same sorts of studies I have argued are required to establish the validity of contact theory's benefits: "large-scale, well-controlled longitudinal investigations that model IAT prediction of socially meaningful criteria in organizations, schools, hospitals, and other contexts in which implicit bias is of direct concern."[331]

A more telling critique is that the interventions have only limited effects. Two of the most important scholars in this area, for example, have observed that "[l]ike stretched rubber bands, the associations modified . . . likely soon return to their earlier configuration. Such elastic changes can be consequential, but they will require replication prior to each occasion on which one wishes them to be in effect."[332] There is, however, an important difference between many of the studies that have been done in this field and what is likely to occur if the techniques are employed routinely in multiple courses during the full span of undergraduate, graduate, or professional education. This assumes commitments of the sort that many colleges and universities have not made to date. But if undertaken, there is

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325. Payne, *supra* note 321, at 187.

326. *See, e.g.*, Jessica J. Sim et al., *Understanding Police and Expert Performance: Whether Training Attenuates (vs. Exacerbates) Stereotype Bias and the Decision to Shoot*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 291 (2013) [hereinafter Sim]; Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007).

327. Sim, *supra* note 326, at 300.

328. *Id*.

329. Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Scores*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 188 (2013).

330. *See, e.g.*, Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 560 (2015) (arguing that even in the light of the Oswald et al., *supra* note 329, criticisms the "level of correlational predictive validity of IAT measures represents potential for discriminatory impacts with substantial societal significance").

331. Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Social Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 569 (2015).

332. BLIND SPOT, *supra* note 264, at 152.

reason to believe that "given sufficient practice and training . . . implicit attitude changes can remain stable over time."[333]

The insights gleaned from implicit social cognition are supplemented by a second recent body of work, cognitive neuroscience, which has been made possible by significant advances in "functional human brain imaging."[334] The underlying assumption is "that the approach taken by the individual's mind to solve a problem will be physically present in the workings of her brain."[335] The application of knowledge about the brain to these matters had been hampered by the "[l]ong-held scientific paradigm that the brain stops growing or changing early in life, and as a result you could not actually 'change' your brain no matter what you thought."[336] That tracked a core criticism of the early diversity studies, that its effects are much more robust for late adolescents or young adults—individuals who have not reached a stage in life where their attitudes, beliefs, and perspectives have solidified – than they are for true adults. In this instance, however, scientific developments reveal a basis for believing that the potential for individual development continues over time.

The focus here is a body of work that makes use of technology that now allows "neuroscientists . . . to 'see inside' the brain, *while it was working*."[337] In particular, the technology has enabled researchers to identify and focus on areas of the brain associated with mental inferences about individuals and groups.[338] It also led to the rejection of "the 'old dogma' that there is a fixed number of neurons in the adult brain that cannot be replaced when the cells die."[339] Instead, "scientists [now see] that the human brain, instead of being set and static, continually reprogram[s] and restructure[s] itself . . . gr[owing] and chang[ing], moment by moment, input by input, and thought by thought."[340] Originally referred to simply as "plasticity," what is now characterized as "neuroplasticity" or "neuronal plasticity" is a body of research based on the realization "that learning occurs because of changes in the efficacy of synaptic transmission along specific brain pathways."[341]

Individuals interested in implicit bias can accordingly now use "[n]euroscientific techniques such as functional magnetic resonance imaging (fMRI) and electroenceephalography (EEG) . . . to begin to elucidate the neural

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333. Sabine Glock & Carrie Kovacs, *Educational Psychology: Using Insights from Implicit Attitude Measures*, 25 EDUC. PSYCHOL. REV. 503, 515 (2013).

334. Michael I. Posner & Gregory J. DiGirolamo, *Cognitive Neuroscience: Origins and Promise*, 126 PSYCHOL. BULL. 873, 874 (2000).

335. Goodenough & Tucker, *supra* note 277, at 62.

336. Shad Helmstetter, THE POWER OF NEURO-PLASTICITY 12 (2014) [hereinafter POWER OF NEURO-PLASTICITY].

337. *Id.* at 14.

338. *See generally*, Juan Manuel Contreras et al., *Common Brain Regions with Distinct Patterns of Neural Responses during Mentalizing about Groups and Individuals*, 25 J. COGNITIVE NEUROSCIENCE 1406 (2013).

339. Eberhard Fuchs & Gabrielle Flugge, *Adult Neuroplasticity: More Than 40 Years of Research*, 2014 NEURAL PLASTICITY 1.

340. POWER OF NEUROPLASTICITY, *supra* note 336, at 14.

341. G. Berlucchi & H. A. Buchtel, *Neuronal Plasticity: Historical Roots and Evolution of Meaning*, 192 EXPERIMENTAL BRAIN RES. 307, 308 (2009).

systems involved in the expression and regulation of implicit attitudes."[342] In particular, neuroscience has "identif[ied]. . . the amygdala as a brain region involved in the expression of implicit attitudes."[343] The amygdala is "a small group of nuclei" that "is well situated to combine social and cognitive input and to modulate cognition and automatic aspects of behavior" and "is sensitive to the types of social cues imperative in the formation of implicit attitudes."[344] Research has shown, for example, that "[v]iewing images of racial out-group members activates the amygdala more than does viewing of racial in-group members . . . and [that] this difference in amygdala activity correlates with implicit measures of racial bias."[345]

It has also been shown that the amygdala is "flexible" and "can respond to positive and negative stimuli, stimulus intensity, and, more generally, the motivational relevance of stimuli."[346] The research shows that "[i]ndividual differences, stimulus context, and social goals all influence relatively automatic biases."[347] This means that interventions can be developed to moderate and even possibly eliminate biased responses. In one study differentiating between "[s]imple visual inspection"[348] and "social categorization of . . . faces"[349] showed "that a stereotyped or prejudiced response to an out-group member requires, at a minimum, that the stimulus . . . be processed deeply enough that it represents a social target."[350] That meant that "perceivers can change the social context in which they view a target person" and that "regardless of an individual's long-term tendencies toward prejudice, responses to the target person varied with controllable processing goals."[351] That will particularly be the case where care is taken to direct "attention . . . away from social category and toward the individual person."[352]

This is consistent with the general belief that "[r]esearch on plasticity has revealed new information about and realistic hope for ways to shape the circuitry of emotion to promote increased well-being and positive affect."[353] It is also significant in the light of two aspects of Justice O'Connor's opinion for the Court in *Grutter*. The first is the assumption that one important value of diversity is its

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342. Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 165 (2008) [hereinafter Stanley].

343. *Id*. at 165.

344. *Id.*

345. Jay J. Van Bavel et al., *The Neural Substrates of In-Group Bias: A Functional Magnetic Resonance Imaging Investigation*, 19 PSYCHOL. SCI. 1131, 1132 (2008) (citations omitted).

346. *Id.* at 1337.

347. Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56 (2005).

348. *Id.* at 61.

349. *Id.* at 58.

350. *Id.* at 61.

351. *Id.*

352. Stanley, *supra* note 342, at 167.

353. Richard J. Davidson et al., *Emotion, Plasticity, Context, and Regulation: Perspectives From Affective Neuroscience*, 126 PSYCHOL. BULL. 890, 904 (2000).

ability to "diminish[] the force of . . . stereotypes"[354] and eliminate situations where previously "underrepresented minority students [are viewed as] spokespersons for their race."[355] An institution that treats diversity as an opportunity for creative and proactive education, rather than as simple numbers, can use the sorts of approaches described in the implicit bias literature to work toward the elimination of inappropriate attitudes and beliefs. The American Psychological Association made that point in a brief filed in *Grutter*, observing that "one promising strategy for attacking unconscious social biases is to 'create the social conditions that allow new associations and new learning about social groups that blur the bright line that demarcates social groups.'"[356]

The second element of *Grutter* worth noting here is its emphasis on much more than a simple "robust exchange of ideas" in class and during campus life.[357] Justice O'Connor's opinion for the Court made post-enrollment perspectives and skills a central element in her declaration that the "benefits [of diversity] are not theoretical but real."[358] Cognitive neuroscience tells us that human development is a lifelong process. It is accordingly significant that the transformations required to detect and move beyond implicit biases can occur after maturation. Student body diversity can – if handled properly – promote "cultural competence and 'pluralistic orientation,'"[359] characteristics that "prepar[e] students for the challenges and complexities of a diverse society."[360]

IV. THINKING LIKE A LAWYER? LEGAL EDUCATION AND DIVERSITY

Justice Brandeis famously observed that "[i]t is one of the happy incidents of our federal system 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."[361] His observation stands for the notion that individual states might serve as laboratories of democracy, places where we can develop "policies

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

355. *Id.* at 319.

356. APA Grutter Brief, *supra* note 14, at 12–13 (quoting Mahzarin R. Banaji et al., *The Social Unconscious*, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY (A[braham] Tesser & N[orbert] Schwartz eds., 2001)).

357. *Bakke*, 438 U.S at 312–13 (focusing almost exclusively on "'exposure' to the ideas and mores of students as diverse as this Nation of many peoples").

358. *Grutter*, 539 U.S. at 330.

359. Brief of Amicus Curiae the American Psychological Association at 34, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345). Both this brief and the APA Grutter Brief, *supra* note 14, discussing the significance and potential malleability of implicit bias at some length. It is surprising that Justice O'Connor did not at least note the existence of the phenomenon in her opinion in *Grutter*, much less cite the APA Brief.

360. Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 RES. HIGHER EDUC. 283, 285 (2007).

361. New State Ice Co. v. Liebman, 285 U.S. 262, 386–87 (1932) (Brandeis, J. dissenting).

'more sensitive to the diverse needs of a heterogeneous society' [and experience] 'innovation and experimentation'. . . ."[362]

I suggest in this final Part that this nation's law schools can, and should, serve as the laboratories within which the view of affirmative action and diversity I have sketched in this Article can be tested and refined. This will not, I hasten to add, be an act of courage on their part. Rather, it is now a requirement imposed on them by the current accreditation standards adopted by the ABA.[363] This is not to say that most law schools in this nation are not enthusiastic supporters and practitioners of preferential admissions. They have in fact been so for a considerable period of time.[364] Rather, I am arguing that the current ABA accreditation regime imposes a combination of obligations on every law school to both pursue diversity and document educational outcomes. That reality, coupled with unique aspects of how virtually all law schools operate provides a matrix within which the assumptions and obligations of a truly narrowly tailored approach to diversity and inclusion can be implemented and assessed.

A. Legal Education, Diversity, and Outcomes: An Obligation, Not a Choice

One of the most interesting and overlooked realities in the debate about affirmative admissions policies is that there are actually two groups of institutions. The first are those that champion diversity, arguably virtually every one of this nation's colleges and universities. The second is those that have an actual need to use preferences in admissions. That is not a problem for most institutions. In their path-breaking study, *The Shape of the River*, William G. Bowen and Derek Bok stressed that "[o]ne of the most common misunderstandings concerns the number of institutions that actually take account of race in making admissions decisions. Many people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them."[365] Noting that "[t]here is no single, unambiguous way of identifying the number of such schools," they stated that "we estimate that only about 20 to 30 percent of all four-year colleges and universities are in this category."[366]

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362. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

363. *See infra* Section IV-A.

364. *See e.g.*, Brief Amicus Curiae for the Association of American Law Schools at 22, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) [hereinafter AALS Bakke Brief] ("[r]esponding to the moral pressures of the civil rights movement . . . in the mid-1960s, . . . law schools began in a variety of ways to take affirmative steps to attain more than a token enrollment of minority students").

365. Bowen & Bok, *supra* note 161, at 15.

366. *Id*. The actual number may well be much smaller. In an important pre-*Grutter* survey, Michael T. Nettles and his colleagues determined that only about 6.6% of this nation's colleges and universities are "'serious affirmative action institutions' . . . meaning that they are the institutions where there has been the greatest gain in numbers of African American and Hispanic students in the past decade or so." Karin Chenoweth, *Not Guilty!*, BLACK ISSUES IN HIGHER EDUC., Oct. 30, 1997, at 10 (Vol. 14, No. 18).

This changes when the focus shifts to the schools and colleges that offer the first professional degree in law. All of these are by nature and design both selective and routinely confronted by an excess of applications from qualified applicants. As Bowen and Bok emphasized "[i]n law and medicine, all schools are selective."[367] This is true even for institutions that are widely viewed as having lax standards. The rate of acceptance may be high, but not all who apply are admitted.[368]

Law schools in particular are avid supporters and practitioners of affirmative admissions. In the brief it filed in the *Bakke* litigation, the Association of American Law Schools (AALS) stated that "almost all accredited American law schools have adopted 'special admissions programs' which give preference in admissions to blacks and members of other 'discrete and insular' minorities."[369] That has not changed. The belief that "diversity . . . contributes to a better legal education . . . has become conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today."[370] It is, the AALS declared in *Fisher I*, one of legal education's "core values."[371]

Diversity is also a goal that requires "explicit measures to achieve racially diverse student bodies."[372] The two basic statistical admissions rubrics for law schools are undergraduate grade point averages and scores on the Law School Admissions Test. Those "raw numbers are startling"[373] and "[t]he simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of a certain race unless they adopt admissions policies designed to alter that outcome."[374] It is accordingly hardly surprising that the studies show that "[r]acial preferences are particularly large and mechanical at law schools."[375]

The interplay between legal education's support for diversity and the reality that principled diversity is grounded in educational values will soon become a

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367. Bowen & Bok, *supra* note 161, at 282. I discuss medical school accreditation and diversity *infra* at text accompanying note 420.

368. For example, the most recently available ABA data show that while Western Michigan University Cooley Law School admits slightly over 85% of the people who apply, it nevertheless did reject 216 applicants. *See* Western Michigan University Cooley Law School – 2014 Standard 509 Information Report, http://www.cooley.edu/publicinformation/_docs/2014_aba_standard_509_information.pdf.

369. AALS Bakke Brief, *supra* note 359, at 3.

370. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1553 (2011).

371. Brief for Amicus Curiae Association of American Law Schools at 1, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2414 (2013).

372. Brief of the Law School Admission Council as Amicus Curiae at 2, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2414 (2013).

373. *Id.* at 10.

374. *Id.* at 2.

375. Peter Arcidiacono, *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 686 (2015). This conclusion was based on the results of a forthcoming study, Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, J. ECON. LIT. (forthcoming 2015).

pressing matter for every law school in the nation given the combined effect of two provisions in the most recent iteration of the American Bar Association's *Standards and Rules of Procedure for Approval of Law Schools*.[376] The first is Standard 206, which addresses "Diversity and Inclusion."[377] The second is Standard 302, which focuses on "Learning Outcomes."[378] Taken together, these accreditation rules have profound implications. Under them, what was once simply an article of faith has become a series of positive obligations. It is no longer enough for a law school to embrace diversity as a value and take only those steps it deems appropriate to admit a diverse entering class. Rather, after first actually achieving that goal – a result that is now required – a law school must create and maintain proactive educational programs that produce actual educational outcomes, documented by rigorous, ongoing assessment.

This becomes apparent when we examine how the ABA standards have evolved over the years. The pre-*Bakke* diversity formulation spoke simply of the need to "maintain equality of opportunity in legal education without discrimination or segregation on the ground of race, color, religion, national origin, or sex."[379] As phrased, that standard reflected "classic liberalism's command not to discriminate."[380] That began to change after *Bakke*, as the ABA made two changes in the standards. The first was to broaden the non-discrimination mandate into a more proactive policy:

> Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms.[381]

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376. A. B. A., *ABA Standards and Rules of Procedure for Approval of Law Schools, 2014-2015* (2014) [hereinafter Current ABA Standards]. Compliance with the ABA standards and rules is incredibly important. The ABA is the only accrediting body for law schools recognized by the United States Department of Education. *Id.* at vii ("Since 1952, the [ABA] has been approved by the United States Department of Education as the recognized national agency for the accreditation of programs leading to the J.D. degree."). A degree from an accredited law school is, in turn, a prerequisite for taking the bar examination in virtually every state. *Id.* ("Almost all jurisdictions rely exclusively on ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied.").

377. *Id*. at 12–13.

378. Current ABA Standards, *supra* note 376, at 15–16.

379. A.B.A., *Approval of Law Schools, American Bar Associations Standards and Rules of Procedure*, Standard 211 (1979). The same language recurred in the 1983 version.

380. Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 54 (1992).

381. A. B. A., *Standards and Rules of Procedure for the Approval of Law Schools and Interpretations*, Standard 212 (Aug. 1981).

The second was to add the admonition that a "law school shall not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin, or sex."[382]

These two requirements remained in place leading up to *Grutter*, albeit with some minor changes. In the last iteration before *Grutter* the ABA dropped the reference to "diversity" from what had been Standard 211(b) and spoke simply of a need not to discriminate in admissions on the basis of various characteristics as part of "Equality of Opportunity."[383] The "concrete action" provision remained in the Standards virtually verbatim, albeit now styled as part of a requirement that law schools demonstrate an "Equal Opportunity Effort."[384]

Neither the Standards nor the Interpretations fleshing them out expressly commanded any particular result. Law schools were required to "exhibit a special concern for determining the potential of these applicants through the admissions process"[385] and to "prepare a written plan describing its current program and efforts."[386] They were also given a series of examples of "the kinds of actions that can demonstrate" such a commitment.[387] That list included such traditional process elements as recruitment,[388] participation in programs and efforts that would "encourage [minority students] to study law,"[389] and "enable . . . disadvantaged students to attend law school,"[390] and the creation of "programs that assist in meeting the unusual financial needs of many minority law students."[391]

That changed in the wake of *Grutter*. Consistent with the theory embraced by the majority in that decision, the initial post-*Grutter* iteration changed the name of the standard from "Equal Opportunity Effort" to "Equal Opportunity and Diversity."[392] It continued the requirement for "concrete action" directed toward "full opportunities for the study of law and entry into the profession."[393] But for the first time, it added the need to "demonstrate . . . a commitment to having a student body that is diverse with respect to gender, race, and ethnicity."[394] In particular, expressly citing *Grutter*, the ABA transformed Justice O'Connor's statement there that laws schools should "aspire to 'achieve that diversity which

382. *Id.*, Standard 211(b).

383. A.B.A., *Standards for Approval of Law Schools 2001-2002*, at 19, Standard 210(b) [hereinafter 2001-2002 ABA Standards]. One important development was the addition of the category "sexual orientation" to the list of protected classes.

384. *Id.* at 21, Standard 211.

385. *Id.*

386. *Id.* at 22, Interpretation 211-2.

387. *Id.* at 21, Interpretation 211-1.

388. *Id.*, Interpretation 211-1(c).

389. *Id.*, Interpretation 211-1(d).

390. *Id.*, Interpretation 211-1(e).

391. *Id.*, Interpretation 211-1(i).

392. A. B. A., Section of Legal Education and Admissions to the Bar, *Standards and Rules of Procedure for Approval of Law Schools 2006-2007* at 15, Standard 212 [hereinafter 2006-2007 ABA Standards].

393. *Id.*, Standard 212(a).

394. *Id.*

has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts'"[395] into something much stronger.

Two things made the new standards and interpretations especially noteworthy. Before *Grutter* the ABA had not spoken in terms of anything that sounded like an actual preference. The new approach changed that, expressly adding the observation that it contemplated an "admissions process" within which "a law school *may* use race and ethnicity . . . to promote equal opportunity and diversity."[396] The second was to make it clear that the focus had shifted from process to results:

> [t]hrough its admissions policies and practices, a law school *shall* take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups, and backgrounds.[397]

The shift from "may" to "shall" in these provisions was clearly significant. Under the previous standards a determination that a law school had met its obligations was "based on the totality of its actions."[398] Post-*Grutter*, now styled as a call for "Diversity and Inclusion,"[399] that metric became "the totality of the law school's actions *and* the results achieved."[400]

In *Fisher I* the ABA characterized this as an approach that simply "urges law schools . . . 'to enroll a diverse student body.'"[401] The reality is something different. Results matter. Indeed, as I have previously argued, "the ABA does not appear to treat the pursuit of diversity as optional."[402] The requirements imposed by Standard 206(a) apply even in the face of "a constitutional provision or statute that *purports* to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions."[403]

The significance of the ABA diversity mandate is magnified by a relatively new requirement, Standard 302, which states that law schools must now adopt and

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395. *Grutter*, 539 U.S. at 315 (quoting Univ. of Michigan Law School Admissions Policy).

396. Current ABA Standards, *supra* note 376, at 16, Interpretation 212-2 (emphasis added).

397. *Id.* (emphasis added).

398. 2001-2002 ABA Standards, *supra* note 383, at 21, Interpretation 211-1.

399. Current ABA Standards, *supra* note 376, at 12, Standard 206.

400. 2006-2007 ABA Standards, *supra* note 392, at 16, Interpretation 212-3 (emphasis added).

401. Brief of the American Bar Association as Amicus Curiae at 5, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (quoting Interpretation 212-2).

402. Killenbeck, *supra* note 43, at 41. This article focuses on a prior iteration of the ABA Standards, within which the diversity provisions were designated as Standard 212(a) and Interpretation 212-1.

403. Current ABA Standards, *supra* note 376, at 13, Interpretation 206-1 (emphasis added). This provision refers to measures like Michigan's Proposal 2, which the Court sustained in Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014). The ABA will, presumably, revisit this question in the wake of that decision.

pursue "Learning Outcomes."[404] This closely tracks Justice O'Connor's emphasis in *Grutter* on the link between diversity and educational outcomes. Indeed, when read in the light of *Grutter*, the diversity mandate in Standard 206 fits comfortably within the outcomes requirement in Standard 302, which states that "[a] law school shall establish and publish learning outcomes designed to achieve [its educational and professional] objectives."[405]

The curious thing about the current standards is the total lack of connection between the outcomes the ABA specifies as essential in Standard 302 and Standard 206's focus on the supposedly essential educational and professional outcomes associated with diversity. The interpretation fleshing out Standard 206 does tip its hat toward those outcomes, stating that "the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds."[406] But none of these objectives appear in Chapter 3 of the Standards, which sets out the required elements of a "Program of Legal Education." In particular, they do not form part of what the ABA describes as a "rigorous program of legal education" designed to "prepare[] . .. students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[407]

Standard 302 requires each "law school [to] establish and publish learning outcomes designed to achieve [its] objectives."[408] Those "outcomes . . . shall, at a minimum, include competency"[409] in four areas:

> (a)Knowledge and understanding of substantive and procedural law;
>
> (b)Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
>
> (c)Exercise of proper professional and ethical responsibilities to clients and the legal system; and
>
> (d)Other professional skills needed for competent and ethical participation as a member of the legal profession.[410]

Each of these is important. Each is, in pertinent respects, an aspect of the goal articulated in *Grutter*, to "'better prepare students for an increasingly diverse workforce and society, and better prepare them as professionals.'"[411]

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404. Current ABA Standards, *supra* note 376, at 15. This standard was approved by the ABA in August, 2014 and will be applied as part of the accreditation process in 2016-2017. *See* A. B. A., Section of Legal Education and Admissions to the Bar, *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, Aug. 13, 2014, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf.

405. Current ABA Standards, *supra* note 370, at 15, Standard 301(b).

406. *Id*. at 13, Interpretation 206-2.

407. *Id*. at 15, Standard 301(a).

408. *Id*., Standard 301(b).

409. *Id*., Standard 302.

410. *Id*. at 15.

411. *Grutter*, 539 U.S. at 330 (quoting Brief of the American Educational

But none of the educational outcomes the ABA actually expects laws schools to pursue speak directly to either the values or outcomes associated with diversity. The one possible exception is an option to include "cultural competency" as a possible subset of "other professional skills."[412] In a similar vein, the balance of Chapter 3 in the current Standards describes a curriculum within which neither the general outline[413] nor any of the component parts of "a rigorous program of legal education"[414] describe or require anything that remotely resembles the diversity interests articulated in *Grutter* or Standard 206.[415] Individual law schools are free to "identify any additional learning outcomes pertinent to its program of legal education."[416] But the manner in which the ABA has approached the combination of diversity and actual educational outcomes leaves the distinct impression that all it really cares about is structural or numerical diversity.

The ABA approach stands in stark contrast to the one taken by the Liaison Committee on Medical Education (LCME),[417] the accrediting body for the other set of professional colleges and schools where selectivity and the need for affirmative action is the rule. Medical schools also have a long-standing commitment to "provide opportunities for obtaining a medical education to applicants of diverse racial and ethnic backgrounds who are qualified to perform successfully as medical students."[418] That is both necessary and appropriate, they believe, in the light of "numerous studies [that] have demonstrated that minority physicians are more likely than their non minority counterparts to serve minority populations."[419] It also reflects "empirical studies indicat[ing] that minority patients express greater reluctance to accept physician recommendations or seek medical care than their white counterparts," but "[w]hen given the choice . . . tend to choose, and be more satisfied with, physicians of their own race or ethnic background."[420]

Research Association et al. at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).

412. *See* Current ABA Standards, *supra* note 376, at 16 (noting that the "other professional skills," Standard 302(d), as "determined by the [individual] law school . . . *may* include . . . cultural competency")(emphasis added).

413. *See* Current ABA Standards, *supra* note 370, at 16, Standard 303 (Curriculum).

414. *Id*. at 15, Standard 301(a).

415. *See generally id*. at 17–20, Standards 304-307.

416. *Id.* at 16, Interpretation 302–2.

417. Like the ABA, the LCME is recognized by the Department of Education as the accrediting body for medical schools located in the United States and Canada. *See* http://www.lcme.org/about.htm. It is a joint undertaking of the American Medical Association and the Association of American Medical Colleges.

418. Brief of the Association of Medical Colleges Amicus Curiae at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

419. Brief of the Association of American Medical Colleges et al. at 9, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 02-241) [hereinafter AAMC Fisher I Brief].

420. *Id.* at 11. *See generally* Jordan J. Cohen, *Statistics Don't Lie: Anti-Affirmative Action is Bad for Our Health*, 78 ACAD. MED. 1084, 1084 (1997); Dean K. Whitla et al., *Educational benefits of Diversity in Medical Schools: A Survey of Students*, 78 ACAD. MED. 460, 461 (2003) (arguing and noting research in support of

The current iteration of the LCME standards describes the need for "medical education program [that] occurs in professional, respectful, and intellectually stimulating academic and clinical environments, recognizes the benefits of diversity, and promotes students' attainment of the competencies required of future physicians."[421] Each medical school is required to have "effective policies and practices in place" for "ongoing, systematic, and focused recruitment and retention activities' that will "achieve mission-appropriate diversity outcomes among its students."[422] The net result is a system within which "diversity in medical and other health professional school admissions is not itself an end goal, [but rather simply] an essential mechanism for helping to produce a culturally aware workforce of future health care professionals."[423]

As part of this accreditation system, the LCME lists detailed educational outcomes closely tied to the values associated with diversity. Its description of expected "Curricular Content" emphasizes what it characterizes as "cultural competence." Medical school faculty must "ensure that the medical curriculum provides opportunities for medical students to learn to recognize and appropriately address gender and cultural biases in themselves, in others, and in the health care delivery process."[424] The curriculum, in turn, should include instruction regarding:

- The manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments.
- The basic principles of culturally competent health care.
- The recognition and development of solutions for health care disparities.
- The importance of meeting the health care needs of underserved populations.
- The development of core professional attributes (e.g., altruism, accountability) needed to provide effective care in a multidimensional,

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the proposition that "affirmative action in medical school admissions . . . expand[s] health care delivery to traditionally underserved communities, generating social benefits that go beyond the individual physician").

421. *See* Liaison Committee on Medical Education, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* at 4, Standard 3 (March 2014, Effective July 1, 2015) [hereinafter Current LCME Standards]. This is a new formulation, replacing one that required "policies and practices to achieve appropriate diversity" and stated that medical schools "must engage in ongoing, systematic, and focused efforts to attract and retain students . . . from demographically diverse backgrounds." Liaison Committee on Medical Education, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Educational Programs Leading to the M.D. Degree*, at 4, (June 2008).

422. Current LCME Standards, *supra* note 421, at 4, Standard 3.3. The primary focus is on so-called "pipeline" programs "aimed at achieving diversity among qualified applicants for medical school admission." *Id.*

423. AAMC Fisher I Brief, *supra* note 419, at 18.

424. Current LCME Standards, *supra* note 421, at 12, Standard 7.6.

diverse society.[425]

My point is not (necessarily) to praise the LCME and condemn the ABA. It is rather to stress that it is possible to approach these matters in a way that emphasizes the value of diversity and describes curriculum and educational outcomes within which the elements associated with diversity are present. That combination is essential in the light of what I believe *Grutter* requires if a given institution opts to pursue diversity and, as part of that process, decides to employ a race-conscious admissions process.

It is also critical given three realities. The first is that it is entirely up to each institution whether it will engage in proactive diversity, by which I mean employ preferences in the admissions process, which are almost certain to be race-conscious. *Fisher I* requires that there be "a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve [a given institution's] educational goals."[426] If there is, "*Grutter* calls for deference to [that] conclusion."[427] This means that as long as the interest in diversity is recognized as compelling for constitutional purposes, an individual college or university may – or may not – opt to go down that path (law schools excepted given the ABA standards).

The problem for each institution is the second reality: the rigors of strict scrutiny require that each individual institution that embraces diversity and employs such preferences must be able to defend its own policy. It is one thing to benefit from the deference afforded in making the initial decision to use preferences. It is quite another to fashion an approach that can be defended, either as a matter of educational policy or in a court of law. Both are important. Both require that the diversity regime be keyed to educational outcomes, actively program for such outcomes, and actively and continuously assesses whether and why outcome are (or are not) occurring.

The third is that accreditation standards that direct attention to outcomes can and should be more than a knee-jerk reaction to public calls for "accountability." In a recent op-ed, for example, a dean asked whether "anyone [has] looked into whether assessing student-learning outcomes over many years has made American colleges, or students, better in some way?"[428] The answer is yes, and that the "evidence [demonstrates] a connection between changes in accreditation and the subsequent improvement of programs, curricula, teaching, and learning in undergraduate programs."[429] The focus in that study was on a new iteration of the accreditation standards for "undergraduate engineering programs [that] shift[ed] the emphasis from curricular specifications to student learning outcomes and

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425. *Id.*

426. *Fisher I*, 133 S. Ct. at 2419.

427. *Id*.

428. Erik Gilbert, *Does Assessment Make Colleges Better? Who Knows?*, THE CHRON. OF HIGHER EDUC., Aug. 14, 2015, http://chronicle.com/article/Does-Assessment-Make-Colleges/232371/?cid=at&utm_source=at&utm_medium=en.

429. J. Fredericks Volkwein et al., *Measuring the Impact of Professional Accreditation on Student Experiences and Learning Outcomes*, 48 RES. HIGHER EDUC. 251, 277 (2006). One of the student outcomes in question was "[a]wareness of societal and global issues that can affect (or be affected by) engineering decisions,", an area especially pertinent in the context of diversity. *Id*. at 271.

accountability."[430] The study found that the revised standards were "indeed a catalyst for change" and "provide[d] additional convincing evidence supporting the important role that accreditation has played in engineering programs."[431] This suggests that the sorts of changes being made by both the ABA and LCME can matter, and should be treated as a welcome opportunity rather than an onerous obligation.

B. Legal Education, Diversity, and Outcomes: Obligations Create Opportunities

The ABA's approach to diversity reveals the dangers that arise when an otherwise intelligent and well-meaning group assumes that a simple commitment to "diversity and inclusion" is all that is required. Although the recent change in the accreditation standards renders a great service by recognizing the importance of diverse learning environments and the fundamental need for assessment, two significant flaws emerge.

The first is the fact that the ABA does not expressly connect the dots between learning outcomes associated with diversity and professional skills. For example, will a racially diverse law school environment produce attorneys who are more skilled at assessing the strength of a witness, finding facts, negotiation, structuring settlements, and giving persuasive closing arguments? Will future prosecutors and defense attorneys fully understand the role unconscious bias plays in day to day events that give rise to criminal prosecutions? Will future legislators be better able to create fair and impartial laws?

Each institution faces both the challenge and opportunity of crafting learning outcomes tied to its unique institutional mission. However, it seems to me that the ABA could acknowledge and set out more concrete learning outcomes tied to substantive legal knowledge and key professional skills. Not only would the standards garner more respect across a range of constituencies, but the articulation of discrete knowledge and skills is the vital first step in any assessment plan. Correcting this oversight in the accreditation scheme should be a fairly simple process. The ABA recently announced that the Council for its Section of Legal Education and Admissions to the Bar has asked its Standards Review Committee to "review" three of the current Standards.[432] That process should be expanded to include crafting a link between the diversity obligations imposed by Standard 206 and the educational outcomes contemplated within Standard 302.

The harder question is how to structure curriculum and courses in ways that would achieve these goals. The materials I have discussed suggest that a comprehensive educational plan should emphasize two particular programming

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430. *Id*. at 254.

431. *Id*. at 278.

432. A.B.A STANDARDS REVIEW COMMITTEE, *2015-16 Academic Year Agenda*, *available at* http://search.americanbar.org/search?q=standards+review+committee&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&ud=1. The review will include Standard 206, but not Standard 302.

approaches: "interventions . . . designed to change the biases themselves,"[433] and "decision-making strategies [that] prevent the unwanted biases from being activated or influenc[ing] judgment."[434]

Changing biases is admittedly not an easy task, particularly when the goal is to change *unconscious* biases that operate outside our explicit awareness.[435] However, as we proceed to develop interventions designed to reduce unconscious racial bias, we can take comfort in the fact that research supports the notion that fundamental cognitive change of this sort is attainable in law student populations. As indicated earlier in this article, human development theory generally posits that "late adolescence and early adulthood are the unique times when a sense of personal and social identity is formed."[436] A substantial body of the social science evidence arguing for the value of diversity is accordingly predicated on the assumption that "late adolescence is a time for the formulation of a person's adult identity, with "the identity formation process . . . enhanced when young adults have the opportunity to experiment with life within different and diverse environments."[437] The pre-college years remain important given the general consensus that undergraduate education "increase[s] learning outcomes and depth of analysis" when young people are exposed "to diverse ideas and novel situations."[438]

That said, these parameters apply equally well in the unique environment of a law school. One of the central elements in contact and developmental theory is the assumption that the benefits of diversity are associated with "discontinuity and discrepancy," which "spur[s] cognitive growth."[439] Characterized as "disequilibrium," the focus is on "transitions [which] are significant because they present new situations about which individuals know little and in which they will experience uncertainty."[440] Law school is traditionally described as having precisely that purpose and effect.[441] This means that while law students may well be adults for traditional developmental theory purposes, the peculiar nature of legal education provides opportunities "to experiment with new ideas, new relationships, and new roles."[442]

Further, our evolving understanding of brain growth and neuroplasticity suggests that change in cognitive structures is possible even in the "mature

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433. Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL. REV. 113, 129 (2012) [hereinafter Nosek & Richmond].

434. *Id*.

435. *See supra*, text accompanying notes 288, 290 (discussing initial assumptions that implicit biases were "entrenched" and "likely to be very rigid").

436. Gurin Report, *supra* note 217, at 368.

437. Crosby & Smith, *supra* note 207, at 126.

438. *Id*.

439. Gurin, *supra* note 141, at 335.

440. *Id*.

441. *See* Killenbeck, *supra* note 41, at 46 (discussing the idea that law schools can have "a particularly strong socializing influence on their students" grounded in "the extraordinary psychological impact" in can have on them).

442. Gurin, *supra* note 141, at 335.

adult,"[443] a characterization that describes the majority of law students. It also suggests that skills and perspectives developed and acquired during law school have the capacity to shape behavior and values over time, an important parameter given *Grutter*'s emphasis on the real benefits of diversity persisting into post-educational work environments.[444]

With these points in mind, legal education may prove to be an especially apt venue developing models for effective interventions. Law schools typically assert an interest in justice and social responsibility. An appropriately "rigorous program of legal education"[445] should then be about more than simple "[k]nowledge and understanding of substantive and procedural law."[446] It is, for example, one thing to learn what is required to prove that an individual has committed the crime of "distribu[ting] . . . or posess[ing]" crack cocaine "with intent to . . . distribute or dispense."[447] It is quite another to recognize how stark cultural differences between individuals who routinely use crack versus powdered cocaine "can unjustly and disproportionately penalize African American defendants for drug trafficking comparable to that of white defendants."[448] In a similar vein, it is one thing to profess allegiance to the general notion that "[o]ur constitution is color blind and neither knows nor tolerates classes among citizens."[449] It is quite another to understand why a key element in the argument for affirmative action and diversity may well be that "[i]n order to get beyond racism, we must first take account of race."[450] In each instance, the manner in which law schools approach teaching these matters may prove to be at least as important as the fact that they are included in the curriculum. As I noted when discussing the research and findings associated with implicit bias and neuroscience, one very promising intervention involves the use of counter-stereotypical exemplars.[451] In Constitutional Law, for example, the back stories behind the development of many important substantive rules may be at least as important as the rules themselves. So, for example, identifying and focusing on the contributions of individuals like Thurgood

443. *See supra* text accompanying notes 339–41.

444. *See supra* text accompanying notes 155–59.

445. Current ABA Standards, *supra* note 376, at 15, Standard 301(a).

446. *Id*., Standard 302(a).

447. 21 U.S.C. § 841(a)(1).

448. AMERICAN CIVIL LIBERTIES UNION, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (2006). The original sentencing disparity between crack and powdered cocaine of 100 to 1 was reduced to 18 to 1 by the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). For a discussion of the politics and bias informing the original regime, see Charles Ogletree et al., *Coloring Punishment: Implicit Social Cognition and Criminal Justice, in Implicit Bias Across the Law*, 45, 50–52. A recent study indicates that even with the 2010 reduction the combination of low socioeconomic status and race/ethnicity continues to produce "disproportionate numbers [of blacks] incarcerated for crack offenses." Joseph J. Palamar et al., *Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015).

449. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

450. Bakke, 438 U.S. 407 (Blackmun, J., concurring).

451. *See supra* text accompanying notes 279–84.

Marshall and Ruth Bader Ginsburg to the development of widely accepted constitutional doctrines can help dispel "stereotypic images of minorities and women."[452]

A second possible intervention strategy involves the formation of links between individuals and others who were previously perceived as members of "outgroups."[453] There are any number of courses in law school where collaboration is an essential part of the instructional process. That will be especially the case in "skills" courses, a subset of the curriculum that has become increasingly important in recent years as law schools have been admonished to provide education and training that has "real world" dimensions. By working closely in such classes with individuals from different races and cultures, law students can achieve precisely the sorts of "group formation and in-group regard" described in the implicit bias literature. It is important, however, that this intervention establish contexts within which students classify other students, including majority-minority students, as part of their group.[454]

Research supports a variation on this intervention where individuals of different races become allies or team members.[455] The trials resulting in decreased implicit bias among majority members placed white students in hypothetical scenarios that "linked positively with Black people *and* negatively with White people."[456] As the authors to the study note, "interventions that reduce relative preferences by increasing negativity toward the more positively valued group may not be desirable for application."[457] Indeed, this approach would be unethical in practice.

Law schools could, however, use videotaped simulation exercises where teams of individuals traditionally assumed to be less than able are seen to be highly skilled, well prepared, and successful. The images conveyed would be those associated with successful attorneys: individuals who are articulate, discerning, and smart. In particular, interactive simulations could allow student teams to participate in the simulation as team members or allies with the group on the video. The students would be familiar with the law and facts of the case. The end result is that the "team" consisting of the video characters and on-site law students would be successful against another team in the simulation who is less prepared and inspiring.

In addition to interventions designed to reduce implicit bias, the second programming track focuses on strategies to constrain behavior.[458] This track acknowledges that implicit biases are difficult to change. Although altering behavioral tendencies resulting from implicit biases is similarly complex, the combined tracks are more likely to achieve positive outcomes.

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452. Dasgupta & Greenwald, *supra* note 310, at 308.

453. *See* Woodcock & Monteith, *supra* note 316, at 446 (noting that "positive intergroup attitudes [are] fostered by linking the self to outgroups through common ingroup membership").

454. *Id.* at 447.

455. *See, e.g.*, Lai, *supra* note 309, at 16.

456. *Id.*

457. *Id.*

458. *See, e.g.*, Nosek & Riskind, *supra* note 433, at 129.

Studies suggest that individual "motivation to respond without prejudice can be effective at reducing discriminatory behavior."[459] Thus, successful strategies to constrain behavior focus on educational programming to alert individuals to the negative consequences and outcomes of unconscious bias. For example, a one-hour interactive lecture that was part of college orientation and featured "experiential illustrations of automaticity as well as group demonstrations of the I[mplicit] A[ssociation] T[est]."[460] Here, "participants' beliefs about bias and motivation to address bias changed immediately following the presentation, and that change was durable at a follow-up assessment two to four months later."[461] The law school environment provides ample opportunities to provide students with this information and, in turn, allows students to reflect on their own judgments within practice scenarios. Through peer and faculty input students learn to intentionally conform behavior to objective standards.

The examples above provide initial thoughts about research-based interventions and strategies that may provide the link between diversity goals and outcomes. Individual institutions, however, must consider strategies that fit within their overall educational program and are targeted to produce the kind of learning outcomes suggested by their unique institutional mission. It is worth recalling here Justice Kennedy's admonition that judicial "acceptance of a university's considered judgment that racial diversity among students can further its educational task" is appropriate "when supported by empirical evidence."[462] Fortunately, the typical hallmarks of legal education are actually conducive to developing this body of evidence. For example, the crack cocaine and color-blind Constitution issues I noted above are central elements in two courses that every law student takes: Criminal Law and Constitutional Law.[463] Criminal Law is almost always a first year course, while Constitutional Law may or may not be in the first year but is invariably required. Both tend to be sectioned courses, meaning that they will be both large and that students will be assigned to them. They will also, consistent with one of legal education's central traditions, be graded on a "blind" basis, with the identity (much less characteristics) of each student unknown as the professor teaching the course reads their examinations and assigns a grade for the course.

This makes such courses ideal for precisely the sorts of pre- and post-enrollment assessment that is central to developing sound assessments of both proposed and actual educational outcomes. A law school willing to do so, for example, could administer a survey at the beginning of the semester in which the course is taken that provides a wealth of information about the background, characteristics, and perspectives of the students enrolled. That would then be repeated at the end of the course, allowing the institution (and the instructor) to identify key changes, both positive and negative. The law school should also

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459. *Id.*

460. *Id.* at 132. I discuss the IAT at text accompanying notes 304–331.

461. *Id.*

462. *Grutter*, 539 U.S. 388–89 (2003) (Kennedy, J., dissenting).

463. These are two of the seven subjects that are part of the Multistate Bar Examination, a 200 objective question examination that individuals must take in order to pass the bar examination in every state except Louisiana. As "bar courses" they are accordingly courses all students will take, whether required to do so or not.

document the presence, or absence, of a number of diversity elements within the course. In this regard it is important to keep in mind that it will be an advantage to have individual courses or law school student cohorts with greater or lesser degrees of diversity, given that meaningful studies must provide "comparisons . . . between students who experience different types of education."[464] It is also important to probe with care the composition of the classes and the outcomes in each, given the benefits that follow when "both diversity and homogeneity can be compared."[465]

The pre- and post-experience surveys can also document a variety of personal attitudes and educational outcomes associated with both education per se and diversity in particular. There are a variety of instruments and survey techniques already available that a law school can use. Individuals interested in these matters have, for example, assessed "critical thinking skills,"[466] "cognitive development,"[467] support for or opposition to social change,[468] and "democratic citizenship."[469] The core problem of implicit bias could in turn be revealed and measured by having students to take one or more of the on-line IAT tests.[470] The time commitment is minimal, often just ten or fifteen minutes per test. The results are immediate. And the information conveyed is instructive and, almost certainly for most students, compelling.

The social sciences resources are available. The only question is whether a given law school is willing to undertake the work required to document what it is doing and what it achieves. The obligations imposed on law schools by the accreditation standards are arguably unique, coupling as they do simultaneous mandates to enroll a diverse class and to document its educational outcomes. The opportunities they have to do that are also unique and, if acted on, can do a long way toward answering key questions in this important and contentious area.

CONCLUSION

I began this Article with the observation that arguably both the best and worst result for diversity's champions is that the Court does not use *Fisher II* to repudiate the diversity rationale and simply refines the narrow tailoring inquiry. I also noted the problems posed by what scholars characterize as "aversive racism," a phenomenon that goes a long way toward explaining the disconnect between social norms that stress general support for equality and recent episodes of race-motivated violence. Americans in general "sympathize with victims of past

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464. Tuckman, *supra* note 122, at 235.

465. Apfelbaum, *supra* note 127, at 240.

466. *See, e.g.*, Pascarella Critical Thinking, *supra* note 258.

467. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4 (2010).

468. *See, e.g.*, Gary D. Malaney & Joseph B. Berger, *Assessing How Diversity Affects Students' Interest in Social Change*, 6 J. C. STUDENT RETENTION 443 (2005); Biren (Ratnesh) A. Nagda et al., *Learning about Difference, Learning with Others, Learning to Transgress*, 60 J. SOC. ISSUES. 195 (2004).

469. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17 (2004).

470. For information about these tests, *see* Project Implicit, *available at* https://implicit.harvard.edu/implicit/ (last visited Oct. 14, 2015).

injustice, support principles of racial equality, and genuinely regard themselves as non-prejudiced."[471] They are also human beings, individuals who regardless of race or ethnicity "possess conflicting, often non-conscious, negative feelings and beliefs about Blacks that are rooted in basic psychological processes that promote racial bias."[472]

The core assumption that animates the pursuit of diversity and the use of admissions preferences is that they provide an essential path through which "all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[473] My "good news - bad news" perspective about all of this is deeply influenced by my recognition that the pursuit and implementation of principled diversity is a complicated process that imposes substantial obligations on any institution that undertakes it. It is also informed by my suspicion that few if any of this nation's colleges and universities – and virtually none of its law schools – are engaged in principled diversity.

The social science suggests that there may well be good reasons to promote diversity. It also tells us that doing it right is a difficult process and that doing it badly could be dangerous. We do not at this point know what the Court will do in *Fisher II*. Regardless, this nation's colleges and universities have an obligation to act in educationally sound ways. If, as will almost inevitably be the case, a given institution lauds and pursues diversity it has a concomitant to engage in the sorts of programming and assessment I have described.

There are good reasons to debate diversity and affirmative action as matters of social policy and constitutional law. Principled diversity is more than simple numbers. Acceptance of diversity as a compelling interest and articulation of a legal narrow tailoring rubric are necessary first steps. Conscious programming and systematic assessment are their necessary companions. Indeed, they are essential elements for any institution that is required to defend its particular approach in a court of law. The fact that most institutions will not face that particular problem does not excuse them from undertaking the work. Sound educational policy requires every institution that embraces diversity must take care that what they do in the name of diversity is truly principled.

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471. Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 10 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316 (2009).

472. *Id.*

473. Grutter v. Bollinger, 539 U.S. 306, 332–33 (2003).

ACCOMMODATING STUDENTS WITH DISABILITIES IN CLINICAL AND PROFESSIONAL PROGRAMS: NEW CHALLENGES, NEW STRATEGIES

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College students with disabilities may be entitled to academic and other accommodations in order to benefit from their educational programs. Students with disabilities enrolled in academic programs with clinical components may face special challenges, however; and the institutions in which they are enrolled, as well as the corresponding clinical placement sites, face their own challenges helping students with disabilities meet the academic and technical standards required by clinical placements. Some students enrolled in programs requiring student teaching, internships, residencies, clinical experiences in medical settings, or other experiential learning have found it difficult to meet physical or behavioral requirements of those programs and may seek different accommodations from those accommodations granted for classroom learning. By the same token, institutions may find it challenging to engage in an interactive process with students regarding clinical requirements and may face difficulty determining whether a proposed accommodation is reasonable, on the one hand, or works a fundamental alteration in the program, on the other. Simply speaking, clinical programming may present more difficult, ongoing accommodation challenges for higher education, particularly as students with complex or multiple disabilities enter higher education with increasing frequency.

The Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the nondiscrimination laws of some states require an educational institution to accommodate a student who is "otherwise qualified," in that the student, with or without reasonable accommodation, is capable of meeting the academic and technical standards of the program. This requirement means that colleges and universities must develop such standards, ensure that the standards are truly necessary to the successful training of students in clinical programs, and apply the standards consistently.

Challenges to the application of these standards to students with disabilities tend to arise at two points in the student's academic career: (i) at the time of application and possible admission to a program requiring clinical experiences and (ii) at the time the student completes classroom courses and begins the experiential or clinical portion of the program. Additional difficulties frequently arise if a student has trouble completing the clinical experience and then seeks a reasonable accommodation or second opportunity to succeed in the clinical experience.

As institutions respond to financial and competitive pressures by adding innovative clinical and non-traditional programs, they must prepare to face and address complicated accommodation issues involving students with disabilities. Proper development and application of technical standards will be highly advisable, if not imperative, to ensure that a clinical or professional program reasonably accommodates students while also maintaining the quality and the fundamental academic requirements

essential to programs whose graduates will move into healthcare or serve the public in learned professions.

After a brief review of the statutory and regulatory framework, this article will review leading and developing law related to admission and to accommodation of disabilities at the beginning of—or during—the clinical experience. The article then offers a proposed framework and practical suggestions for addressing the particular accommodation challenges posed by programs with clinical or experiential components.

I. THE STATUTORY AND REGULATORY FRAMEWORK

A. Applicable Provisions of the ADA and the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 [1] and Titles II and III of the Americans with Disabilities Act of 1990 (ADA),[2] as well as the nondiscrimination laws of some states,[3] prohibit colleges and universities from discriminating against applicants or students on the basis of a physical or mental disability. The ADA prohibits an institution from "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, *unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.*"[4] It also requires that an institution "[m]ake reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, *unless a fundamental alteration would result in the nature of the goods and services provided."*[5] The regulations interpreting Section 504 include similar prohibitions.[6]

Not every applicant (or student) is protected by the ADA, Section 504, or similar state laws. Rather, the individual must have a condition that meets the definitions of "disability" articulated in the relevant laws. The individual must also demonstrate that he or she is "otherwise qualified" by

1. 29 U.S.C. § 794.

2. 42 U.S.C. §§ 12131–12134 (2009) (Title II); 42 U.S.C. §§ 12181–12189 (2009) (Title III).

3. *See, e.g.*, laws prohibiting discrimination on the basis of disability in Maine (Me. Rev. Stat. Ann. tit. 5, § 4602 (West 2015)), New Jersey (N.J. Stat. Ann. § 10:5–12 (West 2014), and Wisconsin (Wis. Stat. Ann. § 36.12 (West 2015).

4. 42 U.S.C. § 12182(b)(2)(A)(i) (Title III) (emphasis added). Title II has similar requirements.

5. U.S. Dep't of Justice, Disability Rights Section, *Title III Highlights*, www.ada.gov/t3hilght.htm (last visited Sept. 29, 2015).

6. 34 C.F.R. § 104.

being able to meet the "academic and technical standards requisite to admission or participation in the [college's] education program or activity."[7] Students with disabilities may request "reasonable accommodations" to help them meet the academic and technical standards of their academic program, and institutions are required to provide those accommodations that do not fundamentally alter the nature of the academic program. As further discussed below, while students with disabilities have, on occasion, attempted to challenge the necessity of certain "academic or technical standards," the courts typically defer to a college's justification for its standards. In a few cases, however, the courts have questioned the college's application of such standards.

The ADA was amended in 2008 by the ADA Amendments Act.[8] The significance of these amendments, for purposes of this discussion, is that it is now much more difficult for an institution to challenge a plaintiff's claim that his or her physical or mental disorder meets the ADA definition of "disability." Very few of the cases reviewed for this article addressed that issue; in most, (i) the courts or agency assumed that the plaintiff had a qualifying disability and thus protected by the law, (ii) the institution did not challenge the student's assertion that he or she had a qualifying disability, or (iii) the facts indicated that the plaintiff clearly met the new, broader definition of disability. Significantly, the amendments did not change the definition of an "otherwise qualified" individual with a disability, and that is the issue upon which most courts focus in these cases.

Students challenging negative admissions decisions or dismissals from an academic program may file a complaint under the ADA, Section 504, or both laws with the U.S. Office for Civil Rights (OCR) within the U.S. Department of Education. They may also file a lawsuit under federal, state, or local nondiscrimination laws (or under multiple such statutory or regulatory schemes). Both the OCR and the courts have issued significant determinations involving alleged discrimination in clinical programs.

B. Authority Permitting Use of Academic and Technical Standards

Regulations implementing both the ADA and Section 504 state that, in order to be protected by the laws, the student must be "qualified," in that the student can meet the "academic and technical standards" of the educational program.[9] While the concept of academic standards may be familiar (examples include the ability to demonstrate knowledge of the course content, as well as the ability to respond to questions and meet a

7. 34 C.F.R. § 104.3(l)(3).

8. Pub. L. 110-325, 122 Stat. 3553.

9. 34 C.F.R. § 104.3(l)(3) (Section 504); 28 C.F.R. § 35.104 (ADA Title II); 28 C.F.R. § 36.302 (ADA Title III—criteria must be "necessary" for the provision of the [educational] service).

pre-determined standard of academic achievement), technical standards are properly linked closely to behavior.[10] As OCR indicated in 1997,"[s]tandards should be based on the legitimate educational . . . program . . . Standards also could include reasonable standards of conduct to continue in a class, program or activity."[11] For instance, in the field of medicine, technical standards may include a student's ability to perform certain medical procedures, such as taking a patient's blood pressure, performing CPR or other lifesaving procedures, or visually inspecting a patient. In the field of education, technical standards may include the ability to convey information to students, professional demeanor, the ability to control a classroom of students, and so forth. A student with a disability may excel at meeting academic standards, but in some cases a disability may interfere with the student's ability to meet one or more technical standards required for the clinical portion of the program.

The OCR has provided specific advice in several letter rulings involving application of technical standards. In *Letter to University of Texas Medical Branch*,[12] the OCR official responding to the student's complaint praised the medical school for the manner in which it evaluated a student's clinical performance against the school's written performance standards. In that case, a medical school applicant with dystonia could not perform manual tasks and had difficulty walking and speaking. The OCR letter ruling notes that, having previously adopted technical standards, the medical school "took reasonable steps to obtain a professional determination regarding the complainant's physical abilities" and the "professionals [on the evaluation committee] had appropriate credentials and used appropriate criteria."[13]

In its *Letter to Appalachian State University*,[14] the OCR official responding to a student's complaint explained at length the OCR's review process. In the letter, OCR offered useful suggestions for developing academic and technical standards:

> OCR reviews whether the determination by an institution that a requirement is an essential requirement is educationally

10. For some clinical programs, there may be an assumption that a student's health poses a risk to patients or to other students or faculty (for example, if a student is HIV positive or has been exposed to tuberculosis or hepatitis B). However, testing positive for exposure to these diseases may not be used to deny admission or continued enrollment to a student without first making an individualized determination as to whether the student's clinical requirements will pose a "direct threat" to others. *See, e.g.*, Letter to Sch. of Med., Sch. of Dentistry, Sch. of Nursing, and Other Health-Related Sch., 47 NDLR 122 (2013) (regarding hepatitis B).

11. Letter to N. Cent. Technical Coll., 11 NDLR 326 (1997).

12. Letter to Univ. Tex. Med. Branch, 30 NDLR 154 (2005).

13. *Id*. at *144–45.

14. Letter to Appalachia State Univ., OCR 34 NDLR 176 (2006), NDLR (LRP) LEXIS 578 (2006).

rationally justifiable. The requirement should be essential to the educational purpose or objective of a program or class. The degree of deference accorded the institution on these types of decisions should correspond with the nature of the decision. Courts and OCR generally defer to academic determinations by colleges and universities based on the expertise of the institution and the right to academic freedom, as long as the institution can show that it reached the determination through a reasoned and informed process. To the extent that a decision or standard is an academic one, it is entitled to more deference. In general, a determination of the requirements to graduate with a degree in Music Therapy is an academic determination. On the other hand, if the decision is more about the modifications or academic adjustments that a student needs to complete the requirements in a program, it is not an academic determination and therefore is entitled to less deference.

In reviewing the process that a postsecondary institution utilizes to determine whether an academic requirement is an essential requirement, OCR considers whether the process has the following elements:

1. The decision is made by a group of people who are trained, knowledgeable and experienced in the area;

2. The decision makers consider a series of alternatives as essential requirements; and

3. The decision follows a careful, thoughtful and rational review of the academic program and its requirements.

An example of this process in the context of a case involving a student teaching program would be that the Dean of Education and a group of experienced staff and professors meet over a period of time to consider a series of options or standards. After a careful, thoughtful review, they develop a group of essential requirements for graduation with a teaching degree that are rationally based on their knowledge of teaching and experience in the field.

In some cases, requirements that are deemed essential by colleges or universities are related to an intended course of study to prepare an individual for a type of job or profession, such as doctor, lawyer, truck driver, teacher, or, as in this case, music therapist. These requirements are often based on the need for a student to master certain skills that are believed to be necessary to perform the duties of the job upon completion of the program. Many of the court decisions in this area have involved essential requirements in professional educational programs and, specifically, various types of clinical settings. An institution

> should determine the appropriate or essential requirements for a course of study, not the licensing requirements for a specific jurisdiction, although these requirements may be similar or related. A student who completes a teacher education or graduate speech therapy program may have an expectation that this course of study will allow the student to meet the local licensing requirements to be a teacher or a speech therapist. Some students may still want to take a program or course of study, although they could not or do not desire to practice in the field. Requirements for programs leading to licensure in a profession may often be directly related to performing the duties of that profession. Different institutions may develop different essential requirements for their programs.15

Courts have agreed and validated the appropriate application of academic and technical standards in professional programs for students with and without disabilities alike. In the leading case of *Southeastern Community College v. Davis*,[16] the United States Supreme Court ruled in 1979 that a college may impose "reasonable physical qualifications" on applicants for admission.[17] The Court stated that denying admission to a hearing-impaired individual who wished to become a nurse did not violate Section 504 because a requirement that nursing students be able to hear protects patient safety and is necessary in order for a nurse to perform the job.[18] Similarly, a federal appellate court ruled in *Doherty v. Southern College of Optometry*[19] that the college's insistence that students in its optometry program be able to see well enough to use optometric instruments was not discriminatory.[20] The court concluded that a student with retinitis pigmentosa whose field of vision was restricted was not "otherwise qualified" because he could not use those instruments.[21] A case brought under state law, *Ohio Civil Rights Commission v. Case Western Reserve University*,[22] reached a similar conclusion when a blind student challenged her rejection by a medical school. The court agreed with the school that too many adjustments would need to be made to the clinical portion of the medical school curriculum, and that these adjustments would be unreasonable as a matter of law because the student then would not be

15. *Id.* at *338–9.
16. Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).
17. *Id.* at 397.
18. *Id.* at 407–09.
19. Doherty v. S. Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988).
20. *Id.* at 575.
21. *Id.*
22. Ohio Civil Rights Comm'n v. Case W. Reserve Univ., 666 N.E. 2d 1376 (Ohio 1996).

able to perform the functions required of a physician.[23] Accommodations such as these, which are recognized to "fundamentally alter" the nature of the program, are not required by either the ADA or Section 504.

On the other hand, courts have criticized negative assumptions or generalizations about the effect of an applicant's medical condition or disorder upon the individual's ability either to succeed in the program or to be a successful practitioner. For example, in *Sjostrand v. Ohio State University*,[24] a federal appellate court reversed a trial court's award of summary judgment in favor of the university and remanded the case for trial. The applicant suffered from Crohn's disease (an autoimmune disorder). She asserted that, during an interview that was part of the application process to a doctoral program in school psychology, the two faculty members who conducted the interview focused more on her disease than on her qualifications or professional interests.[25] When she later telephoned to ask why she had been rejected, she claimed that the reasons she was given were vague. Because her grades and test scores were well above those of individuals who had been admitted, and because the court was skeptical as to whether the "vague" reasons given for her rejection were the true reasons, the court ruled that a jury must decide whether or not she had been the victim of discrimination.

In another such case, the Iowa Supreme Court ruled that a chiropractic school that had refused to allow a blind student to continue in graduate clinical work because he could not read X-rays had not performed an individualized assessment of the student's particular disorder, and the court therefore reversed the trial court's award of summary judgment to the school.[26] Similarly, in *Peters v. University of Cincinnati College of Medicine*,[27] a case involving the dismissal, rather than the admission, of a student with clinical depression, the court found that the dean who made the dismissal decision without referring either to the student's medical records or her evidence of recently improved academic performance appeared simply to be assuming that depression would interfere with the ability to be a good doctor. For that reason, the court denied the medical school's motion for summary judgment. In a pertinent OCR letter also involving the University of Cincinnati, OCR reached a similar conclusion

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23. *Id.*at 1386–87.

24. Sjostrand v. Ohio State Univ., 750 F.3d 596 (6th Cir. 2014).

25. *Id.* at 598.

26. Palmer Coll. of Chiropractic v. Davenport Civil Rights Comm'n, 850 N.W.2d 326 (Iowa 2014) (The court was particularly influenced by the fact that the school had allowed a blind student to graduate in prior years, and discounted the faculty's reliance on technical standards that had been developed in concert with the agency that accredits schools of chiropractic.).

27. Peters v. Univ. of Cincinnati Coll. of Med., No. 1:10-CV-906, 2012 U.S. Dist. LEXIS 126426 (S.D. Ohio Sept. 6, 2012).

that a student who was dismissed for academic failure, and then diagnosed with bipolar disorder, successfully stated a claim of discrimination under Section 504. The agency found that members of the appeals board that ruled on her dismissal asked "generalized questions" about bipolar disorder and its potential impact on the career of a doctor, instead of making an individualized inquiry as to how her disorder and the medications she was taking affected her ability to be a successful medical student.[28]

II. GUIDANCE REGARDING APPROPRIATE USE OF TECHNICAL STANDARDS IN ADMISSIONS

Consistent with the general rulings outlined above, courts evaluating the application of technical standards in the context of admissions decisions for clinical programs appear to identify, as the key issue, whether there is a close relationship between the program's academic and technical standards, on the one hand, and the learning outcomes that will enable the student to be a competent practitioner, on the other. Also significant is whether the institution acted appropriately in applying these standards, considering objective information in an individualized review (preferably by a qualified professional) rather than simply acting upon "generalized" assumptions or stereotypes. Where the institution appears to have engaged in an individualized and informed review, courts tend to defer to the college's judgment in creating and applying these standards, particularly where those standards are clearly linked to the safety of patients, school children, or other clients of the future practitioner.

A good example of the careful creation of technical standards, and judicial deference to application of those standards during the admissions process, is illustrated by *McCully v. University of Kansas School of Medicine.*[29] Ms. McCully applied to the University of Kansas School of Medicine. She had spinal muscular atrophy, resulting in weak upper body strength and inability to walk. In order to meet the accreditation requirements of the Liaison Committee on Medical Education (the unit of the Association of American Medical Colleges that accredits medical schools), the School of Medicine was required to develop technical standards that all medical students must meet. The School of Medicine's technical standards included a requirement that students "have sufficient motor function to elicit information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers" and be able to perform cardio pulmonary resuscitation (CPR) on a patient.[30] The plaintiff

28. Letter to Univ. of Cincinnati, 35 NDLR 151 (2006).

29. McCully v. Univ. of Kan. Sch. of Med., No. 12-2587-JTM, 2013 U.S. Dist. LEXIS 156233 (D. Kan. Oct. 31, 2013), *aff'd*, 591 F. App'x 648 (10th Cir. 2014).

30. *Id.* at *15–16.

could not perform CPR or the Heimlich Maneuver, intubate a patient, or insert a chest tube—all of which require a level of upper body strength. Furthermore, in her application, the plaintiff requested as an accommodation that a staff member serve as her "assistant" during clinical rotations, presumably to perform the functions she could not perform herself. After meeting with the applicant and obtaining extensive information about the accommodations she would need from her treating physician, the admissions committee decided that the plaintiff was unable to meet the technical standards, and denied admission. The court agreed, finding that "motor skills are essential to the learning process for medical students and are skills necessary to becoming a competent, successful clinical practitioner."[31] Additionally, the court noted that the accommodations that the applicant had requested would fundamentally alter the academic program, which the law does not require. Other cases involving applicants for health-related programs whose physical disorders disqualified them from admission include the OCR proceedings described in *Letter to College of the Sequoias*,[32] and *Letter to University of Texas Medical Branch.*[33] In both cases, OCR found these applicants not qualified because they could not meet appropriate technical standards.[34] In these instances, courts rejected students' attempts to pick and choose which portions of the clinical curriculum they will master and which they would like to bypass.

These cases, and others that are similar, strongly suggest that clinical and professional programs, if they have not already done so, should include legitimate physical requirements as appropriate to the particular clinical or professional program at issue. Developing case law strongly suggests, furthermore, that clinical and professional programs should also include legitimate *behavioral* components in their academic and technical standards. Many clinical and professional programs prepare students for entry into professions requiring that students meet professional, behavioral, and ethical standards. Training students in these behaviors, and assessing whether they are meeting behavioral standards, is a fundamental component of most clinical and professional programs, including medicine, law, and nursing. Having both physical and behavioral standards in place prior to making an admission decision (and using them to evaluate student

31. *Id.*

32. Letter to Coll. of the Sequoias, OCR Case No. 09-09-2022 (May 8, 2009) (discussing nursing student who could not lift).

33. Letter to Univ. of Tex. Med. Branch, 30 NDLR 154 2005, NDLR (LRP) LEXIS 253 (2005) (discussing medical school applicant with dystonia who could not perform manual tasks and had difficulty walking and speaking).

34. *See also* Cunningham v. Univ. of N.M. Bd. of Regents, 531 F. App'x 909 (10th Cir. 2013) (noting in dicta that a medical student whose visual impairment made his vision "fragmented" had requested accommodations that would have fundamentally altered the nature of the medical school program, and thus were not required by law).

performance prior to making a dismissal decision) will help a clinical or professional program make good decisions reflecting legitimate academic concerns. This, in turn, helps the program defend against allegations of disability discrimination, breach of contract, or tort liability.

OCR and judicial decisions also indicate that, after a program has developed, reviewed, or updated its technical standards, the program should ensure that applicants (and current students) are advised of these standards before making decisions whether to apply to, matriculate into, or continue in a program. A good approach is to communicate with applicants or potential applicants at the outset regarding the institution's technical standards and then, at the point of application or conditional admission, ask applicants to affirm their ability to meet the standards. If they cannot do so, this allows the institution to begin a dialogue about whether the standards can be met with accommodations. One OCR letter that approved a medical school's use of technical standards in its admissions and review process described and approved this kind of two-step process.[35] First, the medical school determined whether an applicant met the academic requirements for admission. If so, the applicant was admitted conditionally, was sent a "technical standards certification form," and was asked to affirm the applicant's ability to meet the technical standards. At that point, if an applicant indicated that he or she could meet all the technical standards, the condition would be satisfied and the student would be admitted. Applicants who indicated that they could not meet one or more standards, or would have difficulty doing so, were considered to have made an implicit request for accommodation. The medical school's "ADA Panel" would then review the student's information, ask for additional information if necessary from the student's medical provider or other relevant professional, and then determine whether the institution could provide appropriate accommodations that would 1) enable the student to meet the technical requirements but 2) not work a "fundamental alteration" upon the program. This process was approved by OCR as a permissible application of technical standards at the point of admission.

Another appropriate method of determining whether an applicant meets the program's technical standards could be to interview conditionally accepted applicants. Determining whether an applicant has the emotional or psychological strength to succeed in a demanding professional program (and subsequently in a demanding career) is a particularly complex analysis. Conducting interviews with applicants may help program faculty ascertain whether the applicant will be able to meet the academic and technical standards with respect to stress and time management, as well as providing an early opportunity to discuss any accommodations that an

35. *See* Letter to Univ. of Tex. Med. Branch, *supra* note 33.

applicant may need for a disability that the applicant has disclosed. For example, a court dismissed an applicant's disability discrimination claim in *Manickavasgar v. Virginia Commonwealth University*,[36] in part because the faculty member who interviewed the applicant articulated several objectively reasonable justifications for denying admission. Interviews addressing disability issues are challenging but may be performed in a manner that is both legally compliant and also extremely useful in securing information about a student's ability to meet technical standards. Although a program may not ask a student outright to disclose a disability, the initial application may certainly detail the academic and technical standards for the program, ask applicants to affirm that they can meet those standards, and if not, ask them what accommodations they might require to meet the standards.[37] Use of an interview process in addition to written applications, however, definitely requires that all faculty participants and others involved in interviewing be well educated about the relevant technical standards and the permissible methods of discussing student disability and accommodation issues.

Where institutions act appropriately in adopting and applying technical standards, courts have generally respected and deferred to these judgments. Although judicial deference to academic judgment is not inviolate, the ruling of the U.S. Supreme Court in *Regents of the University of Michigan v. Ewing*[38] is cited frequently in cases involving the denial of admission or dismissal from clinical programs of students with disabilities. There, the Supreme Court emphasized that deference should only be given *when the faculty members were actually exercising academic judgment*.[39] Another case cited frequently for its deference to academic judgment in developing and applying academic and technical standards is *Kaltenberger v. Ohio College of Podiatric Medicine*.[40] In this litigation, the plaintiff had been dismissed from the college's program and asserted that the college had not accommodated her disability of Attention Deficit Hyperactivity Disorder (ADHD) by allowing her a third chance to take an examination—a modification that violated the college's standard policy. The court deferred to the college's policy, and, citing *Doherty*[41] said: "We should only

36. Manickavasagar v. Va. Commonwealth Univ. Sch. of Med., 667 F. Supp. 2d 635 (E.D. Va. 2009).

37. For useful additional discussion of permissible admissions practices, *see* S. Heyward, *ADA and Section 504: Application and Impact on Study-Abroad Programs, and Clinical and Other Internships* (NACUA March CLE, 2003); V. Gotkin, *From Diagnosis to Remedy: Responding to Student Claims of Learning, Psychological and Emotional Disabilities* (NACUA Annual Conference, 2002).

38. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

39. *Id.* at 227.

40. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432 (6th Cir. 1998).

41. *See supra* p. 127.

reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession.'"[42]

Of course, the court must be convinced that the faculty exercised "genuine academic judgment" before deference will be afforded. In the *Peters* case noted above,[43] the court believed that the decision-maker (the dean) did not exercise genuine academic judgment but, instead, relied upon stereotypes concerning depression to speculate that a student would be unsuccessful as a practitioner. This underscores the need not only for well-drafted technical standards but also for the proper education of decision-makers. They may be particularly prone to make assumptions or rely on stereotypes about the ability of mentally ill students to meet behavioral requirements of the relevant profession.

If a court is unconvinced that the application of academic or technical standards in the clinical context has involved an application of "genuine academic judgment," it may even order a trial to determine whether a negative decision (at the point of admission or later dismissal) involving a student is entitled to deference or is motivated by discrimination. For instance, in *Ward v. Polite*,[44] the plaintiff student had been dismissed from a master's program in counseling because she had refused on religious grounds to counsel a client who she believed to be gay. The program faculty said that the code of ethics of the American Counseling Association—the entity that accredits counselors and counseling programs—required practitioners, including students, to accept all clients and not to impose their moral or religious beliefs upon those they counseled. The trial court originally granted summary judgment in favor of the university, but the appellate court reversed, expressing skepticism as to whether the student's refusal to counsel the client was truly a violation of the code of ethics and suggesting that the faculty's decision to dismiss her from the program may have been motivated by religious discrimination. Although this case appears to be an outlier with respect to judicial deference, it suggests that, while courts may accept the institution's right to articulate academic and technical standards, particularly those closely linked to the program's accreditation requirements, courts may scrutinize the application of those standards for fairness and consistency and institutions should prepare accordingly.

Some plaintiff students have argued that evaluation of clinical performance for behavioral factors does not reflect academic judgment but

42. *Id.* at 437.
43. *See supra* p. 128.
44. Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).

instead constitutes disciplinary assessment, to which courts typically do not defer. To date, that argument has been unsuccessful in the present context involving academic programs with clinical components. As the U.S. Supreme Court emphasized in *Board of Curators of the University of Missouri v. Horowitz*:

> It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum. Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.[45]

Courts in more recent cases have agreed. In *Doe v. Board of Regents of the University of Nebraska*,[46] the state supreme court declared: "Evaluating performance in clinical courses is no less an academic judgment than that of any other course, and is entitled to the same deference." And in *Falcone v. University of Minnesota*,[47] the court noted the faculty's "virtually unrestricted discretion to evaluate academic performance." Again, however, having technical standards that incorporate legitimate behavioral and professional expectations will greatly aid an institution in identifying behavioral assessments as academic rather than disciplinary decisions.

In sum, courts have regarded the standards of behavior that a student must meet in a clinical assignment to be both academic and technical in nature. In the context of admissions decisions (as well as in continuation/ dismissal decisions, which are discussed below), courts defer to the institution's academic judgment where the court is satisfied that the standards applied were non-discriminatory as framed. Courts will also review whether these standards were then applied consistently to the student with disabilities as well as others.

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45. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 95 (1978) (Powell, J., concurring).

46. Doe v. Bd. of Regents of the Univ. of Neb., 846 N.W.2d 126, 151 (Neb. 2014).

47. Falcone v. Univ. of Minn., 388 F.3d 656, 659 (8th Cir. 2004).

III. USE OF TECHNICAL STANDARDS IN EVALUATING CLINICAL PERFORMANCE

The admissions process is the initial circumstance in which academic and technical standards potentially impact the educational aspirations of students with disabilities. The more significant (sometimes, intractable) disputes may arise, however, when a student with a disability matriculates into a clinical or professional program and, after a period of some success, encounters difficulties performing the clinical or field work requirements of a program. Many of the significant judicial and OCR decisions regarding technical standards (including several discussed above) arise in the context of a student's requests for accommodations, performance difficulties, or academic failure during the clinical component of an academic program. Some such scenarios arise from dismissals for academic failure or clinical incompetence.[48]

The most complicated of all involve a student's inappropriate conduct or inability to observe professional conduct standards during an internship or clinical rotation, especially when the student's difficulties appear to arise at least in part from a disability that has not been or cannot be reasonably accommodated. These are immensely difficult and painful scenarios for student and program alike; typically, the student and institution have invested a huge amount of time and resources in bringing the student to the clinical point, and no one wants to see the student fail or be dismissed. In such circumstances, and as discussed above, courts and agencies have generally recognized the institution's right to apply uniform academic or technical standards, even if the student's difficulties stem from a disability. But, as emphasized in Section IV below, these situations may raise challenging accommodation issues requiring careful management.

Generally, institutions may enforce uniform academic and technical standards upon students with disabilities even when issues occur in the context of internship or clinical experience. For instance, in *Herzog v. Loyola College in Maryland, Inc.*[49] a clinical psychology graduate student with ADHD who had earned good classroom grades was dismissed because of his "unprofessional behavior" during a required internship. The court ruled that his poor behavior during the internship was a legitimate, nondiscriminatory reason to dismiss him. Medical students whose "unprofessional behavior" interfered with their clinical performance have

48. *See, e.g.*, Widomski v. State Univ. of N.Y., 748 F.3d 471 (2d Cir. 2014); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7 (4th Cir. 2005).

49. Herzog v. Loyola Coll. in Md., Inc., No. RDB-7-02416, 2009 WL 3271246 (D. Md. Oct. 9, 2009).

also been found "not qualified" and thus unprotected by the ADA or Section 504.[50]

Difficulties often arise and are similarly addressed in the context of education programs involving student teaching. In most states, students preparing to be K-12 teachers must not only meet coursework requirements but also perform successfully in student teaching in order to be licensed—and, in some cases, in order to successfully complete their academic degrees. Previously manageable difficulties on the part of students with disabilities may become significant in the context of student teaching. For instance, in *Reichert v. Elizabethtown College*,[51] an undergraduate with ADD and epilepsy was barred from student teaching because he frequently interrupted people, could not create lesson plans in a timely fashion, and muttered to himself as a coping strategy. The college had implemented a "Teacher Disposition/Foundational Competencies Policy" that required students to be able to communicate in a professional manner, demonstrate emotional maturity, and respond constructively to criticism. The court ruled that the faculty's attempts to determine whether the plaintiff was otherwise qualified by evaluating him against these criteria were not discriminatory, and that the student, in fact, was not otherwise qualified.[52]

Other disciplines requiring field work, such as social work or counseling, frequently adopt disposition/competency policies (sometimes as required by professional accreditors or licensing agencies). In such circumstances, a non-discriminatory application of the requirements to students with disabilities presumably would be permissible as in *Reichert*, on the theory that any other result would constitute a fundamental alteration of the program (or even, in aggravated cases, would place future clients of the student at risk). In one such case, a student with ADD challenged her dismissal from a doctoral program in professional psychology after she failed a required internship for lateness, was exceptionally disorganized, and acted in a "socially inappropriate" manner during the placement. In that case, *Patel v. Wright State University*,[53] the court ruled that the student neither had a disability nor was otherwise qualified. Likewise, another student with ADHD was expelled from a graduate program in clinical psychology because of "continued behavioral concerns" and "continued

50. *See, e.g.*, Bhatt v. Univ. of Vt., 958 A.2d 637 (Vt. 2008); Halpern v. Wake Forest Univ. Health Sci., No. 10-2162, 2012 U.S. App. LEXIS 5287 (4th Cir. Feb. 28, 2012); and Schwarz v. Loyola Univ. Med. Ctr., No. 08-C-5019, 82749 2012 WL 2115478 (N.D. Ill. June 11, 2012).

51. Reichert v. Elizabethtown Coll., No. 10-2248, 2012 WL 1205158 (E.D. Pa. Apr. 10, 2012).

52. For a similar case with a similar outcome, *see* Oyama v. Univ. of Haw., No. 12-00137 HG-BMK, 2013 WL 1767710 (D. Haw. Apr. 23, 2013).

53. Patel v. Wright State Univ., No. 3:07-cv-243, 2009 WL 1458908 (S.D. Ohio May 22, 2009).

difficulties with professional responsibilities."[54] The court awarded summary judgment to the university.

In short, judicial and agency decisions consistently recognize the right of institutions to develop and enforce appropriate academic and technical standards in the context of clinical and professional programs, even after the student has matriculated and performed successfully during classroom portions of the curriculum. As with application of these standards at the point of admission, the basic judicial deference and ADA principles apply: courts will defer to the academic judgments of institutions, but the institutions need to be prepared to demonstrate that their decisions regarding the performance of a student with disabilities reflect "well-reasoned professional judgments" and were not based upon ill-will or discriminatory stereotypes.[55]

IV. REASONABLE ACCOMMODATIONS IN CLINICAL PLACEMENTS

Although courts and OCR have been very clear to recognize the rights of institutions to impose uniform academic and technical standards on students with disabilities in clinical programs, it is also the case that institutions must frequently respond to requests for reasonable accommodations from students with disabilities during or after the clinical portion of an academic program.[56] In cases involving proposed academic modifications and accommodations, "the burden is on the institution to demonstrate that relevant institution officials considered alternative means, their feasibility, cost, and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic

54. North v. Widener Univ., No. 11-6006, 2013 WL 3479504 (E.D. Pa. July 11, 2013).

55. Wong v. Regents of the Univ. of Cal., 192 F.3d 807 (9th Cir. 1999).

56. As discussed in Section II *supra*, these requests—and consequent challenges—can also arise where an institution notifies an applicant during the admissions process about technical standards for which an applicant believes he or she would need reasonable accommodation. In the *University of Texas Medical Branch* and *Virginia Commonwealth University* decisions discussed in Section II *supra*, the University's admissions process encouraged discussion of potential accommodations prior to admission of students, both because the institutions made effective use of technical standards and also because, in the case of VCU, the University used an effective personal interview method to air these issues. Letter to Univ. of Tex. Med. Branch, 30 NDLR 154 (2005); Manickavasgar v. Va. Commonwealth Univ., 667 F. Supp. 2d 635 (E.D. Va. 2009). Accommodation issues may still arise in this context and, in some cases, they result in lawsuits or charges filed with an agency. As discussed in Section II *supra*, where the institution has carefully developed reasonable technical standards and applied them uniformly, the standards will likely be upheld as reasonable; the institution will still, however, need to engage in a consideration of reasonable accommodations where an applicant requests such an accommodation, prior to the institution's making an admissions decision.

standards or require substantial program alteration."[57] And, given the nature of clinical programs (which frequently involve assignment of students to conduct field work at locations not supervised by institutional representatives), this presents unique challenges that an institution must address to ensure compliance with the ADA and Section 504.

The general law with regard to the obligation to provide accommodations is the same in the clinical context as in the classroom: the institution must, upon request and proper documentation, provide "reasonable accommodations" or auxiliary aids, as long as the accommodations or aids do not result in fundamental alteration of the program or cause undue burden to the institution. How this plays out in clinical programs varies, but the legal obligations are the same as in the context of traditional classroom accommodation.

A.Timing of an Accommodation Request

In the context of clinical placements, as well as in the classroom context, the timing of a request for accommodation (and the institution's notice of a student's potential needs) is often determinative in assessing whether an institution has violated the ADA by imposing uniform standards upon students with disabilities. In many instances, a student with disabilities fails to request accommodations or even self-identify as having a disability. Then, the student fails a clinical rotation or exhibits difficult conduct that becomes the subject of a disciplinary or termination hearing. At that point, the student self-identifies as having a disability and requests readmission or a new clinical placement as an accommodation.

The issue of whether students are entitled to readmission or "second chances" after declining to self-identify prior to an academic failure has been frequently litigated and discussed by courts, agencies, and commentators. It has been well recognized in a variety of contexts that institutions are only required to make accommodations for students with known disabilities.[58] Courts and agencies continue to recognize this

57. Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C.U.L. 169, 185 (*citing* Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (lst Cir. 1991)).

58. Barbara A. Lee, *Dealing with Students with Psychiatric Disorders on Campus:Legal Compliance and Prevention Strategies*, 40 J.C. & U.L. 425, 429 (2014). *See also* Halpern v. Wake Forest Univ. Health Sci., 669 F.3d 454, (4th Cir. 2012) (discussing medical student with ADHD and anxiety disorder did not request accommodations until several academic years after engaging in unprofessional acts); El Kouni v. Trustees of Bos. Univ., 169 F. Supp. 2d 1, 3–5 (D. Mass. 2001) (no denial of accommodation for period before medical student requested accommodations); Garcia v. State Univ. of N.Y. Health Sci. Ctr., 2000 WL 1469551 (E.D.N.Y. 2001) (summary judgment granted where student dismissed from medical school for unsatisfactory performance prior to identification of disability); Tips v. Regents of Tex, Tech Univ., 921 F. Supp. 1515 (N.D. Tex. 1996) (no violation of ADA because graduate psychology student did not reveal learning disability or request accommodation).

limitation in the context of cases involving requested accommodations in clinical or professional programs.[59] Where a student requests accommodation after having already performed poorly on a test or evaluation, institutions are not required to change grades or, generally, permit a "do-over" of a project or clinical experience.

It is important to note, however, that there is some authority to the effect that institutions should at least *consider* the effects of a disability in evaluating a student's request for reconsideration of a decision to fail the student, dismiss the student, or terminate a clinical placement.[60] And the peculiarities of these issues as they arise during clinical or professional programs offer strong practical reasons to consider, at the very least, whether additional opportunities should be provided.

First, as a matter of basic fairness, it is always worth considering whether there is some reasonable way to help the student salvage his or her hopes for a clinical or professional career. Students enrolled in professional or clinical programs have frequently invested a very significant amount of time, energy, and financial resources in the particular program. Institutions are often highly motivated to help them obtain at least partial value from the educational experience; depending upon the nature of the program, it is often worth exploring whether there is reason to believe that the student could, in fact, succeed in a second placement if provided reasonable accommodations. This is particularly the case where, for instance, a student develops a disability in the course of the program or a disability is newly identified during the course of a program.[61]

In addition, issues involving accommodation of disabilities during clinical work often arise in an unusual procedural context that lends itself to a dialogue about accommodations—and, conversely, makes it questionable to argue that the student is just "too late." Often a student engaged in field work or student teaching may have been dismissed from a field placement, perhaps by a third-party provider, but the student is still entitled to additional process within the institution before being dismissed from the particular program or even from the college or university. Indeed, in many programs, dismissal from one field placement does not automatically equate to termination even from the particular program,

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59. Wong v. Regents of the Univ. of Cal., 192 F.3d 807 (9th Cir. 1999). *See* cases cited in footnote 50 involving clinical and professional programs.

60. *See, e.g.*, Letter to DePaul University, 4 NDLR 157 (1993) (involving dismissal of student with disabilities from law school prior to student's self-identification and request for accommodations).

61. *See, e.g.*, Singh v. George Washington Univ. Sch. of Med. and Health Sci., 508 F.3d 1097 (D.C. Cir. 2007) (appellate court reversed summary judgment award to medical school in part because school did not demonstrate that it would be unreasonable to provide the accommodations requested by the student when newly-diagnosed disorder was discovered).

much less from the college or university. The program must still institute its own internal process for evaluating whether the student may be placed into a second clinical experience and the conditions under which this can happen. In such clinical programs, at least, this is not the same situation as the typically litigated accommodation requested after a student has been definitively dismissed from a program or institution. In short, depending upon the nature of the clinical program, dismissal from a placement is far from an automatic end to a student's career at the institution, and it may not be accurate or legally compliant simply to disregard an accommodation request as "too late."

It should also be strongly emphasized that many of the cases in which courts or agencies exonerate institutions from allegations of disability discrimination arise after institutions have first provided accommodations but the student has nonetheless failed to succeed. Even where an institution *could* take the position that accommodation was not timely requested, entering into a dialogue and suggesting reasonable accommodations that provide the student a final chance to succeed is often prudent as a risk management strategy and consonant with the institution's mission.

In short, an institution will not necessarily wish to disregard a tardy self-identification made in the context of clinical (or even professional) programs. Dismissal from a placement often is not tantamount to dismissal from the entire program or institution; an institution may still be committed to undertake an appropriate interactive process and consider reasonable accommodations as it determines the significance of the student's failure in one placement or clinical experience. Moreover, students in clinical or professional programs are often high achievers exceptionally invested in success. For their part, institutions are equally invested in helping those students succeed, as long as academic standards are maintained and no fundamental alterations are required. This is a situation in which risk management and policy imperatives align. The law is clear that, where accommodations are requested by a qualified student with disabilities before or during a program, the institution must consider them, enter into an interactive process, and grant reasonable accommodations if warranted; the policy reasons for doing so in clinical contexts, even when the student's timing and ultimate prospects of success are questionable, are often valid.

B. Reasonableness of Specific Accommodations

Several interesting OCR letters and judicial decisions discuss the scope of the accommodation obligation in professional/clinical programs and the issue of "fundamental alteration" in clinical or professional placements. In one such case, a student in a clinical program sought as an accommodation substitution of fieldwork for classroom work. The student, who was enrolled in a Pharmacy Assistant program, requested that she be permitted to substitute additional cooperative work experience for two classroom

theory courses, maintaining that her learning disability and her consequent memory problems compromised her ability to pass formal examinations. The college declined to substitute field work for classroom work, noting that the two courses at issue were "an integral component of the program in that they present fundamental information and theory." OCR agreed that the institution need not modify coursework requirements that it demonstrated to be essential to the program.[62]

More typically, students with disabilities have experienced difficulties and sought accommodation during clinical placements or second opportunities for clinical placements, despite having performed at a satisfactory level during classroom work. In another OCR case, a medical student who documented a mental illness sought an abbreviated "call schedule" during her clinical rotations. She argued that adhering to the regular schedule would cause her stress and extreme sleep deprivation, which might in turn cause her to become unstable.[63] The institution denied this request on the grounds that this would fundamentally alter the clinical training program and result in her not being adequately prepared for the residency program. Significantly, the institution instead offered her the option of beginning her clinical rotations with specialties that had fewer "call" requests and, presumably, would result in shorter hours and less sleep deprivation. She declined that offer of accommodation and filed an OCR charge. OCR ruled in favor of the school, finding that the school was not required to modify the call schedule because it demonstrated that the requirement was essential to the program of instruction. Several other cases involving requests to alter residency requirements or "call schedules" also resulted in decisions favoring the institution, again because the requested accommodation would work a "fundamental alteration" in the course of study.[64]

Many such decisions were issued following good faith attempts by the institution to offer reasonable accommodations that did not fundamentally alter a program; this reflects that, even in clinical or professional programs,

62. Letter to N. Seattle Cmty. Coll., 10 NDLR 42 (1996).

63. Letter to Morehouse Sch. of Med., 17 NDLR 94 (1999).

64. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999) (upholding a refusal to rearrange clinical rotation schedule of student with learning disability on the grounds this was a fundamental alteration of program); Maczaczyj v. New York, 956 F. Supp. 403 (W.D.N.Y. 1997) (student who could not participate in residency requirement due to severe panic disorder was denied request to participate in residency requirements by telephone on the grounds that this constituted a fundamental alteration of the program; he was deemed not otherwise qualified for the program). *See also* Amir v. Saint Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (court refused to second-guess the University's denial of a student with disabilities' accommodation request to complete his clinical rotation in Israel under a different supervisor; this was inconsistent with school's uniformly-applied policy prohibiting students experiencing academic difficulties from attending other universities).

institutions will want to interact appropriately and, if possible before taking drastic action, first provide accommodations generally recognized not to constitute "fundamental alterations" of academic programs. For instance, in *El Kouni v. Trustees of Boston University*,[65] a student dismissed from a joint medical and Ph.D. program exhibited academic and behavioral issues before requesting accommodations during examinations. Those accommodations were granted, but he was eventually dismissed for unsatisfactory grades and inappropriate conduct. He subsequently sued, arguing that his poor performance was attributable to his disability and should have been disregarded by the school due to this alleged causation. The court concluded that this student was not discriminated against or denied reasonable accommodations but, in fact, was held to the same standards and terminated for poor performance as were similarly situated students.[66] The student's argument, after the fact, that his previous poor grades and conduct were attributable to (and excused by) an unaccommodated disability probably would not have persuaded the court in any event. But it is not irrelevant that, despite the student's unreasonableness, the institution had appropriately provided exam-timing accommodations once accommodation was requested. This underscored that the institution was striving to provide the "level playing field" that is the underlying reason for the accommodation requirement and, most likely, encouraged the court to defer to the institution in its insistence upon holding the student to basic academic standards.[67]

Although the cases discussed in this article indicate that courts are likely to defer to the academic decisions of institutions using appropriate technical standards and accommodation procedures, it must be repeatedly emphasized that this deference is not unlimited. For instance, in *Wong v. Regents of the University of California*, the university argued that a medical student's completion of third-year rotations within a prescribed period of time was an essential program requirement.[68] The court did not defer to this determination. Instead, the court found a jury question regarding potential denial of reasonable accommodation because the university had previously approved extra time for the student to complete two previous rotations. It had also allowed him to take a leave of absence during his third year (therefore already deviating from the consecutive rotation schedule that it now argued to be "essential.") These factors, as well as the fact that a medical school faculty member had recommended to the university that the requested accommodation be accepted, raised a genuine

65. El Kouni v. Trustees of Bos. Univ., 169 F. Supp. 2d 1, (D. Mass. 2001).

66. *Id.* at 2–4.

67. *See* Rothstein, *supra* note 577, at 24, for an exhaustive discussion of additional judicial and OCR decisions regarding academic accommodations viewed as reasonable (or insufficient) by courts and agencies.

68. Wong v. Regents of the Univ. of Cal., 192 F.3d 807 (9th Cir. 1999).

issue of fact as to whether the institution's insistence upon consecutive completion of third-year rotations was genuinely an essential element of the curriculum.[69]

Wong serves as a useful reminder that, while judicial and agency deference to genuine academic determinations remains strong, particularly with regard to clinical or professional programs, institutions need to be prepared to interact in good faith. They are also well-advised to offer reasonable accommodations where warranted, and be prepared to justify accommodation denials by reference to academic standards that are rational and consistently applied.

V.A FRAMEWORK FOR APPLYING TECHNICAL STANDARDS AND ACCOMMODATING STUDENTS IN CLINICAL PROGRAMS

As NACUA presenter Salome Heyward perceptively noted in 2003, clinical programs and internships raise significant ADA compliance issues. She highlighted three reasons: (1) the "heightened importance of technical standards," (2) the "obligation of institutions to monitor the treatment of students by third parties," and (3) the "responsibility of students to be 'otherwise qualified' in settings that incorporate both academic and professional requirements."[70] Since 2003, these observations have certainly been validated, both in court and agency decisions and also through the experiences of institutions offering an increasing array of clinical opportunities for undergraduate and graduate students. To these three observations, we would identify several additional factors that appear to be increasing the frequency and the complexity of disability issues involving clinical programs:

- the influx into higher education of students experiencing mental challenges, particularly autism spectrum issues; difficulties arising from these kinds of conditions may not manifest themselves until students are placed in field or clinical settings requiring complex social interactions;
- increasing regulation of disability issues not only on the federal but also on the state and local levels, with state compliance laws being adopted that are sometimes broader in scope than the ADA or Section 504; and
- increased collaboration between academic institutions and outside clinical placement locations (both in the United States and abroad), where behavioral standards and expectations may

69. *Id.*

70. S. Heyward, "ADA and Section 504: Application and Impact on Study-Abroad Programs, and Clinical and Other Internships" (NACUA March CLE, 2003), at 1.

be different outside the institution from expectations within the institution itself.

Of the three additional factors noted, perhaps the most significant to this discussion is the influx into higher education of individuals experiencing significant mental illness challenges, such as autism spectrum issues. Students with mental challenges of this significance may experience social difficulties that do not manifest themselves in the classroom, but become very limiting in interactive experiential learning contexts such as student teaching or fieldwork. Institutions need to be prepared to develop and apply technical standards, as well as engage in an interactive process about accommodations, in a manner that properly recognizes the needs of these students while upholding the academic and technical standards of the particular program. In addition, students with mental challenges may experience difficulty even discussing accommodations, much less in agreeing to and adhering to an accommodation plan. Institutional counsel will likely encounter with increasing frequency the involvement of private attorneys or social service agencies purporting to represent such students. Indeed, in some cases, the involvement of advocates for the students may prove constructive in negotiating appropriate accommodations.[71]

The following are strategies, derived from a review of the above case law as well as from the collective experience of campus counsel, for a framework that helps clinical programs properly integrate the requirements of the disability laws, and the special needs of students with disabilities, into the operation of the clinical programs. Essentially, we advocate an approach that views ADA compliance, in the context of clinical program management, as an ongoing priority in the operation of a clinical program—one that should be emphasized from the point of admissions through the completion of all degree requirements, including clinical components. Faculty in each clinical program should discuss, adopt, and properly implement technical standards that incorporate legitimate academic, physical, and behavioral requirements. Program personnel should learn about the ADA accommodation process and, when appropriate, communicate with clinical sites about accommodation issues. The goal of strategies such as those summarized below is to help programs balance the various interests and factors to achieve a compliant result that maintains the academic standards of programs while honoring the rights and needs of applicants and students with disabilities:

1. Adopt Technical Standards for all Clinical Programs.

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71. Attached as Exhibit A are examples of communications provided to program faculty, the student, and the student's counsel to facilitate discussion of an accommodation plan for a student with Asperger's syndrome regarding his assigned second practicum.

- Given the potential for conflict between a student with a disability who is judged unable to meet academic and technical standards of a clinical program and the institution, it is important that clinical programs (or any program requiring some form of experience beyond the traditional classroom), develop a list of appropriate academic and technical standards that are applied uniformly to applicants and current students. These should include appropriate physical and behavioral requirements. In developing standards, program faculty should be encouraged to review the requirements of accrediting agencies, professional associations, and other groups that are knowledgeable about—or, in some cases, specifically articulate—the behavioral and skill requirements of the relevant profession. This does not necessarily mean that students unable later to meet licensure requirements should be denied admission to or continuation in a program; this depends upon the particular program and, specifically, whether it is designed primarily or entirely to prepare students for licensure or, rather, has a broader and less "practical" purpose. Program faculty members, as well as those involved in accreditation, are essential participants in the development of technical standards.

2. Periodically Review and Update Technical Standards.
   - Technical standards should be reviewed periodically to ascertain whether advances in technology or professional practice suggest that the standards should be altered—particularly those physical standards that could preclude students with physical or mental disabilities from completing a clinical program. Limitations that were reasonable even five years ago may be rendered obsolete and potentially unlawful by advances in technology. Technical standards should be reviewed whenever regional or professional accrediting standards change, to ensure that the standards being applied institutionally are justifiable and adequate in light of external accrediting modifications. Technical standards should also be reviewed whenever federal or state disability law changes or when significant additional regulatory guidance is issued by agencies. And, of course, advances in technology or medical management of certain disabilities may call for modification of technical standards.
3. Consistent and Non-Discriminatory Application of Standards during Admissions Process.
   - Consistent and appropriate application of technical standards during the admissions process is essential to ensure that the institution is admitting students who are "otherwise qualified" to fulfill the essential requirements of a program. All

information provided to applicants and students considering whether to matriculate should refer to the academic and technical standards so that both groups are clearly on notice of the institution's requirements. Indeed, it is probably a "best practice" to require, as part of the admissions process, that students specifically review, acknowledge, and certify their ability to meet each specific technical standard. Some institutions use this type of certification process to begin productive interactive processes, where students identify specific technical standards for which they will need reasonable accommodation.[72] Many difficult dismissal cases might be avoided if institutions made more effective and rigorous use of technical standards at the point of admission.

4. Additional Discussion of Technical Standards at the Point Students Begin Clinical Rotations.
   - One perhaps underutilized strategy is to discuss with all students, prior to the commencement of clinical rotations or fieldwork, technical standards that will be enforced in a consistent and appropriate manner during fieldwork. This may forestall a student's failure in a clinical rotation; it also addresses the situation in which a student began the program without having disability issues but has been diagnosed with them or developed them during the course of the program. There is never any harm in communicating on a periodic basis about the institution's consistent expectations and in inviting students with disabilities to request accommodations or engage in a dialogue *before* difficulties arise.
5. Individualized and Rigorous Review of Requests for Accommodation.
   - Requests for accommodation should be encouraged and, if made, reviewed on an individualized basis by professionals qualified to analyze documentation provided by the student. An individualized determination should be made as to whether that particular student's disorder or condition can be reasonably accommodated sufficiently to meet the technical standards. In close situations, and unless health or safety issues preclude such an approach, institutions should make every effort to offer some sort of reasonable accommodation that would allow current students an opportunity to succeed.

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72. *See, e.g.*, technical standards and related certifications attached to Vicki Gotkin's useful 2002 outline discussing medical school technical standards. V. Gotkin, *From Diagnosis to Remedy: Responding to Student Claims of Learning, Psychological and Emotional Disabilities* (NACUA Annual Conference 2002), at Exhibit A-C.

6. Consistent and Effective Documentation of Interactive Processes and Accommodation Plans.
    - All such discussions and offers should be documented not only internally but with the student (and, if the student is amenable, with the field placement personnel – as further discussed below). Attached to this Article as Exhibit A are redacted examples of an accommodation plan and communications with a student with disabilities, prepared in an attempt to ensure a smooth second placement of a student with Asperger's syndrome who was unable to complete an initial clinical rotation.
7. Effective and Clear Appeal Process(es).
    - Section 504 requires that all institutions offer some sort of appeal process in the event a student is denied an accommodation, but appeals frequently become a source of confusion and potential legal risk where accommodation issues arise in the context of clinical placements. In some cases, a student's dismissal from a field placement does not equate to automatic dismissal from the program or institution as a whole. In that situation, it is not always clear whether the appropriate appeal is of the field termination, the denial of accommodations, or both. There is no single way to address this situation, but it should be addressed. Clinical programs should be clear on the appeal process that applies when a student's field placement is terminated—and general institutional policies should clarify how programmatic appeals harmonize with appeals of alleged ADA discrimination issues. Program faculty typically have a difficult time evaluating the significance of disability in addressing field placement terminations; leadership should address which appeal process applies in which situation and should be prepared to modify appeal processes to ensure a substantially fair hearing for a student who claims that a dismissal is the result of a denial of accommodation.
8. Education of admissions staff, faculty, and administrators of clinical programs.
    - A related, and very critical, component of this compliance process is education of program personnel, field placement administrators, admissions employees, and all others called to deal with these issues. All need to know the academic and technical standards applicable to each program and the proper manner in which to apply those standards and handle accommodation requests. Ideally, program personnel will also communicate with and educate supervisors at the students' placement sites.

9. Attention to confidentiality and proper communication within the program and institution.
    - Many clinical programs are offered in the context of health science, counseling, social work, or psychology programs. Professionals working in these areas and serving as program faculty often are sensitive to confidentiality issues involving their own patients and clients, but they may not understand the important limitations (arising not only from the ADA but also from state medical confidentiality laws) to maintain confidentiality of student disability issues and requests. They also may not be sensitive to the importance of not engaging in unofficial diagnoses or launching e-mail threads in which program faculty theorize about the perceived or actual disability of a particular student. These scenarios are extremely common and highly regrettable. As such, this is an important, additional point of education for program personnel and academic administrators. All of them need to understand the importance of limited, appropriate discussion of student medical issues only on a "need to know" basis (and the dangers inherent in "unofficial diagnosis" of students with disabilities).
10. Coordination with Clinical Sites.
    - It cannot be emphasized enough that institutions must engage in proper oversight of clinical placement sites, as well as communicate consistently with clinical sites regarding the requirements of the ADA and the need for appropriate response to student disability issues. ADA/accommodation requirements should be noted in affiliation agreements with clinical sites, just as such agreements commonly acknowledge an obligation on the part of the site and the school to cooperate where sexual harassment or other civil rights issues are raised.

11. Appropriate Policies Regarding Information Provided to Site Personnel.
    - A significant caveat, of course, is that the institution may not be entitled to discuss with the placement site concerns about a particular student absent the agreement of the student. This is a difficult problem. Although program personnel are probably within their rights communicating to site supervisors issues regarding direct observations of students, where these observations arise from concerns about disability or obvious manifestations of disability, it will be all too tempting for program personnel to violate medical confidentiality or ADA confidentiality limitations in making such disclosures. Institutions should discuss these situations and educate program personnel about the circumstances in which disability issues

may or may not be discussed with site personnel. In some instances, it may be possible to incorporate such policies into site affiliation agreements. Program personnel should also have a process for talking with students with disabilities about potentially self-identifying to the site supervisor, asking for accommodations on-site, and releasing the program personnel to have conversations with site personnel about the student's issues and/or accommodation needs. This kind of communication has to be handled carefully, to avoid discrimination claims by the student, but it can be a part of the discussion of technical standards.

12. Consistency of technical standards, procedures and policies as between different clinical programs.
    - Institutions should review technical standards and procedures as between different clinical programs, to ensure consistency (where appropriate) between different programs' description of essential requirements. The University should also review program descriptions of essential functions and technical standards to ensure that termination processes and accommodation processes used within individual programs and colleges are reasonably consistent with those used within the rest of the institution. This will assist the University in defending both its decision not to engage in "fundamental alterations" and its decisions about the reasonableness of specific proposed accommodations.

APPENDIX A

REMEDIATION PLAN FOR STUDENT X

Introduction to the Remediation Plan: The elements of this Remediation Plan are aligned to the required performances for teacher candidates as mandated by the State Professional Teaching Standards as ruled by the State Board of Education pursuant to Part __ of the State Administrative Code. Each standard has been incorporated into the Remediation Plan (1st column). The plan also includes a corresponding goal to guide Student X in his work to address the required performances (2nd column) and to promote communication between Student X and his faculty mentor and site supervisor. Finally, the Plan includes the actions/ evidence required of Student X to demonstrate that he can achieve each of the goals set forth in the Plan (3rd Column).

As a pre-requisite to be eligible for a second student teaching assignment, the remediation "Plan" also includes a semester-long credit-

bearing Practicum course designed to provide Student X with additional exposure to field-based/clinical work in classroom(s). The University would suggest that Student X complete this practicum course EDU-___ Independent Study in Education (3 credit hours) during the fall 20XX term. The tuition cost for this practicum course is approximately $1500.00. Professor Y will serve as Student X's principal contact and as a resource for Student X during the Practicum course. Another important element of the Remediation Plan is for Student X to enter into counseling at his expense for the development of communication and interpersonal skills. The University also asks that Student X sign release forms authorizing the University to communicate with (a) Dr. Z, Psy.D., and any other professionals at Dr. Z and Associates regarding Student X's diagnosis and their treatment recommendations as they relate to Student X's performance as a student teacher; and (b) the social workers or other counseling professionals whom Student X engages as part of the Remediation Plan, regarding their recommendations and Student X's progress with regard to the elements of the Remediation Plan.

The Practicum course must be successfully completed before the University can seek a partner K-12 school for a second student teaching experience. Although the University cannot guarantee Student X or any other student a student teaching placement, if Student X successfully completes the Practicum course, the University will seek to place Student X with a K-12 school for a second student teaching experience as soon as practicable following his successful completion of the Practicum (hopefully, during the Spring 20XX term, which starts in January of 20XX).

Such placements are not assigned; rather, they are carefully worked out in communications between the University, K-12 schools, and the student teacher/intern. The K-12 school partner may end the student teaching experience at any time if the school partner determines that the student teacher is not performing adequately or is otherwise not meeting the school's expectations.

For purposes of communicating with any potential K-12 school partners, the University would use the following communication to ensure that the potential school partners are aware of relevant information regarding Student X's background.

We are seeking a 16-week student teaching placement for Student X for spring term, 20XX. This will be Student X's second student teaching assignment.

Student X did not successfully complete his first assignment, and subsequent to this experience, he was diagnosed with Asperger's Syndrome and ADHD.

Student X has requested that he be allowed another attempt at student teaching with specific accommodations related to his disability. The University is doing all that it can to honor that request.

We also want to emphasize that we share not only a commitment to Student X, our teaching candidate, but also to you, our school-based partners, in the preparation of pre-service teachers. We could not successfully train our candidates without your commitment and expertise.

It is in that spirit that we share with you this background information regarding Student X as you consider our request to place him in your school. He has consented to our sharing this information with you. We want to assure you that we will be working closely with Student X both before and during his field experience in an effort to ensure that he is as prepared as possible for this experience.

If you require further information, do not hesitate to contact the Office of Field Experience Director, Ms. _____.

Performance Goal	**Remediation plan goal**	**Action required to meet goal**
1. Knowledge of Subject Matter		
1.2 Exhibits thorough understanding of content	Increase content knowledge	Complete additional classroom observations.
1.3 Evaluates teaching resources and curriculum materials for their comprehensiveness, accuracy, and usefulness	Work with a variety of resources to be used in planning for instruction	Complete additional classroom observations.
1.4 Makes choices that reflect diverse perspectives in content areas	Develop a bibliography of different resources that can be used to present core content material	Complete additional classroom observations. *After completion of additional observations related to building content knowledge, write journal entries that demonstrate enhanced content knowledge and how you will decide on diverse resources to teach a variety of content material.*
2. Knowledge of Human Development and Learning		
2.2 Designs	Review unit and	Enroll in a

instruction that meets learners' intellectual, social, personal, and developmental needs	lesson planning information from course work	practicum/directed study that will provide a review and additional instruction in unit and lesson planning
2.4 Makes instructional decisions based on knowledge of human development	Role play how you will handle different classroom situations-work with counselor/ social worker to rehearse decision making in a variety of contexts such as those required daily in the school building and classroom.	Complete personal journal entries reflecting on your learning and listing the specifics on how you believe you have improved in this area.
3. Adapting Instruction to Diverse Learners		
3.1 Makes appropriate provision for individual students who have particular learning differences or needs	Review the material from unit and lesson planning that deals with accommodating to the special needs of learners. Review material from the exceptional learner class.	Complete journal entries in which you address how you will specifically plan for the needs of diverse learners in your classroom.
3.2 Uses cultural diversity and individual student experiences to enrich teaching	Review material from exceptional learner and methods courses.	Complete journal entries in which you address how you use student diversity to enrich your classroom. Observe and note practices you experience in the practicum assignment.
3.4 Identifies and designs instruction that recognizes student differences in learning styles, multiple	Review material from exceptional learner and methods courses.	Construct a matrix or other graphic organizer that will guide you through the process of

intelligences, and developmental needs		differentiating the instruction you are planning.
4. Multiple Instructional Strategies		
4.2 Promotes students' critical thinking, problem solving, and performance capabilities	Complete additional reading on incorporating critical thinking and problem solving strategies in classroom instruction.	Successfully Complete Practicum course.
4.3 Evaluates and uses alternative teaching strategies and materials to achieve different instructional purposes to meet student needs	Review material from exceptional learner course.	Successfully Complete Practicum course.
4.4 Encourages student interaction with subject matter in a variety of ways	Complete additional reading on how to actively engage students in learning activities.	Successfully Complete Practicum course.
4.5 Monitors and adjusts strategies in response to learner feedback	Complete additional reading and reflection on formative assessment and how to use it to support student learning.	Successfully Complete Practicum course.
5. Classroom Motivation and Management Skills		
5.2 Organizes, allocates, and manages resource of time, space, and materials to constructively engage students	Review management articles from the EDU-6060 course	Successfully Complete Practicum course.
5.3 Manages the classroom environment and makes decisions that enhance social relationships, student	Review management material from the EDU-6060 course	Successfully Complete Practicum course.

motivation, and engagement in productive work		
5.4 Manages transitions effectively	Observe how other teachers handle these situations in the classroom.	Complete journal entries that outline strategies you have seen employed in the classrooms you observed.
5.6 Responds to unanticipated sources of input and adjusts plans to meet student needs	Observe how other teachers handle these situations in the classroom.	Complete journal entries that outline strategies you have seen employed in the classrooms you observed.
6. Communication skills		
6.5 Asks questions at different cognitive levels to stimulate varying responses	Review additional material about asking higher-level questions in the classroom.	Successfully Complete Practicum course.
6.6. Exhibits and responds to non-verbal communication	Work with counselor/social worker to improve processing of non-verbal communication	Complete journal entries regarding what you have learned from these sessions.
6.7 Uses clear, accurate presentations and alternative explanations	Reflects on how to achieve greater clarity in presentations and more effective listening skills in working with both students and adults	Journal how you will improve in these areas.
7. Instructional Planning Skills		
7.2 Selects and creates learning experiences that are appropriate for curriculum goals, relevant learners, and based upon principles of effective instruction	Review material from classroom teaching skills course as well as methods classes.	Successfully Complete Practicum course.
7.3 Develops creative	Review material	Successfully

lessons and activities that operate at multiple levels to meet the developmental and individual needs of diverse learners, including learning styles and performance modes	from classroom teaching skills course as well as methods classes and the diverse learner course.	Complete Practicum course.
7.5 Creates long-term plans that are linked to student needs and performance	Review material from assessment course taken previously.	Successfully Complete Practicum course.
7.6 Reflects effectively to improve teaching methods	Develop patterns and strategies to engage in regular professional reflection.	Complete journal entries regarding how you will engage in regular reflection during your next student teaching assignment.

8. Assessment of Student Learning		
8.2 Uses a variety of formal and informal assessment techniques to enhance learners' knowledge and evaluate their progress	Review material from assessment course.	Successfully complete Practicum course.
8.3 Monitors and adapts teaching strategies and behavior in relation to student success	Review all material on formative assessment.	Successfully complete Practicum course.
8.4 Uses assessment strategies to involve learners in self-assessment activities	Review all material from assessment course.	Successfully complete Practicum course.
9. Professional commitment and responsibility		
9. 1 Uses classroom observation, student information, and research as sources for evaluating outcomes and as a basis for experimenting with, reflecting on, and revising practice	Develop strategies for engaging with school-based personnel in a more effective way to receive and reflect upon feedback given.	Journal as to how you will interact more effectively with school-based personnel to use feedback to improve performance.
9.2 Acts professionally and appropriately to unanticipated situations	Learn to monitor your own behavior to eliminate inappropriate or unprofessional responses. Discuss these issues and potential strategies with a counselor.	Journal about how you will make improvements in this area.

Agreed:

_____

Student X

Agreed:

_____
University

Proposed Practicum Schedule

Fall Semester, 20XX

This Practicum is dependent upon securing a partner school and cooperating teacher. In anticipation that Student X will accept this plan, the office of fieldwork has started preliminary inquiries to locate a suitable site that can provide the supportive environment needed and is willing to accept the increased workload that will come with the practicum. Our framework is time-sensitive in that we need to have Student X's commitment no later than October 15, 20XX. The earlier we receive his commitment, the sooner we can finish the planning and have everything put into place.

Eight Week Practicum
Start Date: October 22, 20XX
End Date: December 14, 20XX (end of fall term)

Expectations: Weekly schedule is to report to assigned classroom Monday – Thursday (actual times to be determined by school). Friday meeting with university supervisor on the Main Campus.

Should this not be possible to accomplish due to unavailability of sites or if Student X is unable to begin on October 22, this practicum can be organized for the Spring 20XX semester.

Please let Dr. _____ know if Student X decides to move ahead with this plan.

Dr. _____, Dean

Accommodations to be implemented for Student X
Practicum EDU-XXXX, Fall 20XX Academic Year

Confidential – do not share unless specifically authorized by the Dean

1. Please find the document "Mid-Term Evaluation." The Mid-term Evaluation is the best summary to provide for Mr. Student X because it documents every area of weak performance from his internship. The document is an assessment Rubric aligned to the performance standards required by the State Educator Preparation and Licensure Board. Should Mr. Student X continue to have questions about any of the standards (not his rating), the faculty practicum supervisor will assist Student X to gain an understanding. It is important to note that these standards and concepts are covered in the previous course work that Student X successfully completed.

2. The practicum offered will provide Student X with clear instructions written in a familiar course guide format. The Practicum Guide will include the written remediation plan with all the assessments and instructions included. All assignments will have clear instructions and Student X will have weekly meetings with the practicum instructor to ask questions and receive support. All textbooks used in his previous coursework are good resources of information to help him with his practicum assignments. The college requires use of a specific lesson plan format which is available online with complete instructions. Student X received training in his courses in the use of both lesson plans and unit plans. The practicum instructor will review these plans with Student X. Student X is encouraged to ask questions through email when he has need. The practicum instructor will respond within a reasonable time. Common terms and professional vocabulary are in the resources used in previous coursework; Student X should feel free to consult his textbooks for definitions and operational meanings.

3. Student X will be required to meet with his university practicum course instructor weekly to review his work, classroom activity, and performances. This weekly conference/meeting with his practicum instructor can include discussions of his overall strengths, weaknesses, and overall progress. This discussion will be based on the practicum instructor's written observation notes, which will be supplied to Student X. This meeting will be scheduled to be held on the Main Campus. The meeting will be used to review the supervising classroom teacher's comments on Student X's performances, examine Student X's reflections, and support his work on lesson planning and unit planning. Feedback will be provided in a variety of formats as is practical and useful. Written notice of any areas/skills/requirements for which Student X is not meeting expectations or performance requirements will be accompanied by support as is useful including mentoring, demonstrations, and other instructive measures. The meeting times can be used to seek support for his preparations for those assignments given by his classroom cooperating teacher. The weekly meeting is for Student X to seek clarification for any

assignments, use of forms, reports due to his supervising teacher, and any other need. The university practicum instructor will provide coaching, mentoring, and recommendations through both oral and written communications to Student X to assist him in developing effective teacher performances and practices.

4. Field work logs and reflections will be required of Student X during this practicum. They will be emailed to his university practicum instructor each day following his work in the classroom. These logs and reflections will be used to monitor his formative development on those areas identified as weak and unacceptable from his Mid-term evaluation cited in no. 1 above. The practicum instructor will review these logs with Student X at the weekly meetings.

5. A weekly meeting with the supervising classroom teacher will be expected. The purpose of this meeting will be to review Student X's performances and practice in the classroom with his cooperating teacher. The cooperating teacher opens his/her classroom to Student X and is not a faculty member of the University. The invitation to open the classroom to Student X to enter and work with students does not include an expectation that the classroom teacher provide Student X with additional support over and above what is routinely expected in field work settings. The cooperating teacher will continue to use the university performance rubrics, as is routine practice. These assessment rubrics are the critical performance assessments to be used during this practicum. This practice will focus on those areas identified from the internship, which need improvement in order to document Student X's progress on achieving State Professional Teacher Standards in order to be successful in the classroom as a teacher.

6. As the record from the past internship demonstrates, Student X has always been provided written instructions and guidance by the University. Written communications from the University will continue to be provided to Student X and will include agendas for meetings that identify the purpose and topics to be addressed. Meetings requested by Student X will be transcribed, included in the academic record, and supplied to Student X. We experienced many impromptu meetings where Student X walked into the office. All future meetings will be scheduled and all documents such as agendas and notes will be provided. What is expected of Student X is a disposition of professionalism that includes respect for others in his communication and human interaction. The State is moving to a licensure system and will no longer certify teachers after February 1, ____. To address the regulations and expectations in the State Educator Code of Ethics, which applies to teacher candidates, the college has established a Teacher Candidate Review Board to uphold these new expectations. (link)

Student X will need to familiarize himself with these expectations, as will other teacher candidates. This Plan will help him do it.

7. The University has an expectation that Student X is able to identify tasks or terms with which he is struggling and is able to articulate questions to seek assistance. Learning is a cooperative venture and requires diligent participation from both student and teacher. Student X, in this plan, is provided substantial support not normally provided to teacher candidates. Student X should understand that this level of support almost certainly cannot be offered in student teaching. The overarching goal of student teaching is for the teacher candidate to assume personal responsibility to demonstrate competence in planning instruction, leading instruction, and managing a classroom without the presence of supervisors in the classroom.

8. Student X is expected to have read, and is committed to following policies and expectations as published in the university catalog and the Teacher Education Handbook. A course guide will be provided with specific requirements and expectations for the practicum.

9. The University will request that as Student X is given the task to lead instruction that he permit video of his practice instruction to be captured for the purpose of review and reflection. Oftentimes, seeing oneself engaged in an activity will be useful in monitoring one's strengths and weaknesses, and it is also helpful in mentoring a student's improvement. This accommodation may assist Student X in processing his experiences and understand what is successful and what is missing or weak.

10. The university will assign a member of the education faculty to provide assistance to Student X to process his experiences and the feedback he has received as well as helping him to communicate with faculty and staff, in addition to his practicum instructor.

TRUSTING U.: EXAMINING UNIVERSITY ENDOWMENT MANAGEMENT*

CHRISTOPHER J. RYAN, JR.**

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INTRODUCTION:

A. The State of the Modern American University Endowment

American higher education is the product of a *laissez-faire* system; unlike other global university models, the American higher education model operates with little direct influence or interference from the federal or state government[1]—while fulfilling a vital public function. The historical freedom from regulatory intrusion that American higher education institutions have enjoyed both precipitated an entrepreneurial expansion of higher education and yielded a wide array of higher education models.[2] Today, American higher education is among the most market-oriented systems of higher education in the global context,[3] and it looks and runs more like a business than ever before.[4]

Resultantly, the financial viability and success of a university[5] is reflected in the market value of its endowment assets.[6] In the twenty-first

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1. *See* Martin Trow, *Federalism in American Higher Education*, *in* HIGHER LEARNING IN AMERICA: 1980-2000 39 (Arthur Levine ed., 1993) (touting the nominal direct influence of the federal government on the American higher education system); Christopher J. Ryan, Jr., *Something Corporate: The Case for Treating Proprietary Education Institutions Like Corporations*, 40 J.C. & U.L. 247, 257 (2014). Perhaps this protected status is due, in part, to the historical insulation from market pressures that are pervasive in and germane to the private sector that higher education has enjoyed because it has long been held in public favor. *See* Aaron N. Taylor, *Your Results May Vary: Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 743 (2010). *But see* Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government and Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 151 (Philip G. Altbach et al. eds., 2d ed. 2005).

2. CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 116-19 (2006). *See also* Taylor, *supra* note 1, at 743; Ryan, *supra* note 1, at 257.

3. *See* David D. Dill, *Allowing the Market to Rule: The Case of the United States*, 57 HIGHER EDUC. Q. 136, 137 (2003) (discussing the increased "marketization" of higher education and its impact on the public interest).

4. If anything, the recent economic recessions, among other fiscal and social trends, have diminished the protections that higher education historically enjoyed, allowing a capitalistic approach to higher education to predominate. *See* DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 2 (2003) ("American higher education is being transformed by both the power and the ethic of the marketplace.").

5. This article uses the term "university" to refer to institutions of higher education institutions. Thus, the article's use of "university" should be read as inclusive of colleges as well as universities.

6. The National Conference of Commissioners of Uniform State Laws defines an endowment fund as an institutional fund that is not expendable by the institution on a current basis under the terms of the applicable gift investment. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(2) (UNIF. LAW COMM'N 2006) [hereinafter UPMIFA]. This relatively narrow definition, however, encompasses only the *res* or

century, university endowment funds—the sum of a university's endowment asset portfolio—have become robust and position universities as major economic market participants; universities now occupy a deeply integrated role within national and international economic markets as both creators of and reactors to extra- and intra-market forces.[7] Thus, managing a university's endowment is both a big business and an increasingly competitive and complex endeavor.[8]

The volatile economic climate of the last decade has greatly disrupted the long-held principles that guided endowment management for over fifty years.[9] As a result of the Great Recession,[10] the endowments at

principal of the fund and not the broader meaning of the term, which include its assets, restrictions, and even beneficiaries.

7. *See* Sarah E. Waldeck, *The Coming Showdown Over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1796-99 (2009) (discussing the volatility of the market and its effect on university endowments immediately after the start of and during the Great Recession).

8. *See, e.g.*, Derek Bok, *The Ambiguous Role of Money in Higher Education*, CHRON. HIGHER EDUC., Aug. 16, 2013, at A28–29 (arguing that competition "intensifies the ambiguous role of money in higher education. The struggle for financial advantage creates a potent incentive to emulate the successful practices of rival institutions. This process improves performance when the practices involved enhance the quality of lower the cost of education. But it can also cause universities to adopt inappropriate methods of their rivals if they appear to be effective."). *See also*, Seth Zweiler, *At Yale an Investment Guru Grooms a New Generation*, CHRON. HIGHER EDUC., Aug. 16, 2013, at A8 (suggesting an arms race at top universities to grow endowments as well as savvy endowment management staff working directly for the university).

9. *See, e.g.*, Bok, *supra* note 8; John C. Bogle, Remarks at The NMS Investment Management Forum, The Lessons of History – Endowment and Foundation Investing Today, 1-15 (Sept. 12, 2011), *available at* http://johncbogle.com/wordpress/wp-content/uploads/2011/09/NMS-9-12-12.pdf (discussing his experience as founder of the Vanguard Group, and managing university endowment funds). "Now fifteen years of history have rolled by—a history replete with waves of greed, fear, and hope in the stock market. What an era it's been! An era that began with a market boom, followed by a 50 percent bust, a solid recovery, yet another 50 percent bust, and another nice recovery, albeit one that seemed to fall apart after the June 30, 2011, fiscal year ended." *Id.* at 1.

10. This article refers to the "Great Recession"—the nation's most severe financial crisis since the Great Depression—and means it to include such adverse economic factors as: "the combined failure of the market for subprime mortgages; the collapse of the collateralized debt obligation . . . market; the failure of large financial institutions such as Bear Stearns, Lehman Brothers, Freddie Mac, Fannie Mae, Washington Mutual, and American International Group (AIG); and the consequent market upheaval" which began precipitously in 2007 and continued to unfold until 2013. Peter Conti-Brown, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in the Financial Crisis*, 63 STAN. L. REV. 699, n.7 (2011); FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT XV (Jan. 2011). It should be noted that instability, in the form of historic market rallies in late 2014 and early 2015 and significant losses just prior to the time of publication illustrate market volatilities since the Great Recession, but cannot be said to encompass the Great Recession. *See* Tracy Alloway, *Market Volatility Has Changed Immensely*, BLOOMBERG BUSINESS (Sept. 8, 2015), http://www.bloomberg.com/news/articles/2015-09-

the top American schools, posting seemingly limitless gains from the 1990s to the mid-2000s, faced significant losses across a variety of investments.[11] For example, from June 30, 2008 to June 30, 2009, Yale University, regarded as a pioneer in substantial alternative investments such as real estate and private equity,[12] recorded a twenty-nine percent loss, or $6,582,785,000, to its endowment fund's market value.[13] Not to be outdone by its rival in the same fiscal year, Harvard University's endowment fund lost $10,891,304,000, nearly thirty percent of its market value.[14] To put this loss in perspective, if either of these losses were instead the market value of an endowment fund, they would rank as the sixth and ninth largest university endowment funds in the nation, respectively, for the 2008 fiscal year—the historical height of university endowment market values.[15] At the completion of FY2013, neither Harvard's nor Yale's endowment fund market values had returned to their pre-recession levels; however, while Yale's endowment fund posted gains in FY2014 so that its market value, totaling $22,900,000,000, finally eclipsed its FY2008 market value, Harvard's endowment fund market value of $35,883,691,000 was still $692,593,000 below its FY2008 market value in FY2014.[16] These examples merely illus-

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08/market-volatility-has-changed-immensely (maintaining in pertinent part that "On Aug. 24[, 2015], as global markets fell precipitously, one thing was shooting up. The Chicago Board Options Exchange's Volatility Index, the VIX, briefly jumped to a level not seen since the depths of the [2008] financial crisis.").

11. *See* Jason R. Job, *The Down Market and University Endowments: How the Prudent Investor Standard in the Uniform Management of Institutional Funds Act Does Not Yield Prudent Results*, 66 OHIO ST. L.J. 569 (2005).

12. *Id.* at 576. In the mid-1990s, Yale University invested "roughly sixty percent of its portfolio into less-conventional and generally riskier-investments" while these riskier investments accounted for one-third to one-half of portfolio investments at other top colleges." Karen W. Arenson, *Universities Taking on Risks to Overcome Fiscal Squeeze*, N.Y. TIMES, July 24, 1995.

13. NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: Table 372. Endowment Funds of the 120 Colleges and Universities with the Largest Endowments, by Rank Order: 2008 and 2009* (2010), http://nces.ed.gov/programs/digest/d10/tables/dt10_372.asp.

14. *Id.* Relatedly, both Harvard and Yale's endowments recently underwent a change in management. *See* Zweiler, *supra* note 8, and Dan Primack, *Harvard Endowment's Private Equity Future*, CNN MONEY (Oct. 22, 2013), http://finance.fortune.cnn.com/2013/10/22/harvard-endowments-private-equity-future/?iid=SF_F_River.

15. *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 13.

16. *See infra*, Tables 1–2. *See also* NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2014 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2013 to FY 2014* (2015), *available at* http://www.nacubo.org/Documents/EndowmentFiles/2014_Endowment_Market_Values_Revised2.27.15.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2013 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2012 to FY 2013* (2014), *available at* http://www.nacubo.org/Documents/EndowmentFiles/2013NCSEEndowmentMarket%20ValuesRevisedFeb142014.pdf; NACUBO, *U.S. and Canadian Institutions Listed by*

trate the modern realities of higher education finance. The lasting impact of the effects of the Great Recession on educational endowments that is still being felt today demands real and practical change in development, investing, and endowment management practices.[17] Now, more than ever, as

Fiscal Year 2012 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2011 to FY 2012 (2013), *available at* http://www.nacubo.org/Documents/research/2012NCSEPublicTablesEndowmentMarketValuesRevisedFebruary42013.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2011 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2010 to FY 2011* (2012), *available at* http://www.nacubo.org/Documents/research/2011NCSEPublicTablesEndowmentMarketValues319.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2010 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2009 to FY 2010* (2011), *available at* http://www.nacubo.org/Documents/research/2010NCSE_Public_Tables_Endowment_Market_Values_Final.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2009 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2008 to FY 2009* (2010), *available at* http://www.nacubo.org/Documents/research/2009_NCSE_Public_Tables_Endowment_Market_Values.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2008 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2007 to FY 2008* (2009), *available at* http://www.nacubo.org/documents/research/NES2008PublicTable-AllInstitutionsByFY08MarketValue.pdf.

17. While the stock market has rallied from its abysmal losses in FY2009, the effects of the Great Recession are still being felt even "[f]ive and a half years after the start of a frightening drop that erased $11 trillion from stock portfolios and made investors despair of ever getting their money back. . ." *See* Bernard Condon, *Dow Hits Record, Erasing Great Recession Losses*, TIME (March 5, 2013), http://business.time.com/2013/03/05/dow-hits-record-erasing-great-recession-losses/. That said, FY2013 marked the first time that gifts to universities returned to pre-Recession levels. *See* Don Troop, *Gifts to Colleges Hit $33.8 Billion, Topping Pre-Recession Levels*, CHRON. HIGHER EDUC. (Feb. 12, 2014), http://chronicle.com/article/Gifts-to-Colleges-Hit/144707/. This trend coincided with positive university endowment performance—for the first time since the onset of the Recession—over the same fiscal year. *See* Don Troop, *Strong US Stock Market Put College Endowments Back in the Black in 2013*, CHRON. HIGHER EDUC. (Jan. 28, 2014), http://chronicle.com/article/Strong-US-Stock-Market-Put/144253/; Ry Rivard, *Endowments Up 12%*, INSIDE HIGHER ED, Jan. 28, 2014, http://www.insidehighered.com/news/2014/01/28/college-endowment-funds-did-well-market-2013#sthash.pWITnjsC.dpbs; Kimberly Hefling, *College Endowments See Strong Growth*, DIVERSE ISSUES HIGHER EDUC. (Jan. 28, 2014), http://diverseeducation.com/article/60434/. In fact, at the time of publication of this article, FY2015 returns were expected to fall sharply from the gains of FY2013 and FY2014. *See* NACUBO, *Educational Endowments' Investment Returns Decline Sharply to 2.4% in FY2015; 10-Year Returns Fall to 6.3% Institutions Increase Endowment Spending Despite Lower Returns* (2015), *available at* http://www.nacubo.org/Documents/2015%20NCSE%20Press%20Release%20%20FINAL.pdf; *But see* Ry Rivard, *Private Distress*, INSIDE HIGHER EDUC. (Dec. 9, 2013), http://www.insidehighered.com/news/2014/01/28/college-endowment-funds-did-well-market-2013#sthash.pWITnjsC.dpbs (detailing the new travails of private colleges just after they managed to "weather the recession"). This improvement stands in sharp contrast to the previous year's average investment return of -0.3%. *See* Don Troop, *College*

university endowments approach recovery, universities and their endowment managers should model investor responsibility, transparency, and accountability.[18] To the extent that a measured model for university endowment growth can realize steady appreciation in market value and remain more stable in the face of adverse economic factors like those pervasive during the Great Recession, at the very least, it should be considered as a viable alternative to the total-return approach.

This article aims to bring to light the endowment management practices that resulted in this unprecedented growth and loss to endowment value on a national scale. Part I of this article examines the history of university endowments in America and provides a primer on the function of university endowments. In Part II, this article introduces the legal requirements of universities and their endowment managers that have sprung up as a result of the historical economic crises that university endowments have weathered. Part III furnishes data on the effect of the recent economic recession on university endowments, examining returns under a hypothetical alternative investment strategy that would have resulted in greater appreciation in market value and increased market stability between FY2004 and 2014 for half of the universities in the study sample, and also discusses the prevailing, though useless, cause of action by means of which donors may challenge a university's endowment spending, establishing a correlation between economic recessions and challenged gifts to universities in the American courts. Finally, Part IV offers recommendations for universities and their endowment managers to navigate uncertain waters in the modern context and articulates a sensible, sustainable university endowment management standard.

Endowments Rebound After a Flat Year, Preliminary Data Show, CHRON. HIGHER EDUC. (Nov. 7, 2013), http://chronicle.com/article/Colleges-Endowments-Rebound/142847/; Ry Rivard, *Endowment Returns Up, for Now*, INSIDE HIGHER EDUC. (Nov. 7, 2013), http://www.insidehighered.com/news/2013/11/07/endowment-returns-negative-2012-return-double-digits#sthash.ccjWGeTv.dpbs. Yet, these signs of progress still leave many skeptical that higher education will "recover" any time soon, in part because, according to these critics, the "economy does not depend on higher education." *See* Simon Zekaria, *Pearson CFO: U.S. Higher-Education Recovery Unlikely This Year*, WALL ST. J. (Jan. 23, 2014), http://blogs.wsj.com/corporate-intelligence/2014/01/23/pearson-cfo-u-s-higher-education-recovery-unlikely-this-year/; Arthur M. Cohen, Carrie B. Kisker, & Florence B. Brawer, *The Economy Does Not Depend on Higher Education*, CHRON. HIGHER EDUC., October 28, 2013, http://chronicle.com/article/The-Economy-Does-Not-Depend-on/142641/.

18. James J. Fishman, *What Went Wrong: Prudent Management of Endowment Funds and Imprudent Endowment Investing Policies*, 40 J.C. & U.L. 199, 201 (2014) (recommending that "endowments invest with more awareness and consider more realistically the possibility of negative returns, and their impact on the university or university, its beneficiaries, and the communities it affects").

PART I

A. A Brief Discussion of the Function of American University Endowments

Endowments—once simple, trust-like instruments—have become sophisticated devisement and investment systems that are central to the financial health of nearly every American university.[19] At their most basic level, endowments embody financial assets that a donor has contributed to a university.[20] These assets are later invested by the university, for the purpose of supporting the university's educational mission. In fact, an endowment is, simply put, "a gift of money or property to [a university] for a specific purpose, [especially] one in which the principal is kept intact indefinitely and only the interest income from that principal is used."[21] The purpose of an endowment is for donors' contributions to be invested, so

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19. This is true even—and perhaps most importantly—at tuition-dependent universities. *See* Lisa Jordan, *Outlook for University Liquidity Management*, BUSINESS OFFICER (March 1, 2011), http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/Volatility_Dominates_Endowment_Forum_Discussion/Outlook_for_University_Liquidity_Management.html (indicating that spending from even the most meager endowment returns allows tuition-dependent universities to offset operating expenses that would otherwise result in higher tuition); Ry Rivard, *Private Distress*, INSIDE HIGHER ED (Dec. 9, 2013), https://www.insidehighered.com/news/2013/12/09/private-colleges-remain-under-weather (discussing that endowments address the functional needs of all universities, tuition-dependency notwithstanding).

20. While the practice of funding university endowments, particularly among alumni or friends of the university, is alive and well in the United States, Canada, and Great Britain, it is less prevalent in continental Europe and abroad. That said, the Russian government appears to be encouraging endowment funding at its universities throughout the country. *See* Eugene Vorotnikov, *State Acts to Encourage Endowment Funds*, UNIVERSITY WORLD NEWS (Jan. 13, 2013), http://www.universityworldnews.com/article.php?story=20130111125957359.

21. BLACK'S LAW DICTIONARY 241 (3d ed. 2006). Originally, endowments were contributions of property bestowed upon a university to provide it with a source of secure income. "Additional gifts constituted the primary source of their growth, and colleges' tax-exempt status allowed donors to give generously while getting generous tax deductions for their gifts. For educational institutions, the role of tax-deductible gift-giving remains an extremely important source of endowment funds, as any college fundraising or development officer can attest; but since the 1970s, finance has superseded fundraising as the main vehicle for the growth of endowments." TELLUS INST. & CTR. FOR SOCIAL PHILANTHROPY, EDUC. ENDOWMENTS AND THE FIN. CRISIS: SOCIAL COSTS AND SYSTEMIC RISKS IN THE SHADOW BANKING SYSTEM, 8 (2010), *available at* http://www.community-wealth.org/_pdfs/news/recent-articles/07-10/report-humphreys-et-al.pdf. Undoubtedly, the tax deduction is beneficial to the donor and the institution, and the very bedrock on which higher education philanthropy rests. However, there are those who would have it otherwise. *See* Josh Freedman, *Are Universities Charities? Why the 'Nonprofit Sector' Needs to Go*, FORBES (Dec. 10, 2013), http://www.forbes.com/sites/joshfreedman/2013/12/10/the-nonprofit-sector-should-not-exist/ (arguing that tax-exemption only makes the elites more, well, elite).

that the endowment's total asset value yields an inflation-adjusted principal amount, along with additional income for further investments and supplementary university expenditures.[22] As a general matter, the university board of trustees is entrusted with overseeing an endowment, which is often professionally managed to achieve the endowment's stated objectives and generate income.[23] In healthy years, excess earnings are reinvested in the *res* of the endowment in order to compensate for inflation and recessions in future years.[24] During historical recessions, investment of endowment funds tends toward frugality, and endowment income, to the extent any can be eked out of a down market, is used to satisfy debt obligations.[25]

That said, variation exists within the framework of the use and management of university endowment funds, particularly with regard to the legal right to invade the endowment principal.[26] For purposes of explaining the variation among endowment types regarding this right, endowments are typically bundled into one of three categories: (1) true endowments; (2) term endowments; and (3) quasi-endowments. A true endowment consists of funds that have been donated on the condition that the principal be invested and preserved in perpetuity.[27] With true endowments, only interest income may be used for expenditures.[28] True endowments typically comprise the majority of a university's endowment fund. A term endowment resembles a true endowment; however, unlike true endowments, the investment and preservation of principal is finite. The principal of a term endowment is preserved for a designated period of years, usually in decade increments.[29] Thus, a term endowment is identical to a true endowment until the term runs, at which time a term endowment becomes a quasi-endowment. Last, quasi-endowments, in which the donor requests the con-

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22. Albert Fung, *How Do University Endowments Work?*, INVESTOPEDIA (Feb. 26, 2009), http://www.investopedia.com/ask/answers/06/universityendowment.asp.

23. *See generally* Peter Williamson & Hazel A.D. Sanger, *Educational Endowment Funds*, *in* INVESTMENT MANAGER'S HANDBOOK 827-41 (Sumner N. Levine ed., 1980).

24. *See id.* at 841. *See also* Joel C. Dobris, *Real Return, Modern Portfolio Theory, and College, University, and Foundation Decisions on Annual Spending from Endowments: A Visit to the World of Spending Rules*, 28 REAL PROP. PROB. & TR. J. 49, 50 (1993) (sketching a picture of the formulaic approach of traditional university endowment management until the mid-1960s).

25. *See* Dobris, *supra* note 24, at 50.

26. *See* Fishman, *supra* note 18, at 201 (noting that "The world of endowments is highly stratified in terms of size, utilization of modern theories of finance, trustee governance procedures, and delegation to and reliance on outside experts.").

27. NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS, *2002 NACUBO Endowment Study: Executive Summary* 62 (2002).

28. COMMONFUND INST., *Commonfund Benchmarks Study: Educational Endowment Report* 13 (2003) (relating that, as of the date of the study, only twelve percent of endowment funds surveyed invaded their corpus).

29. *See* NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS, *supra* note 27, at 62.

tribution not be invested in perpetuity, allow principal funds, usually up to an amount equal to the original gift value, to become available for the current use of the university.[30]

Additionally, endowments may vary with regard to the use of their funds for a general or particular purpose. In most cases, a university's endowment fund functions as a true endowment for the use of financing, in part, the operating expenses of the university. In addition to its general endowment fund, a university may also control restricted endowment funds—contributions earmarked by a donor to fund a specific need or program within the university.[31] When an endowment is restricted, the income from the endowment may only be used for a particular purpose—akin to the quasi-endowment described above. For example, an endowed professorship[32] represents a faculty position paid by revenue from an endowment fund specifically established for that purpose. Endowing professorships helps to reduce university expenditures by attracting top academics, who are not paid entirely out of the university's operating budget, to be members of the uni-

30. In many cases, quasi-endowments may include "the additional income from true endowments when there have been operating surpluses. Since the college . . . is not required to preserve the principal, the governing board . . . will invest [quasi-endowments] more aggressively than true and term endowment funds." Job, *supra* note 11, at n.4. *See also* NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS, *supra* note 27, at 62.

31. In such a case, a donor restricts the use of the endowment's income to provide for a particular institutional program. Most commonly, endowed professorships, scholarships, and endowed fellowships comprise restrictive endowments. *See* Fung, *supra* note 22.

32. The practice of endowing chairs dates back to the Roman Emperor Marcus Aurelius' providing for an endowment of the four major schools of philosophy in Athens in the Second Century A.D. *See generally* JOHN P. LYNCH, ARISTOTLE'S SCHOOL: A STUDY OF A GREEK EDUCATIONAL INSTITUTION, 192-216 (Univ. of Cal. Press 1972). In the early Sixteenth Century, Lady Margaret of Beaufort adapted the Roman practice to the English university system when she established endowed chairs among the divinity faculty at Oxford and Cambridge universities. Half a century later, Lady Margaret Beaufort's grandson, King Henry VIII, established the Regius Professorships at the same universities in divinity, civil law, Hebrew, Greek, and medical sciences. *See Commemorating Benefactors*, CAMBRIDGE UNIV. (Nov. 3, 2006), http://www.cam.ac.uk/news/commemorating-benefactors. Private individuals—and more recently non-royals—soon adopted the practice of endowing professorships. Beginning in 1669, Sir Isaac Newton held the Lucasian Chair of Mathematics position—named for benefactor, English clergyman, and member of the House of Commons, Henry Lucas—at Cambridge, which "father of the computer" mathematician Charles Babbage and theoretical physicist and cosmologist Stephen Hawking have more recently held. *See* Kevin Orman-Rossiter & Morgan Saletta, *From Newton to Hawking and Beyond: A Short History of the Lucasian Chair*, THE CONVERSATION (June 18, 2015, 4:10 PM), http://www.theconversation.com/from-newton-to-hawking-and-beyond-a-short-history-of-the-lucasian-chair-40967. *But see* Vimal Patel, *When Creating an Endowed Chair Poses a Dilemma for a University*, Chron. HIGHER ED (Aug. 27, 2015), http://chronicle.com/article/When-Creating-an-Endowed-Chair/232637/ (stating an argument in the modern context for universities to decline the naming of controversial endowed professorships).

versity community.[33] In this way, with principal to be invested and income to be distributed for a specific use or benefit, endowments are undeniably trust-like instruments and merit treatment under the law as a trust.[34] Though endowment categories may vary, their essential function is the same: to utilize contributions to the university so that they provide for the university's needs in the best of times and shelter the university from financial ruin during the worst of times. The following sections of this article contemplate the historical implications of this fundamental purpose.

B. A Primer on the History and Management of University Endowments

Endowments have a history spanning millennia.[35] For much of this time, endowment managers were limited in their investment choices; the ability to invest endowment funds in a variety of instruments, especially assets associated with high risk, is a recent phenomenon.[36] Until the early Nineteenth Century, American universities primarily invested in real estate;[37] however the "prudent person" rule, described more fully in the next

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33. Not only does this practice free university assets that would otherwise have been spent on faculty salaries or auxiliary university needs, it arguably improves the educational experience of the students by reducing the student to faculty ratio. At the same time, it allows donor intent and values to influence faculty composition. *See, e.g.*, Daniel Aloi, *Cornell College of Arts and Sciences to Recruit Faculty for Three New Endowed Humanities Professorships*, EZRA MAGAZINE (Nov. 2010), http://ezramagazine.cornell.edu/update/Nov10/EU.humanities.profs.html#main. Yet, recently faculty members who benefit from these endowed funds have, somewhat confoundingly, become uneasy about the role of private funds in higher education. *See* Carl Straumsheim, *Profit or Progress?*, INSIDE HIGHER ED (Oct. 10, 2013), http://www.insidehighered.com/news/2013/10/10/faculty-group-criticizes-role-private-money-higher-education#sthash.2PrzXusg.dpbs (voicing a national group of faculty leaders' concern about the influence of private funds on higher education); Jon Marcus, *Foundations are Increasingly Running U.S. Higher Ed, Spending Millions to Influence*, HUFFINGTON POST (Oct. 1, 2013), http://www.huffingtonpost.com/2013/10/01/foundations-higher-ed_n_4023826.html?utm_hp_ref=@education123.

34. In fact, simply defined, a "trust" is "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)." BLACK'S LAW DICTIONARY 734 (3d ed. 2006). By this definition, an endowment seems to be a flavor of trust in the way that squares are rectangles, but not all trusts are endowments, given that only equilateral rectangles can be squares. As such, the law should formally recognize endowments as trusts for the sake of consistent treatment.

35. *See supra* note 32.

36. The current freedom to invest endowment funds in nearly any asset has enjoyed only roughly fifty years of popularity. *See* TELLUS INST., *supra* note 21, at 8.

37. During the early American republic most endowment funds used mortgages, promissory notes, and real estate as investments of choice until 1830, when the Supreme Court of Massachusetts established guidelines for managing endowments according to the so-called 'prudent man' rule in a precedent-setting case involving Harvard College." *Id.*

section, slightly widened the options of investment instruments available to endowment managers. The prudent person rule was the pervasive endowment management standard for the remainder of the Nineteenth and early Twentieth Century. In short, this rule allowed endowment managers to invest endowment funds in low-risk assets—as a "prudent person" would conduct his or her own financial affairs.[38] For example, under this view, fixed-income securities[39] were seen as a safer, and therefore as a better, alternative to common stocks as the Nineteenth Century progressed.

During the Reconstruction Era, the United States Department of the Treasury issued a significant number of government and railroad bonds.[40] Given the ubiquity and relative safety of fixed-income securities, many endowment managers transferred the majority of their endowment's investible funds into secured corporate and government bonds but retained up to a third of their portfolio in real estate and mortgages.[41] In the early Twentieth Century, however, the promise of high returns from investment in corporate stock proved too alluring for endowment managers to avoid. Even despite the Stock Market Crash of 1929 and the subsequent Great Depression of the 1930s, the largest university endowments began to accrue corporate stock holdings, once considered speculative under strict applications of the prudent person rule.[42] Over the next two decades, university endowments increased their public equity investments at a torrid pace. By the late 1960s, a majority of university endowments had adopted a model of investing three-fifths of endowment funds in corporate stock and only two-fifths remained in bonds.[43]

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38. Harvard Coll. v. Amory, 9 Pick. 446, 461 (Mass. 1830).

39. Fixed-income securities are investments providing returns as fixed periodic payments, with the eventual return of principal upon the maturity of the security. Two examples of fixed income securities are treasury notes and corporate bonds. *See Fixed-Income Securities*, INVESTOPEDIA, http://www.investopedia.com/terms/f/fixed-incomesecurity.asp.

40. *See* Job, *supra* note 11, at n.14 (citing BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (New York: Oxford University Press, 1986)). "In 1884, Harvard University invested 51.9% of their endowment invested in bonds versus 0% of their endowment funds in 1830. . .Similarly, Princeton University had 3.4% invested in bonds in 1830 and 91.4% in 1884." *Id.*

41. TELLUS INST., *supra* note 21, at 8.

42. By the early 1940's, it is estimated that these universities had nearly 45 percent of their portfolios allocated to equities—at the expense of investment in real estate and mortgages. *See* TELLUS INST., *supra* note 21, at 8.

43. This allocation, or the "60/40" endowment allocation, was the prevailing endowment investment model at the turn of the Twenty-First Century. *See id.*; LONGSTRETH, *supra* note 40; Job, *supra* note 11, at 569-613; and WILLIAM L. CARY AND CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS (New York: The Ford Found., 1969).

From the wilderness of New Hampshire,[44] at the pinnacle of post-war prosperity, emerged a substantially more aggressive approach to endowment management. Dartmouth College's J. Peter Williamson[45] and John F. Meck, Jr.,[46] with support from the Ford Foundation, visited and collected data from finance officers at more than thirty American university campuses to produce "one of the most comprehensive studies to date on the management of endowment funds"—the "Barker Report."[47] Ushering in the foundation for the application of Modern Portfolio Theory[48] to endow-

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44. The Dartmouth College motto, "*Vox Clamantis in Deserto*," is translated in English to mean "A Voice Crying out in the Wilderness."

45. From 1961 to 1992, J. Peter Williamson was a professor of finance at Dartmouth College's Tuck School of Business, carrying the title of Laurence F. Whittemore Professor of Finance, Emeritus. *See J. Peter Williamson's Obituary*, RAND-WILSON FUNERAL HOME (July 30, 2012), http://rand-wilson.com/obituaries/obit_view.php?id=56.

46. John F. Meck, Jr., a 1933 graduate of Dartmouth College, served the College's administration in various positions such as vice president and chairman of Dartmouth's Investment Committee and ultimately as the College's Chief Financial Officer. *See* Interview by Jane Carroll with David T. McLaughlin, President Emeritus of Dartmouth College, in Hanover, NH and West Lebanon, NH (Nov. 8, 1996; Feb. 4, 1997; Oct. 23, 1997; and Dec. 10, 1997), http://www.dartmouth.edu/~library/rauner/archives/oral_history/oh_interviews_pdf/McLaughlin_David.pdf.

47. TELLUS INST., *supra* note 21, at 8-9. The 1969 report issued by the Advisory Committee on Endowment Management is actually entitled *Managing Educational Endowments: Report to the Ford Foundation* but was colloquially named for Wall Street financier Robert R. Barker, who chaired the Ford Foundation's Advisory Committee on Endowment Management as well as Harvard University's Board of Overseers. *See Robert R. Barker, 87, Endowment Expert*, N.Y. TIMES, (Nov. 16, 2002), http://www.nytimes.com/2002/11/16/nyregion/robert-r-barker-87-endowment-expert.html. *See also* ADVISORY COMM. ON ENDOWMENT MGMT., *Managing Educational Endowments: Report to the Ford Foundation* (New York 1969); J. PETER WILLIAMSON, *Performance Measurement and Investment Objectives for Educational Endowment Funds*, THE COMMON FUND (New York 1972).

48. Harry Markowitz, professor of finance at the University of California, San Diego's Rady School of Management, pioneered Modern Portfolio Theory—an idea that garnered the Nobel Prize in Economic Sciences. The theory, not wholly Markowtiz's work, was developed and has been subsequently applied and elaborated by economists Eugene Fama, Sidney Alexander, William Sharpe, James Tobin, Fischer Black, and Myron Scholes, among others. *See* TELLUS INST., *supra* note 21, at 9–10. A more nuanced discussion of Modern Portfolio Theory is beyond the scope of this article. However, reduced to its most basic elements, the finance theory is based upon the principle that carefully choosing the proportions of various assets for investment through diversification can maximize a portfolio's expected return against some portfolio risks. *See* Harry Markowitz, *Portfolio Selection*, 7 J. OF FIN. 77-91 (1952). "Modern Portfolio Theory is the simple proposition that risk and return are highly correlated, and that with greater risk come higher returns. [The theory also] provides a framework for managing risk at the portfolio level, primarily through diversification. . . . Because of their fundamentally long-term investment horizon, endowments seemed to have a much higher tolerance for risk precisely because they could weather short-term volatility in pursuit of higher long-term returns." TELLUS INST., *supra* note 21, at 10 (citations omitted).

ment management,[49] the report proposed that endowment managers should focus investment to maximize long-term total return in place of investing endowment funds solely to secure income.[50]

The practical strictures of endowment management had to be loosened to allow for the application of Modern Portfolio Theory to take effect. In the first half of the Twentieth Century, many endowment fund managers could only distribute income generated by the university endowment's investments. Thus, an endowment's investment income necessarily fell when it was divested of bonds and income-producing assets in favor of common corporate stock shares.[51] This valuation decrease would occur because "the dividend payout rate on common stocks was lower than the rates of return available on fixed-income securities."[52] Under the old rules, university endowment management, managers who invested for capital appreciation would have been unable to make adequate endowment distributions, straining many university institutional budgets. "In order for endowment fund managers to maximize the benefits of investing in corporate stocks, they had to change their accounting methods . . . from an income-only accounting method to one allowing for [total-return] accounting."[53] Such a paradigm shift also required reshaping commonly held notions of endowment income; the more inclusive definition of endowment income advocated by the report not only encompassed the actual yield generated from interest and dividends but also contemplated unrealized capital gains from any appreciation in the principal value of the endowment's securities.[54]

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49. Because the Barker Report confined itself to marketable securities, its strategic approach remained a far cry from the Endowment Model of Investing that would arise in the later era of David Swensen and Jack Meyer." TELLUS INST., *supra* note 21, at 9. David Swensen, Yale University's Chief Investment Officer since 1985, and Dean Takahashi credited with developing what is arguable the most successful applications of Modern Portfolio Theory to university endowment management (and most contentious, costly, and cumbersome of approaches when tailored to other universities)—the "Yale Model." *See* Rick Ferri, *The Curse of the Yale Model*, FORBES (April 16, 2012), http://www.forbes.com/sites/rickferri/2012/04/16/the-curse-of-the-yale-model/2/.

50. *See generally* ADVISORY COMM. ON ENDOWMENT MGMT., *Managing Educational Endowments: Report to the Ford Foundation* (New York 1969).

51. *See* Job, *supra* note 11, at 574.

52. *Id.*

53. *Id.* at 574-75. "For example, suppose C University has an endowment with 1000 shares of XYZ Corp[.] with a cost basis of $10. Over the past year, XYZ Corp[.] stock paid $3 a share in dividends and has increased in value to $15 a share. Under an income-only accounting method, C University will have $3,000 of income and depending on its spending strategy will be able to distribute up to $3,000. Under a system of total return accounting, 'income' includes some price appreciation in addition to the dividends paid by XYZ Corp[.] Thus, C University will have at most $8,000 of income to distribute ($3,000 in dividend income and $5,000 in unrealized appreciation in XYZ stock). Generally, a portion of the $8,000 would be allocated to income in order to allow for inflation and other expenses of the endowment fund." *Id.* at n. 20.

54. *See* ADVISORY COMM. ON ENDOWMENT MGMT., *Managing Educational En-*

In short, the Barker Report, and subsequent studies issued by the Ford Foundation's Advisory Committee on Endowment Management, fundamentally changed the landscape of endowment investment strategy. In the wake of these reports, endowment trustees pursued growth, casting aside their aversion of risk and fears of short-term volatility—even if doing so meant delegating investment authority to external managers "who could seize investment opportunities unavailable to finance officers on campus."[55] These reports, pacing the emerging finance theory of the day, argued that universities were forfeiting capital gain returns because of their mistaken understanding of the definition of prudence.[56] Shifting the focus from secure endowment income to growth and total-return, university finance officers began to pay attention to the message of these reports and increasingly devolved management of their endowments to professional asset managers,[57] who applied true Modern Portfolio Theory techniques to generate higher risk-adjusted investment returns—even turning to non-traditional investment vehicles.[58] For nearly half-a-century, Modern Portfo-

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dowments: Report to the Ford Foundation (New York 1969). *See also* Job, *supra* note 11, at 575.

55. TELLUS INST., *supra* note 21, at 9. Nevertheless, by downplaying the importance of risk and volatility and de-emphasizing liquidity, the Barker Report and the other Ford Foundation reports on educational endowment management helped lay the intellectual foundations for a new paradigm of higher-risk, higher-return investment management strategies for nonprofit endowments. *Id.*

56. *See generally* WILLIAM L. CARY & CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS (1969); WILLIAM L. CARY & CRAIG B. BRIGHT, THE DEVELOPING LAW OF ENDOWMENT FUNDS: "THE LAW AND THE LORE" REVISITED (1974). *Compare* RESTATEMENT (THIRD) OF TRUSTS (1992) (revising the prudent investor portions of the Second Restatement) *with* RESTATEMENT (SECOND) OF TRUSTS (1959).

57. Perhaps, the message was amplified by the movement of a few major endowments to a total-return investment strategy, thereby entering the stock market on a greater scale and divesting of fixed-income securities—like bonds with declining value due to "increased interest rates, high inflation, and poor stock market performance . . . ." Job, *supra* note 11, at 575–76. However, perhaps foreshadowing the ultimate concern with the application of Modern Portfolio Theory to university endowments, this shift marked an end to the bull market of the 1960s and caused precipitous losses in the value of many endowment funds. For example, from June 1973 to October 1974, Harvard University lost roughly $300 million dollars from its endowment, while Dartmouth College's endowment fell from over $170 million to between $130 million and $135 million. Michael C. Jensen, *From Ivory Tower to Bottom Line*, N.Y. TIMES, Jan. 15, 1975. Over the span of a decade—from 1967 to 1978—Yale University's endowment reported no growth, even though it received more that $100 million in gifts during the same time period. *Yale Buys Interest in Corning Building*, N.Y. TIMES, Dec. 10, 1978.

58. Among the non-traditional investment vehicles that endowment managers experimented with in the late 1970s were: private equity funds, hedge funds, commodities, including timber, oil and gas partnerships, "venture capital, . . . foreign equities[,] . . . shopping ventures, office buildings,. . . unimproved land." Job, *supra* note 11, at 576. *See also* Lee Smith, *A Small College Scores Big in the Investment Game*, FORTUNE, Dec. 18, 1978, at 68 (detailing the investment of funds from Grinnell College's endowment in venture capital—capitalizing Intel Corporation—and a television

lio Theory-based investment strategies enabled university endowments to grow an unprecedented rates, and as university endowment assets continued to increase, endowment managers experimented more with alternative investments, many of which possess more risk than stocks and bonds and are, thus, more susceptible to extended losses.[59] Manifested in various forms, the application of Modern Portfolio Theory to endowment management prevailed at the onset of the Great Recession and, for better *and* for worse, is still the dominant investment theory at the time of this article's publication.

PART II

A. The Development of American University Endowment Law

Legal regimes are often slow-moving, even glacial, in keeping pace with market needs. Thus, when adverse economic factors, such as a recession, necessitate changing business models, the contributions of forward-thinking minds[60] in the areas of economic policy and theory have profound implications upon shaping a solution to curb negative market trends and ultimately upon the way the law develops to recalibrate a balance of market interests. Occasionally, however, the law sets the pace. For instance, in the Eighteenth and early Nineteenth Centuries, American universities invested endowment funds in only the safest assets available,[61] but with one judicial decision, *Harvard College v. Amory*, the Massachusetts Supreme Court liberalized this investment strategy.[62] Adopting the "prudent person" rule, the court held that a trustee's fiduciary duty in the governance of a trust—the college's endowment—was based on "how men of prudence, discretion

station). Such non-traditional investments, however, did not always pan out. In fact, in the late 1990s, a portion of Brown University's $1 billion endowment was invested with the Bermuda-based hedge fund, Everest Capital Limited, which lost more than $1.3 billion of its $2.7 billion in assets under management in less than eight months. Brown University's endowment was not the lone university endowment that suffered; Yale University, Emory University, and the University of Iowa also had funds invested with Everest Capital during this time. Lynn Arditi, *Brown University Won't Comment on Endowment's Loss in Hedge Funds*, PROVIDENCE J., Oct. 7, 1998, at 1F.

59. *See* Job, *supra* note 11, at 576.

60. This article counts Barker, Meck, and Williamson, among the brain trusts who led the way for the application of Modern Portfolio Theory to endowment management in the early going, along with William L. Cary, once Dwight Professor at Columbia Law School and former chairman of the Securities and Exchange Commission from 1961 to 1964. *See William Carey, Former S.E.C. Chairmen Dies at 72*, N.Y. TIMES (Feb. 9, 1983), http://www.nytimes.com/1983/02/09/obituaries/william-carey-former-sec-chairman-dies-at-72.html.

61. *See* TELLUS INST., *supra* note 21, at 8.

62. Harvard Coll. v. Amory, 9 Pick. 446 (Mass. 1830). This decision articulated the formula for the prudent person rule, which became the national benchmark for endowment management for over a century.

and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, and as well as the probable safety of the capital to be invested."[63]

If not in practice, by today's definition, a prudent person would seemingly satisfy this standard with an investment in common stock; however, the early Nineteenth Century notion of this fiduciary duty—informed by the proliferation of the prudent person rule across the country—seems to require that a trustee avoid speculative investments such as common stocks in order to pursue income and preserve capital.[64] The prudent person rule, as articulated by the court in *Harvard College v. Amory*, dominated the legal theory of endowment management for nearly a century until it gradually became disfavored in the early part of the Twentieth Century and had all but eroded by the time the Barker Report was published. In the last fifty years, Modern Portfolio Theory, advanced by the Barker Report and its successors, gave rise to the development of new institutions and legal norms that centered on the theory of total-return maximization. Among them are the National Association for College and University Business Officers (NACUBO),[65] the Common Fund for Nonprofit Organizations,[66] and the 1972 Uniform Management of Institutional Funds Act (UMIFA).[67]

Universities organized as state instrumentalities or operated exclusively for educational purposes could be subject to the broad jurisdictional hook of the UMIFA "to the extent that [the university] holds funds exclusively for [educational] purposes."[68] Approved by the National Conference

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63. *Id.* at 469 (citing Hall v. Cushing, 9 Pick. 395 (Mass. 1830)). *See also* TELLUS INSTITUTE, *supra* note 21, at 8; LONGSTRETH, *supra* note 40, at 3.

64. TELLUS INST., *supra* note 21, at 8.

65. Originally headquartered at Dartmouth College and founded in 1963, NACUBO is a membership organization representing university business and financial officers through "advocacy efforts, community service, and professional development activities . . . to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions." *See About NACUBO*, NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS, http://www.nacubo.org/About_NACUBO.html (last visited Feb. 4, 2016).

66. The Common Fund is a not-for-profit organization "launched with Ford Foundation seed funding to provide joint investment management of endowment funds." *See* TELLUS INST., *supra* note 21, at 10.

67. The UMIFA codified many of the recommendations of the Ford Foundation reports into new, more flexible fiduciary duty standards and opened the door to increasingly riskier investment strategies. *See id.* at n.11. "According to the Ford Foundation Annual Report for 1969, the Foundation set aside $800,000 to create the Common Fund following publication of the Barker Report and Cary and Bright's legal analysis. Since 1998 the organization has been known simply as Commonfund. Dartmouth Treasurer Meck became president of the Common Fund, and both he and Bright served on the advisory committee to the National Conference of Commissioners on Uniform State Laws, which prepared the UMIFA." *Id.*

68. UNIF. MGMT. OF INST. FUNDS ACT § 1(1), 7A U.L.A. 484 (1999).

of Commissioners on Uniform State Laws in 1972, UMIFA took hold in many jurisdictions contemporaneously with the proliferation of the application of the Modern Portfolio Theory to endowment management.[69] In many ways, the UMIFA was seen as a direct response to the growing tenet among university financial officers that maximizing endowment growth—even at the expense of stability—was preferable to an investment model that sought to preserve the purchasing power of the endowment.[70]

The UMIFA also established guidelines relating to the delegation of authority to invest endowment funds,[71] the authority of trustees and the responsibility for managing the endowment,[72] and the scope of the application of a total-return approach to investing endowment funds,[73] as well as liberalized standards of care and prudence for trustees in the execution of their duties.[74] At the same time, the UMIFA provided endowment managers with more freedom than previous regimes. For example, in terms of executing annual spending and distribution duties, the UMIFA allowed managers to operate under the traditional income-only standard or a total-return standard,[75] and for investment purposes, allowed fund managers to invest under a liberalized prudent person rule.[76]

Before the UMIFA, endowment managers invested significant percentages of endowment funds in high-yielding, fixed-income vehicles, because endowment managers were able to spend only income produced by the endowment. Though high-yielding investments maximized endowment income returns, these investments had nominal price appreciation and thus were unable to maintain an endowment's purchasing power when the inflation rate exceeded the interest rate of the investment vehicle.[77] Frequently, a university's financial obligations "led [its] managers, contrary to their best long-term judgment, to forgo investments with favorable growth prospects if they had a low current yield." The UMIFA, however, directly addressed this concern by equipping endowment managers with the ability to elect liberal spending strategies:

> The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation . . . in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard es-

69. Job, *supra* note 11, at 572–73.
70. *Id.* at 573.
71. UNIF. MGMT. OF INST. FUNDS ACT § 5.
72. UNIF. MGMT. OF INST. FUNDS ACT §§ 4, 6.
73. UNIF. MGMT. OF INST. FUNDS ACT § 2.
74. UNIF. MGMT. OF INST. FUNDS ACT § 6.
75. UNIF. MGMT. OF INST. FUNDS ACT § 2.
76. UNIF. MGMT. OF INST. FUNDS ACT § 6.
77. Job, *supra* note 11, at 578.

> tablished by Section 6. This Section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.[78]

Not only did the UMIFA provide trustees with more latitude for spending, but it also loosened restrictions on the types of investment vehicles that trustees could select;[79] this officially opened trustees and their endowments to diversification practices, exposing them to new market risks.

The complexity and volatility of the markets required an abdication of the Second Restatement on Trusts' duty for a trustee not to delegate "acts which the trustee can reasonably be required to personally perform."[80] However, for years, the law was unsettled on the position of whether a trustee could delegate endowment management to an officer of the university or an advisor outside of the university. There was no substantial authority that barred a board of trustees from delegating its endowment's investment responsibilities "to other responsible [agents], subject of course to the overall supervision of the board of directors."[81] Finally, Section 5 granted the

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78. UNIF. MGMT. OF INST. FUNDS ACT § 2. Section 2, under which this provision is housed within the UMIFA, permitted the trustees to expend net appreciation funds subject to a relativistic standard of "ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision." UNIF. MGMT. OF INST. FUNDS ACT § 6. The shift from a stringent trustee standard of care to a more relaxed standard was deliberately contemplated in the drafting of the section. *Id.* The duty of care is "cast in terms of the duties and responsibilities of a manager of a nonprofit institution. Directors are obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated." *Id.* Just prior to the UMIFA's adoption, courts began rolling back the strictures of the Second Restatement's prudent person rule. *See* Stern v. Lucy Webb Hayes Nat'l Training Sch., 381 F. Supp. 1003 (D.D.C. 1974) (noting also that the District of Columbia's local enactment of the UMIFA occurred in 1977); Denckla v. Independence Found., 193 A.2d 538 (Del. 1963); City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487 (N.J. Super. 1967). Others yet defended the prudent person standard. *See* California v. Larkin, 413 F. Supp. 978 (N.D. Cal. 1976); Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal. 2d 750 (Cal. 1964); Lynch v. John M. Redfield Found., 9 Cal. App. 3d 293 (Ct. App. 1970). The UMIFA's relaxed standard of prudence—although not fully clear—was aimed at settling the uncertainty that had sprung up from the stricter Second Restatement's requirements that trustees were "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property," and were directed "to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived." RESTATEMENT (SECOND) OF TRUSTS § 227. *Compare with* UNIF. MGMT. OF INST. FUNDS ACT § 6.

79. UNIF. MGMT. OF INST. FUNDS ACT § 4.

80. RESTATEMENT (SECOND) OF TRUSTS § 171 (1959). For instance, prior to the UMIFA, a trustee was barred from delegating the selection of investments. *Id.*

81. *But see* Boston v. Curley, 177 N.E. 557 (Mass. 1931) (disallowing such a del-

trustees of the universities in UMIFA jurisdictions authority to delegate investment management to proprietary investment advisory and management services, provided that the governing board maintained a "standard of business care and prudence when delegating the responsibility of investment policy and the selection of competent investment agents."[82]

For thirty-five years, the UMIFA governed university endowment management in forty-seven states and the District of Columbia;[83] however, in 2006, the National Conference of Commissioners on Uniform State Laws redrafted the UMIFA.[84] The result of this initiative is the Uniform Prudent Management of Institutional Funds Act (UPMIFA).[85] In many ways, the UPMIFA grants university endowment managers more freedom than the UMIFA. For example, because donor intent is not always readily ascertainable, the UPMIFA supplies a balancing test to permit modification of restrictions on gifts in certain limited circumstances, and thereby allow universities prescribed methods of invading the principal.[86] The UPMIFA's

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egation). It should come as no surprise that a few state courts disagreed with the Massachusetts Supreme Court's decision in *Boston v. Curley*—including the very same court in an earlier decision. *See* Wilstach Estate, 1 Pa. D. & C.2d 197 (Orphans' Ct. Pa. 1954); Mass. Charitable Mechanic Ass'n v. Beede, 70 N.E.2d 285 (Mass. 1947); Graham Bros. Co. v. Galloway Women's Coll., 81 S.W.2d 837 (Ark. 1935); City of Bangor v. Beal, 26 A. 1112 (Me. 1892).

82. *See* Job, *supra* note 11, at 583.

83. As of 2005, forty-seven states and the District of Columbia had in fact adopted UMIFA. While Arizona did not explicitly adopt the UMIFA, its code approximated the UMIFA. *See* ARIZ. REV. STAT. §§ 10-11801—10-11807 (West 2003). Alaska and Pennsylvania, however, never adopted legislation in step with the UMIFA model. *See* Job, *supra* note 11, at n.2. *See also* Susan L. Davis, *There's a New Sheriff in Town: UPMIFA Drives Accounting and Reporting Changes for Endowments*, MCGLADREY, 1 (2012), *available at* http://mcgladrey.com/pdf/newsheriff_upmifa_drivesaccounting_reporting.pdf. The UMIFA was supplanted, only very briefly by the Uniform Prudent Investors Act [hereinafter UPIA]. UNIF. PRUDENT INVESTOR ACT (UNIF. LAW COMM'N 1994).

84. For further reading about the redrafting process, including copies of proposed drafts, see *The National Conference of Commissioners on Uniform State Laws: Drafts on Uniform and Model Acts Official Site*, http://www.law.upenn.edu/bll/ulc/ulc.htm (last visited Mar. 4, 2013). For a copy of the January 2005 proposed draft, see *The National Conference of Commissioners on Uniform State Laws: Draft Uniform Management of Institutional Funds Act Proposed Draft* (Jan. 2005), http://www.law.penn.edu/bll/ulc/umoifa/2005JanDraft.pdf.

85. Adopted by 44 states and counting, the UPMIFA alters the UMIFA in key ways—including introducing a new prudence standard—that this article will discuss. *See* Kieran P. Marion, *Uniform Prudent Management of Institutional Funds Act (UPMIFA)*, UNIF. L. COMM'N, 1, November 2009, http://www.michiganfoundations.org/s_cmf/bin.asp?CID=2523&DID=38644&DOC=FILE.PDF.

86. ASS'N OF GOVERNING BD. OF UNIV. AND COLL., *Spending and Management of Endowments under UPMIFA*, COMMONFUND INST., 11 (2010), *available at* http://agb.org/sites/agb.org/files/UPMIFASurvey_2010_RePrint_lowres.pdf. "UPMIFA includes a provision that allows a charity to modify a restriction on a small (less than $25,000) and mature (over 20 years old) fund without going to court. If a re-

"Rules of Construction" allow university endowment managers to discern donor intent with regard to "spending, the desire to create an endowment of a permanent duration, and the ability to react accordingly with respect to investment strategies and spending policies once that determination has been made."[87] This balancing test further blurs the line between true and quasi-endowments.

In addition, the UPMIFA provides a safe-harbor for endowment spending—seven percent of the endowment's fair market value—for states to consider,[88] in an effort to spur long term prudent spending and investment policies.[89] Also, not explicitly contemplated by the UMIFA, the UPMIFA gives special treatment to the "preservation of the endowment fund."[90] Section 4 of the UPMIFA examines whether, in the course of the university's management of the endowment, a donor intended that his original gift maintain its purchasing power—that is, need to be increased to keep pace with inflation and accumulated market gains—or simple preservation is all that is intended by the donor and required by the state jurisdiction.[91] The UPMIFA still imposes limits on the original value of a donor's gift that a university may spend.[92] Rather than establishing a bright-line rule for this limit, however, the model language provides a loose standard—including "the duration and preservation of the endowment fund" and "general economic conditions"—to be considered in the endowment managers' calculus before invading the principal.[93] Finally, and perhaps most notably, the revised Act also eliminates the concept of the historic dollar value of the fund, for purposes of determining the restricted principal assets of the fund that the university may not spend.[94] This would allow universi-

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striction has become impracticable or wasteful, the charity may notify the state charitable regulator, wait 60 days, and then, unless the regulator objects, modify the restriction in a manner consistent with the charitable purposes expressed in any documents that were part of the original gift. Note that the specifics of the provision may vary from state to state, and many legislatures modified the provision to increase the threshold value below which institutions can modify restrictions that may have become illegal, impracticable, or wasteful." *Id.*

87. Davis, *supra* note 83, at 3 (analyzing UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4(c) (Supp. 2008)).

88. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4(d) (Supp. 2008).

89. *See* Davis, *supra* note 83, at 2–3.

90. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4(a)(1) (Supp. 2008).

91. *See* Davis, *supra* note 83, at 2.

92. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4(a)(1).

93. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4(a)(3); 7A U.L.A. pt. 3, at 17 (Supp. 2008).

94. In short, the historic dollar value of an endowment fund is the aggregate fair value in dollars of the fund at the time of its creation, including each subsequent donation to the fund made pursuant to a direction in the gift instrument at the time it is made. Typically, the university's determination of this value is held to be a conclusive measure of the historic dollar value of the fund.

ties to spend underwater endowments without violating the law.[95]

The UMIFA, which in its course relaxed the prudent person rule, played a key part in the enormous gains and tremendous loss in university endowment value from the late Twentieth Century to the onset of the Great Recession. However, after the significant depreciation in endowment values had taken place, none of the UPMIFA's features, especially its relaxed spending rules, could have put an end to the initial damage wrought by unchecked university endowment spending under the liberalized rules of the UMIFA.[96] The effect of a recessionary economy on university endowments, a topic which the subsequent section explores, illustrates why the UPMIFA, like its predecessor, may prove to be ineffective in the absence of a practicable solution to allowing endowment managers to spend endowment funds—at pre-crisis levels that the post-crisis endowments simply could not sustain—in a virtually unconstrained endowment management environment.[97]

PART III

A. The Effect of the Great Recession on American University Endowments

In addition to investment gains and losses, modern university endowments' market values are affected by additions through contributions, withdrawals for operational expenses, capital expenses, and management fees, and as such cannot be said to represent directly an investment rate of return for the endowments' portfolio; however, investment returns account for the majority of year-to-year market valuation changes.[98] This is, in part,

95. This is, of course, because the safe-harbor provision is explicitly optional and has only been adopted in a few jurisdictions. *See* Conti-Brown, *supra* note 10, at 719–20.

96. *See id.* at 720–21. It has been argued that the UPMIFA legislation is at best ineffective because even in the throes of the Great Recession, university business officers did not clamor for its ratification; in fact, Harvard officials were not even familiar with the UPMIFA legislation before the Massachusetts legislature. *See* Peter F.Zhu, *Bill May Allow Flexibility*, HARVARD CRIMSON (Jan. 28, 2009), http://www.thecrimson.com/article/2009/1/28/bill-mayallow-flexibility-massachusetts-lawmakers.

97. *See* Conti-Brown, *supra* note 11, at 702–03.

98. *See, e.g.*, NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2014 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2013 to FY 2014* (2015) at title page, http://www.nacubo.org/Documents/EndowmentFiles/2014_Endowment_Market_Values_Revised2.27.15.pdf. Although the market value of a university endowment is most nearly related to the performance of its investment portfolio, endowment values do increase when a university has a successful development campaign and conversely, tend to stagnate—but not necessarily decline—when donor contributions and investment returns are limited. For example, in FY2014, the University of Chicago endowment had

because university endowments have among the most diversified portfolios available, including holdings in indexed funds, hedge funds, private equity groups, and venture-capital funds, as well as real estate and commodities.[99] The stocks held by each of these funds are numerous, constantly shifting, and—even for investors—hard to determine.[100] From this perspective, the Great Recession's deleterious effect on university endowments,[101] and the losses in asset values felt throughout the majority of the global financial market,[102] is a foreseeable, if not likely, market risk. The tremendous growth between FY2004 and FY2008 produced historic highs in the market values of endowment funds; however, much of this progress was lost in FY2009. In the early going, experts predicted an average loss of 23 percent of university endowment market values in just five months.[103] While most of the top university endowments have dramatically improved over their FY2009 losses,[104] much of the wealth lost by university endowments since

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a market value totaling $7,545,544,000, up from $6,668,974,000 in FY2013. Its investment returns generated over $839,000,000 to the endowment, yet the difference of the FY2014 and FY2013 market values is $876,570,000—which would include the addition of investment returns and donor contributions, less expenditures and management fees. *See Annual Report: The Endowment Investment Performance*, UNIVERSITY OF CHICAGO, https://annualreport.uchicago.edu/page/endowment (last visited Aug. 1, 2015).

99. *See* Fishman, *supra* note 18, at 203.

100. Brian Rosenberg, *For College Endowments, Ethical Stands Can Be Complicated*, CHRON. HIGHER EDUC., March 22, 2013, at A29.

101. Deborah Brewster, *Yale Fund Loses 25% in Four Months*, FIN. TIMES (London), Dec. 17, 2008; John Hechinger & Craig Karmin, *Harvard Hit by Loss as Crisis Spreads to Colleges*, WALL ST. J., Dec. 4, 2008; Katie Zezima, *Data Show College Endowments Lost 23% in 5 Months, Worst Drop Since '70s*, N.Y. TIMES, Jan. 27, 2009.

102. Of course, even in a recession, not everyone loses his shirt. *See* MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010).

103. Zezima, *supra* note 101, at A17.

104. *See* NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2014 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2013 to FY 2014* (2015), http://www.nacubo.org/Documents/EndowmentFiles/2014_Endowment_Market_Values_Revised2.27.15.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2013 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2012 to FY 2013* (2014), http://www.nacubo.org/Documents/EndowmentFiles/2013NCSEEndowmentMarket%20ValuesRevisedFeb142014.pdf; NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: Table 376. Endowment Funds of the 120 Colleges and Universities with the Largest Endowments, by Rank Order: 2010 and 2011* (2012), http://nces.ed.gov/programs/digest/d12/tables/dt12_376.asp (noting an average sixteen percent increase nationally in endowment market values); Geraldine Fabrikant, *Harvard Endowment Reports 11% Return for Year*, N.Y. TIMES, (Sept. 10, 2010), (underscoring Harvard's impressive post-crisis return); *MIT Releases 2010 Endowment Figures*, MASS. INST. OF TECH. (Sept. 27, 2010), http://web.mit.edu/newsoffice/2010/endowment-0927.html (noting MIT's ten percent endowment increase); *Princeton Endowment Earns 14.7% Return*, PRINCETON UNIV.,

FY2008 remained unrecovered until FY2013 and FY2014, over six years from the onset of the Great Recession.

Over the FY2004 to FY2014 fiscal decade, the average and annual investment rates of return for university endowments and affiliated foundations that participated in the National Association of College and University Business Officers Commonfund Study of Endowments from FY2004 to FY2014 indicates the strong pattern of growth in the mid 2000s, a precipitous decline during the early years of the Great Recession, then a quick rebound as well as more volatility, which does not result in positive gains until FY2013. Though endowment losses have been tied to economic recession patterns for the last half a century,[105] by contrast, the last time endowment market values reported losses coincides with a brief recession at the turn of the millennium.[106] From June 30, 2000 to June 30, 2003, the top 120 university endowments declined by approximately two percent per year for a total overall decrease in value of six percent over three fiscal years[107]—less than one-third of the loss sustained in FY2009. In FY2005, FY2006, and FY2007, participating universities reported 9.3 percent, 10.8 percent, and 17.2 percent, respectively, average annual returns from their endowment investments.[108] The substantial gains from FY2005 to FY2007

Oct. 15, 2010, http://www.princeton.edu/main/news/archive/S28/71/07M45/index.xml?section=topstories (reporting Princeton's endowment return for 2010); *Stanford Management Company Announces 2010 Results*, STANFORD UNIV., Sept. 28, 2010, http://news.stanford.edu/news/2010/september/merged-pool-return-092810.html (announcing Stanford's 14.4% return for fiscal year 2010); *Yale Endowment Grows by 8.9%, a Gain of $1.4 Billion*, YALE DAILY BULLETIN, Sept. 24, 2010, http://dailybulletin.yale.edu/article.aspx?id=7789 (announcing Yale's endowment return for 2010).

105. Endowments have also reported losses coinciding with recessions during the early 1990s, early 1980s, and early 1970s. *See How Universities Are Suffering in the Recession*, EDUC. INSIDER, http://education-portal.com/articles/How_Universities_Are_Suffering_in_the_Recession_What_That_Means_for_You.html (last visited August 1, 2015).

106. Following what may have been the longest period of economic growth in American history during the 1990s, the dot-com bubble burst on the eve of the September 11, 2001 attacks, bringing nearly a decade of economic growth to an end. Despite these shocking events, this brief recession had run its course by June of 2002. *See* NAT'L BUREAU OF ECON. RESEARCH, *The Business-Cycle Peak of March 2001*, (Nov. 26, 2001), http://www.nber.org/cycles/november2001/.

107. *See* NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: Table 358. Endowment Funds of the 120 Colleges and Universities with the Largest Endowments, by Rank Order: 2000 and 2001* (2002), http://nces.ed.gov/programs/digest/d02/tables/PDF/table358.pdf; NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: Table 359. Endowment Funds of the 120 Colleges and Universities with the Largest Endowments, by Rank Order: 2003 and 2004* (2004), http://nces.ed.gov/programs/digest/d04/tables/dt04_359.asp.

108. 2014 NACUBO-Commonfund Study of Endowments, *Average and Median Annual Investment Rates of Return for U.S. College and University Endowments and*

are significant but appear to have been erased entirely by returns losses during the Great Recession: in FY2008 and FY2009, participating universities report 3.0 percent and 18.7 percent losses.[109] After these significant losses for two fiscal years, FY2010 promised a marked initial improvement, at an average gain of 11.9 percent.[110] However, the next two fiscal years were characterized by volatility: in FY2011, participating universities reported a 19.2 percent gain, followed by an average loss of 0.3 percent in FY2012.[111] Finally, FY2013 and FY2014 saw a return to steady growth, as participating universities reported an 11.7 and 15.5 percent average annual return, respectively.[112]

While many university endowment market values had finally returned to pre-recession levels by FY2014, when one considers how university endowment investment and stocks were tied up with one another since the Modern Portfolio Theory was first applied to university endowment investment strategy, it is troubling that it took an historic bull market of FY2013 and FY2014[113] to pull university endowment returns back to their pre-Recession levels. In just one fiscal year, FY2009, the 120 largest university endowments by value lost an average of 22 percent of their market value, totaling a staggering $68,572,004,000 in losses.[114] In the following fiscal year, from June 30, 2009 to June 30, 2010, exactly 60 percent of these universities reported losses or single-digit gains in endowment market value, while the majority of the other 40 percent fortunate enough to report double-digit gains accrued nominally above ten percent increases in endowment market value.[115] Although these gains took place in the final

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Affiliated Foundations Fiscal Years Ending June 30, 2014-2005 (2015) http://www.nacubo.org/Documents/EndowmentFiles/2014_NCSE_Public_Tables_Annual_Rates_of_Return.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. On July 3, 2014, four days after the close of FY2013, the Dow Jones Industrial Average reached its highest close in history at 17,000 points. This high close was eclipsed on December 23, 2014 at 18,000 points. For the most part, the DJIA closing values remained exceptionally high until August 2015, when it fell below 16,000 points. *Dow Jones Industrial Average Historical Prices*, YAHOO FINANCE, https://finance.yahoo.com/q/hp?s=%5EDJI+Historical+Prices (last accessed August 15, 2015). But see James K. Galbraith, *Why We Won't Get to Normal*, POLITICO, (July 31, 2014), http://www.politico.com/magazine/story/2014/07/the-new-normal-109616.html?ml=m_u6_1#.Vd8eUbSm3BK (presaging that the boom of late 2014 and early 2015 would be something of a flash in the pan, and that the return to a pre-2008 economy is likely unattainable).

114. *See supra* note 19.

115. NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: Table 376. Endowment Funds of the 120 Colleges and Universities with the Largest Endowments, by Rank Order: 2009 and 2010* (2011), http://nces.ed.gov/programs/digest/d11/tables/dt11_376.asp.

months of the Great Recession, this rate of growth roughly illustrates the annual endowment growth in good years since the Modern Portfolio Theory took hold; however even these gains come at a cost.

Considering the long term impact of the ten boom-and-bust fiscal years between FY2004 and FY2014 on the 835 universities participating in NACUBO-Commonfund's ten-year survey of university endowments: (1) trailing three-year annual returns from FY2014 averaged 9.0 percent; (2) trailing five-year returns from FY2014 averaged 11.7 percent; and (3) trailing ten-year annual returns from FY2014 averaged 7.1 percent.[116] The ten-year annual return figures were substantially buoyed by the 132 universities with endowments with assets of $501,000,000 and greater; this university endowment group, comprising just 15.8% percent of the total sample, was the only sector to exceed the average ten-year annual return result.[117] Despite the promise of returning to robust growth that the gains between FY2010 and FY2014, many endowment values have yet to erase the losses realized in FY2009 during the height of the Great Recession. This effect was referenced earlier in the article as it applied to Harvard and Yale, the top two endowment funds by market value between FY2008 and FY2013; however, this effect persists beyond the elite endowment funds.[118] While a 7.1 percent average annual return over a ten-year period is nothing to sneeze at, as was the case between FY2004 and FY2014, it is worth investigating whether a more prudent investment strategy over this same period might have yielded less volatile results. To this end, in addition to Harvard and Yale, one institution's endowment from each band of ten of the top 100 endowments by market value in FY2004 was selected at random and tracked to FY2014 both to ascertain the effect of the recession as well as measure an alternative investment strategy—i.e. investing the market value of the endowment in FY2004 purely in ten-year treasury bonds—over ten years would yield different results.[119]

A top-10 endowment in FY2004, Emory University had an endowment market value of $4,535,587,000 five years before FY2009, when it would fall to $4,328,436,000, but grow again to $6,681,479,000 by FY2014; however, at average annual return rates for ten-year treasury bonds, if the market value of the endowment were invested solely in ten-year treasury bonds—an investment vehicle carrying among the least

116. 2013 NACUBO-Commonfund Study of Endowments, *Average and Median Annual Investment Rates of Return for U.S. College and University Endowments and Affiliated Foundations Fiscal Years Ending June 30, 2014-2004* (2015), http://www.nacubo.org/Documents/EndowmentFiles/2014_NCSE_One_Three_Five_and_Ten_Year_Returns.pdf.

117. These same universities reported the highest returns for the trailing three- and ten-year periods, and lagged the highest five-year return, indicating their disproportionate impact on the national picture of university endowment health.

118. *See supra*, at note 16.

119. *See infra*, Tables 1–12.

risk—its would have grown at a fixed total rate of 60.98 percent between FY2004 and FY2014 to $7,301,561,966.[120] On the other hand, the market values of Cornell University, Johns Hopkins University, University of Washington, and Indiana University, which represent the top-20, top-30, top-40 and top-50 endowment market values, respectively, all outpaced a fixed 60.98 percent earning rate from their FY2004 totals, accumulating 81.88 percent, 67.93 percent, 115.27 percent, and 96.34 percent over their FY2004 market values by FY2014.[121] Importantly, however, each of these institutions had only modestly, if at all, surpassed their FY2008 levels by FY2013.[122]

Outside of the top-50 endowments by market value in FY2004, the results are the opposite. Among University of Cincinnati, Wake Forest University, Tulane University, Oberlin College, and Northeastern University, which represented the top-60, top-70, top-80, top-90, and top-100 endowments, respectively, only Tulane University reported an increase over the fixed rate of its FY2004 endowment market value by FY2014—totaling a 70.92 percent gain.[123] Each other university's endowment in the top-50 to top-100 band, managed through conventional means between FY2004 and FY2014, was valued lower than it would have been if it were instead converted to ten-year treasury bonds in FY2004, earning a 60.98 fixed rate increase over the fiscal decade.[124] As of FY2013 none of these universities, including Tulane University, had returned to their FY2008 market value levels; however, all but one narrowly surpassed its FY2008 market value levels by FY2014.[125] Wake Forest University's endowment, topping $1,253,673,000 on June 30, 2008, lost nearly 29.27 percent of its market value, falling to $886,761,000 by June 30, 2009.[126] The following year, Wake Forest's endowment grew by 5.74 percent, totaling $937,639,000 in market value, and by FY2011, its endowment market value gained 12.86 percent, ending the fiscal year at a $1,058,250,000 market value.[127] FY2012

120. *See infra*, Table 3.
121. *See infra*, Tables 4–7.
122. *See infra*, Tables 4–7.
123. *See infra*, Table 10.
124. *See infra*, Table 8–12.
125. *Id.*
126. *See infra*, Table 9. *See also* NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2009 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2008 to FY 2009* (2010), http://www.nacubo.org/Documents/research/2009_NCSE_Public_Tables_Endowment_Market_Values.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2008 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2007 to FY 2008* (2009), http://www.nacubo.org/documents/research/NES2008PublicTable-AllInstitutionsByFY08MarketValue.pdf.
127. NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2011 En-*

brought a 5.49 percent loss to Wake Forest's endowment fund market value, which totaled $1,000,133,000 USD, and FY2013 returns increased its endowment fund market value to $1,061,639,000, a 6.15 percent annual gain.[128] Finally, by FY2014, Wake Forest's endowment fund market value reached $1,148,026,000, reflecting an 8.14 percent annual gain from the previous fiscal year but an 8.43 percent—or $105,747,000—net loss in market value since FY2008.[129] This illustrative example serves to underscore the raw dollar endowment fund value loss resulting from the Great Recession that still has not been recouped in over six fiscal years.

Despite many of the gains in FY2014 that finally returned many endowment market values to their pre-Recession levels, the foregoing descriptive quantitative evidence suggests that the endowment value decline during the Great Recession is different from, and far deeper than, any experienced in decades. Its effect, however, goes beyond the significant endowment market value losses suffered by even the most financially sound universities—which experienced, in some cases, tangible impacts on campus, resulting in significant budget shortfalls and even workforce reductions to university faculties.[130] State universities, which experienced declines in state support in addition to endowment values, saw endowments fall an average of 24 percent between FY2008 and FY2009 and by and

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dowment Market Value and Percentage Change in Endowment Market Value from FY 2010 to FY 2011 (2012), http://www.nacubo.org/Documents/research/2011NCSEPublicTablesEndowmentMarketValues319.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2010 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2009 to FY 2010* (2011), http://www.nacubo.org/Documents/research/2010NCSE_Public_Tables_Endowment_Market_Values_Final.pdf.

128. NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2013 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2012 to FY 2013* (2014), http://www.nacubo.org/Documents/EndowmentFiles/2013NCSEEndowmentMarket%20ValuesRevisedFeb142014.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2012 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2011 to FY 2012* (2013), http://www.nacubo.org/Documents/research/2012NCSEPublicTablesEndowmentMarketValuesRevisedFebruary42013.pdf.

129. NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2014 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2013 to FY 2014* (2015), http://www.nacubo.org/Documents/EndowmentFiles/2014_Endowment_Market_Values_Revised2.27.15.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2008 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2007 to FY 2008* (2009), http://www.nacubo.org/documents/research/NES2008PublicTable-AllInstitutionsByFY08MarketValue.pdf.

130. *See supra* note 17.

large have not returned to pre-Recession levels.[131] The declines in endowment market value precipitated by the total-growth investment practices during the Great Recession were of the same magnitude as those suffered in the early 1970s, at the onset of the installment of total-growth based endowment investment strategy.[132] These examples signal the real, lasting cost of the application of the Modern Portfolio Theory to university endowment investment and management since FY2009.

B. The Donor's Cause of Action and the Correlation Between Economic Recession and Challenged Gifts to American Universities

During the Great Recession, university endowments suffered for two principal reasons: (1) universities continued to spend endowment funds at pre-crisis levels that the post-crisis endowment could not sustain; and (2) the law allowed universities to spend their endowments without serious threat of restriction or regulation.[133] However, uncovering the liberalized spending practices of university endowment managers during periods of recession is somewhat of a perilous proposition for universities. This is because universities can be sued for spending endowment funds in ways not contemplated by the terms of endowment instruments, even though this

131. *Id.* In fact, at the end of FY2014, state appropriations were still below pre-Recession allocations. *See* Kellie Woodhouse, *Coping with Cuts*, INSIDE HIGHER ED, (Aug. 27, 2015), https://www.insidehighered.com/news/2015/08/27/educational-spending-public-universities-increases-despite-state-disinvestment (citing a report from a 2015 survey by the Association of Public & Land Grant Universities that "public universities and universities have increased their education-related spending even as overall funding has declined. The revenue declines are due to lowering state contributions. And while public universities have raised tuition rates to make up for large state funding losses, they have not fully offset the difference with tuition hikes."); William Selway, *State College Funding Hasn't Passed Pre-Recession Levels*, BLOOMBERG, (May 1, 2014), http://www.bloomberg.com/news/2014-05-01/state-college-funding-hasn-t-passed-pre-recession-levels.html. At Historically Black Colleges and Universities, many of which are also state-funded institutions, the dearth of funding is still substantial-even seven years removed from the onset of the Recession. *See* Ronald Roach, *Funding, Institutional Support Lacking for Historically Black Public Colleges*, DIVERSE ISSUES HIGHER EDUC., (May 7, 2014), http://diverseeducation.com/article/63952/. Declines in appropriations to higher education, and in fact, some of the economic volatility experienced in the last three decades, is perhaps the result of state tax policy. *See* Liz Farmer, *States Try to Prepare for the Economy's Wild Ride*, GOVERNING (August 2014), http://www.governing.com/finance101/gov-volatile-economy-prep.html. "In the 1980s and early 1990s, state tax rates generally increased when the economy soured, in order to stabilize revenue. When the economy expanded, rates generally fell. But since the mid-1990s, tax rates have been less responsive to economic conditions, a function of reluctance among legislators to vote for tax increases at any time, regardless of the economic situation." *Id.*

132. *See supra*, notes 105 −106.

133. *See* Conti-Brown, *supra* note 10, at 703.

threat of litigation rarely results in a lawsuit or prevents universities from spending endowment funds as they please.[134]

Though donor restrictions also limit the use of some endowment funds, even the mere presence of donor restrictions on endowment funds does not necessarily bar the university's expenditures.[135] An average of 80 percent of endowment funds at public universities and 55 percent of endowment funds at private universities are restricted.[136] Unquestionably, donor restrictions limit a university's discretion in endowment management and spending. That said, some universities overstate the weight of donor restrictions on endowments, because universities themselves create these restrictions, as well as their precise terms.[137] Universities also frequently bend the terms of endowment instruments in ways that liberate the ends to which they may spend the funds in question, particularly during a financial crisis when resources are scarce.[138]

The Great Recession brought a short but sudden wave of litigation—against universities for endowment spending practices—which is still being felt today.[139] However, the few cases resulting in judicial decisions

134. *Id.* at 725. "[T]here is always a risk that donors (or, in most cases, state attorneys general) will sue the [university] to enforce the original terms of the donation, or even rescind the gift entirely." *Id.* Additionally, UPMIFA creates a "rebuttable presumption of imprudence" when a university spends more than seven percent of the market value of its endowment principal; however, because this section essentially exempts spending over the statutory threshold when universities are met with economic adversity, it poses no meaningful risk of liability for excessive spending during times of financial crisis. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT (UPMIFA) § 4(d), 7A U.L.A. pt. 3, at 17 (Supp. 2008). At the time of the publication of this article, no suit, utilizing this section as its cause of action, had been brought against a university.

135. *See* Waldeck, *supra* note 7, at 1809.

136. NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, 2006 NACUBO Endowment Study 78 (2007).

137. *See* Waldeck, *supra* note 7, at 1809. "[I]nstitutions expend significant resources cultivating donors and helping to shape their giving preferences. These cultivated gifts often pay for expenditures the [institution] would have made even without a gift, thereby allowing the institution to redirect funds to current expenses or to the endowment. Furthermore, corporations, foundations, and alumni each tend to favor different sorts of projects, with corporations and foundations more likely to give to current operating expenses." *Id.*

138. *See* Conti-Brown, *supra* note 10, at 725.

139. For an unusual, and somewhat eyebrow-raising, case where the donor and donee institutions are co-parties, *see* Ry Rivard, *Foundation and Donor Sue over Failed Deal*, INSIDE HIGHER ED. (Oct. 4, 2013), http://www.insidehighered.com/news/2013/10/04/u-arizonas-foundation-had-stake-offshore-tax-shelter-suing-donors-financial-advisers#sthash.lEZEWSNI.dpbs. "The University of Arizona Foundation and one of its major donors had a stake in a 'sham' offshore tax shelter that the U.S. government later cracked down on, they say in a recent court filing. Now, they are both in federal court accusing a bank that helped set up the deal, [a more than $23 million gift to name Arizona's business school the Eller College of Management,] of defrauding them. The lawsuit . . . pits the foundation and the donor . . . against global financial services giant UBS." *Id.* For a more traditional case

appear to have resulted, in keeping with tradition, in a resounding victory for the university upon a donor's challenge of the university's endowment spending practices. In one such case, donors of approximately $3,000,000 in charitable contributions for the creation of an academic program in gerontology and the construction of a library at St. Bonaventure University, sued St. Bonaventure in 2009 for a declaration that their donations were subject to certain conditions and restrictions, as well as the fiduciary duty of accounting.[140] St. Bonaventure counterclaimed for outstanding pledges, and the New York Supreme Court, Appellate Division, affirming a lower court's decision, held that: (1) the donations were not subject to the restrictions cited by the donors; (2) the donors were not entitled to an accounting on the endowment created by their donation; and (3) St. Bonaventure was entitled to recover outstanding donations from the donors.[141] The donors' argument, which relied on parol evidence to supply conditions not expressed or implied in the written and executed gift commitment and endowment agreements, that the gifts were subject to conditions was admittedly flimsy and unconvincing to the court.[142] Importantly, however, the New York court found that, despite the written and executed gift commitment and endowment agreements between the donors and the university, the pledged gifts did not "create a fiduciary relationship between the parties" that, if present, may have given rise to a cause of action for an accounting.[143] This decision runs contrary to the principal elements of Section 3 of the UPMIFA, which establish a fiduciary relationship between the parties, specifically a duty, on the part of the university and its endowment managers: of care; of loyalty; to minimize costs; and to investigate.[144] While a duty of accounting is not among the duties enumerated in the UPMIFA, which was adopted in New York in 2010,[145] Section 3 of the

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where the donor and the donee institution are adverse parties, *see* Christine Haughney, *Journalism Professor Sues Columbia Claiming Misuse of Funds*, N.Y. TIMES, March 19, 2013, http://www.nytimes.com/2013/03/20/business/media/professor-sues-columbia-alleging-misuse-of-funds.html?_r=0. "Sylvia Nasar, who is the John S. and James L. Knight professor of business journalism at Columbia and the author of the book 'A Beautiful Mind,' which inspired the movie of the same name, charges in the suit that the university mishandled funds from a $1.5 million endowment provided by the Knight Foundation to improve the school's teaching of business journalism." *Id.*

140. *See* Paul & Irene Bogoni Found. v. St. Bonaventure Univ., 2009 WL 6318140 (N.Y. Sup. Ct. 2009).

141. Paul and Irene Bogoni Found. v. St. Bonaventure Univ., 78 A.D.3d 616, 616-17 (N.Y. App. Div. 2010).

142. *Id.* at 616.

143. *Id.*

144. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3 Comments (Supp. 2008), http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf.

145. *See A Practical Guide to the New York Prudent Management of Institutional Funds Act*, OFFICE OF THE NEW YORK ATTORNEY GENERAL CHARITIES BUREAU, March

UPMIFA unequivocally regards the relationship between the parties as a fiduciary relationship.[146] As such, the court's decision finding an absence of a fiduciary relationship can be viewed as damaging to the principles of university-donor relations, but also as a necessary antecedent rationale to its deference to the university and its endowment management practices during a recessionary period.

In a similar action against St. Olaf College, the senior regent and other donors to a fund created for the use of a college radio station sought to enjoin the college from selling the radio station to a private purchaser.[147] The donors unsuccessfully challenged the college's petition requesting the court: (1) to declare that there were no longer restrictions on the gifts; and (2) to approve the college to use the charitable gifts remaining in the endowment for other purposes.[148] Crucially, the Minnesota Court of Appeals held, pursuant to a lower court's finding of summary judgment for the college, that the fund that had been created for the use of the radio station was not a charitable trust but rather an asset of the college.[149] The facts of this case and finding of the court may be distinguishable from other cases in that, here, the college successfully represented in district court that it had petitioned living donors to the fund and received their consent to remove restrictions from the fund as well as withdraw a portion of the fund's assets for incorporation into the college's general endowment fund.[150] However, here too, the court's rationale rests on the troubling determination—that the fund created for the use of the radio station was not a charitable trust but rather an asset of the college—granting deference to the college in its endowment management and a favorable outcome in the case.

Both the St. Bonaventure and St. Olaf cases illustrate the manner in

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2011, http://www.charitiesnys.com/pdfs/NYPMIFA-Guidance-March-2011.pdf (last visited Aug. 1, 2015).

146. In fact, some universities even codify this fiduciary relationship in their endowment policies. *See, e.g.*, *Endowment Policy*, SAN FRANCISCO STATE UNIVERSITY, (June 19, 2014), http://sfsufdn.sfsu.edu/content/endowment-policy (last visited Aug. 1, 2015); *Principles of Endowment Administration*, UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, \http://www.ucop.edu/institutional-advancement/_files/principles.pdf (last visited Aug. 1, 2015); *Best Practices Regarding University Affiliated Foundation Relationships*, UNIVERSITY OF TEXAS SYSTEM ADVISORY TASK FORCE REPORT, Aug. 19, 2013, http://www.utsystem.edu/sites/utsfiles/documents/board-regents/best-practices-regarding-university-affiliated-foundation-relationships/foundationsreportfinal100313.pdf (last visited Aug. 1, 2015).

147. In re WCAL Charitable Trust, 2009 WL 5092650 (Minn. Ct. App. 2009).

148. *Id.* at *3-*4.

149. *Id.* at *12–*13. This is a particularly puzzling finding given that, in the court's own decision, it recognizes that: "St. Olaf solicited donations and grants to provide for the operating costs, the capital assets, and the WCAL endowment. . . Over the years, St. Olaf had established an endowment for WCAL with some of the charitable contributions from WCAL donors." *Id.* at *4–*8.

150. *Id.* at *9–*10.

which university needs appear to trump donor intent during financial crises.[151] Either out of sympathy for the financial needs of the university during the recession, application of the deferential *cy-près* doctrine allowing universities to seek modification of impracticable endowment fund restrictions, or both, the courts deciding these cases, as well as the handful of other courts that issued judicial opinions for decisions in similar cases, provided universities with considerable freedom in determining endowment spending decisions.[152] This judicial abstention from deciding for a university how it should spend income from its endowment funds is sound and undoubtedly offers a university important protections to meet its financial obligations during hard times; however, the reported donor lawsuits, which are admittedly few in number but have considerably multiplied during recessionary periods in the last 15 years, reveal that the donor's cause of action is extremely flimsy.[153] Moreover, when a donor's argument is strong enough and a university's endowment is large enough, the university will merely settle with the donor to be free of a donor's ability to exercise control over the university's ability to spend endowment funds—even if this result is quite expensive.[154]

Most university donors understand that the university and its endowment managers make the investment and management decisions affect-

151. These cases, and the cases referenced *infra* at n.152, are among the only five cases resolved by a court during recessionary periods: 2001–2002 and 2008–2010. As such, they color the complexion of court dispositions during these periods.

152. *Compare* Paul and Irene Bogoni Found., 78 A.D.3d 616, *and* In re Trs. of Columbia Univ., 910 N.Y.S.2d 409 (N.Y. Sur. Ct. 2010) (granting Columbia University's petition to modify restrictions on an endowment fund created for the benefit of its College of Medicine), *and* In re WCAL Charitable Trust, 2009 WL 5092650, *and* In re Polytechnic Inst. of New York Univ., 901 N.Y.S.2d 902 (N.Y. Sur. Ct. 2009) (granting New York University's petition to modify restrictions on an endowment fund created for the benefit of its Polytechnic Institute and applying the *cy-près* doctrine to grant relief from New York University's unforeseen financial problems), *and* Hartford Art School, Inc. v. Univ. of Hartford, 31 Conn. L. Rptr. 244 (Conn. Super. Ct. 2002) (holding that the University of Hartford did not misapply endowment funds), *with* Tennessee Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98 (Tenn. Ct. App. 2005) (estopping Vanderbilt University from denying the validity of a written contract setting forth naming conditions on a gift and disallowing the university from unilaterally abandoning the condition).

153. As mentioned *supra* at n.151 and n.152, the first five cases in the previous series were lodged during recessionary periods: 2001-2002 and 2008-2010. For better or for worse, these appear to be the only donor-university disputes about endowment spending that received published judicial opinions in the last fifteen years.

154. *See, e.g.*, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008). For a detailed description of this high profile case, *see* Conti-Brown, *supra* note 10, at 726-27. "The terms of the settlement required Princeton to pay the Robertson Foundation's substantial legal fees, and an additional $50 million to allow the Robertsons to launch a new foundation dedicated to improving the caliber of public servants. Princeton then gained control of the rest of the Robertson gift, and can use the fund at its own discretion, providing that the original terms of the donation are honored." *Id.* at 727.

ing the use of university gifts. As a result, the expectation of many donors is that these decisions will be made in order to maximize returns from the gift while limiting risk, so that the gift can achieve the beneficial effect for which it was intended.[155] The pursuit of a total-growth model of endowment investment jeopardized this important goal, however, illustrating that exposure to adverse market factors for greater control over endowment expenditures may not be worth the risk to the future health and stability of the university endowment.[156] It is critical, then, to rein in off-course endowment spending by providing clear expectations of the university and its endowment managers, preventing unnecessary litigation against universities while recognizing the important interests of donors. Should this policy not be practicable, ideally, a donor should have at his or her disposal a cause of action that casts more than a mere specter of the inconveniences of litigation to keep university endowment spending more closely aligned with the donor's original intent in creating the endowment fund. In practice, however, these cases all favor universities, sending a clear warning to donors who would bring suit against a university for its failure to adhere to the terms of an endowment instrument.[157]

PART IV

A. A Recommendation for University Endowment Management in the Modern Context

Most benefactors make charitable gifts to a university because they want to ensure the financial stability of the university so that the university can fulfill its educational mission.[158] Giving, then, is a matter of philanthropy and trust—entrusting money to a university to provide for its financial needs. Meeting present needs and planning for future needs, however, should not mandate pursuing limitless endowment growth.[159] The Great

155. *See* Rosenberg, *supra* note 100, at A29.

156. In fact, unexpected market events in the 1980s triggered empirical research on the successes and failures of Modern Portfolio Theory, suggesting its core assumptions—for example, that markets were as efficient as to reflect their fundamental value, or that risk and return, and the covariances between them, could be accurately calculated—were flawed. *See* William W. Bratton, CORPORATE FINANCE 25-28, 192-93, (7th ed. 2012); Richard A. Brealey, Stewart C. Myers & Franklin Allen, PRINCIPLES OF CORPORATE FINANCE 189-91 (10th ed. 2011).

157. Conti-Brown, *supra* note 10, at 727.

158. *See* Rosenberg, *supra* note 100, at A29.

159. The findings of Cary and Bright that "there was little developed law restricting the power of trustees to invest endowment funds to achieve growth, and the impediments to such freedom of action were more legendary than real" still has purchase today. *See* Fishman, *supra* note 18 (citing William E. Cary & Craig Bright, THE LAW AND LORE OF ENDOWMENT FUNDS 60 (1969).

Recession proved that the unbridled application of the Modern Portfolio Theory to university endowment management can produce extremely negative short-term—and even long-term—results, taking several years of recovery to regain pre-Recession wealth. By assuming more risk, endowment managers intensified their endowment's exposure to the volatility of capital markets, potentially losing out on secure income streams and liquidity and jeopardizing the future of their endowments.[160] That said, it is incontrovertible that the 50-year investing experiment produced significant long-term gains in endowment value. However, these gains, to the extent that the Great Recession has not irreparably reduced endowment market values, must be balanced against costs to universities, communities, and the economic markets in which endowment investments participate. It is possible that, with a measured model for growth, university endowments can realize steady appreciation in value and better-weather adverse economic factors like those present during the Great Recession.

Given that, for universities with a large endowment, endowment returns often account for over one-third of the university's operating budget,[161] the workforce reductions, cuts to academic and extracurricular programs, and other undesirable events that coincided with the low returns on endowment investment might have been reduced or altogether removed with a more prudent investment strategy. For example, as illustrated in Tables 1-12 and in Section III's discussion of actual market values over time for ten top-100 university endowments, university endowment investments yielded a 7.1 percent average annual return over ten years from FY2004 to FY2014, owing mostly to pre-Recession gains and very positive returns in FY2013 and FY2014, while subtracting losses in FY2007, FY2008 and FY2012.[162] Over this same ten-year period, as a gross hypothetical exer-

160. *See* TELLUS INST., *supra* note 21, at 63. Although economics assumptions often rest on the idea that economic market participants are rational actors or act to maximize utility; yet, investors often do not—and in the years leading up to the Great Recession, many of the top university endowment managers did not—validate this assumption through their investment behaviors, choosing instead to maximize return while increasing exposure to risk. Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1215 (2011). *See also* Bratton, *supra* note 156, at 29; PETER L. BERENSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 257 (1996); Andrei Shleifer & Lawrence H. Summers, *The Noise Trader Approach to Finance*, 4 J. ECON. PERSP. 19, 20–23 (1990).

161. *See, e.g.*, Jane L. Mendillio, *Harvard Management Company Endowment Report*, HARVARD UNIVERSITY, (2012), http://www.hmc.harvard.edu/docs/FinalAnnualReport2012.pdf; HARVARD UNIVERSITY FINANCIAL REPORT FISCAL YEAR 2013 6 (2013), http://vpfweb.harvard.edu/annualfinancial /pdfs/2013fullreport.pdf. (totaling 35% of the operating budget); THE YALE ENDOWMENT 2010 19 (2010), http://www.yale.edu/investments/YaleEndowment_10.pdf.

162. *See* NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2013 Endowment Market Value and Percentage Change in Endowment Market Value from*

cise, a pure investment in ten-year treasury bonds would have yielded 5.31 percent average annual return, while only posting two fiscal years of losses in FY2009 and FY2013.[163]

Unequivocally, the economically dominant investment strategy, which in this case is in fact the Modern Portfolio Theory approach, is the strategy that yields the greatest returns over the decade. However, although this article does not endorse an undiversified investment strategy, especial-

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FY 2012 to FY 2013 (2014), http://www.nacubo.org/Documents/EndowmentFiles/2013NCSEEndowmentMarket%20ValuesRevisedFeb142014.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2012 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2011 to FY 2012* (2013), http://www.nacubo.org/Documents/research/2012NCSEPublicTablesEndowmentMarketValuesRevisedFebruary42013.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2011 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2010 to FY 2011* (2012), http://www.nacubo.org/Documents/research/2011NCSEPublicTablesEndowmentMarketValues319.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2010 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2009 to FY 2010* (2011), http://www.nacubo.org/Documents/research/2010NCSE_Public_Tables_Endowment_Market_Values_Final.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2009 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2008 to FY 2009* (2010), http://www.nacubo.org/Documents/research/2009_NCSE_Public_Tables_Endowment_Market_Values.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2008 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2007 to FY 2008* (2009), http://www.nacubo.org/documents/research/NES2008PublicTable-AllInstitutionsByFY08MarketValue.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2007 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2006 to FY 2007* (2008), http://www.nacubo.org/Images/All%20Institutions%20Listed%20by%20FY%202007%20Market%20Value%20of%20Endowment%20Assets_2007%20NES.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2006 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2005 to FY 2006* (2007), http://www.nacubo.org/documents/research/2006NES_Listing.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2005 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2004 to FY 2005* (2006), http://www.nacubo.org/documents/about/FY05NESInstitutionsbyTotalAssets.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2006 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2005 to FY 2006* (2007), http://www.nacubo.org/documents/research/2006NES_Listing.pdf; NACUBO, *U.S. and Canadian Institutions Listed by Fiscal Year 2004 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2003 to FY 2004* (2005), http://www.nacubo.org/documents/research/FY04NESInstitutionsbyTotalAssetsforPress.pdf.

163. *Annual Returns on Stock, T.Bonds and T.Bills: 1928 - Current Investment*, NEW YORK UNIVERSITY (2014), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

ly one relying solely on the bond market, it should be noted that pure investment in a bond vehicle could plausibly have avoided systemic market losses of the Great Recession while still posting consistently strong long-term, ten-year average annual returns. At the very least, this hypothetical investment strategy proves the existence of viable, steadily-appreciating, lower-risk investment strategies. Furthermore, this is not to say that each university, much less each university endowment, is the same or should invest in the same way, but every university has a most basic duty, owed to both direct and indirect stakeholders, to make sound investment and distribution decisions. In place of contributing to systemic market risks, externalizing social costs, and financing opaque investment systems, universities and their endowment managers are in the unique position to model investor responsibility, transparency, and accountability for the rest of the investment world.

Moreover, the true cost of endowment declines during the Great Recession cannot be measured only by reduced spending rates and endowment value losses, brought on in part by the very serious problem of excessively optimistic projections prior to the Recession; the systemic risks of the investment model wrought social costs as well, impacting not only those directly affiliated with the university but the local community of which the university forms an integral part.[164] Universities, as institutional investors and enduring fixtures of communities, are among the most important stakeholders in the sustainability of the financial system and the economies in which they participate.[165] In a culture increasingly concerned with conservation and sustainability, a university must reprise its role as a responsible steward.

For the last two centuries, the law has gradually retreated from specificity regarding the fiduciary duties of universities and their endowment managers. The significant losses suffered by endowment funds during the Great Recession highlight the immediacy of the need for change in endowment investment and management strategy as well as the need for change in law governing these vital university services. Instead of returning to restrictive models such as the prudent person rule, a measured approach to endowment investment and management provides a more sustainable alternative to the current theory. This "sensible investor" approach must rely upon integrity, observation, experience, and institutional policy to achieve sound university endowment investing and management goals and must

164. *See* TELLUS INST., *supra* note 21, at 67. Cutbacks in programs and reductions in force and benefits demoralize college staff, faculty and students and extend throughout the regional economies in which schools play such important roles as sources of innovation and resilience. Taxpayers, politicians and policymakers are rightly upset when such reservoirs of tax-privileged wealth can have such spillover effects into their communities." *Id.*

165. *Id.* at 63–64.

center on four[166] interrelated principles:

1. **Resiliency.** In practice, no endowment can be fully insulated from all negative market risks. As such, university endowments invested in vehicles with greater liquidity and lower volatility afford the university with the appropriate flexibility to weather financial storms. A crucial facet of resiliency requires apportioning some excess returns earned during profitable times to be reserved for shortfall in down markets.[167] The most important fiduciary obligation of a university and its endowment managers is to worry about the future and not merely the present.[168] Because concern for the future and present are not mutually exclusive, a university and its endowment managers must be responsible for ensuring that the university will have the resources it requires in 50 years as well as addressing its many legitimate and urgent financial demands today. Resiliency does not require foresight or clairvoyance, but a conscious plan for the future draws rewards.

2. **Sensibility.** Sections 2 and 6 of the UMIFA granted endowment managers the power to invest endowment funds in new investment vehicles deemed prudent under an ordinary prudence standard.[169] However, as the ordinary prudence standard evolved in the last half-century, endowment managers acting under a sliding prudence standard could and did shift into riskier investment strategies in pursuit of total-return and total-growth.[170] The interrelatedness of the market dictates that even

166. Coincidentally, Justice Felix Frankfurter is attributed with articulating a university's four academic freedoms to determine: who may teach; what may be taught, how it should be taught; and who may be admitted to study. Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957). *See also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 241 (1989).

167. *See* TELLUS INST., *supra* note 21, at 63. *See also* Burton A. Weisbrod and Evelyn D. Asch, *Endowment for a Rainy Day*, STANFORD SOC. INNOVATION REV., 42–47 (2010).

168. ASS'N OF GOVERNING BD. OF UNIV. AND COLL., *Fiduciary Behavior: What's the Responsible Trustee to Do (and Not to Do)?*, TRUSTEESHIP, March/April 2013, at 10.

169. UNIF. MGMT. OF INST. FUNDS ACT § 2, 7A U.L.A. 491 (1999). *See* Job, *supra* note 11, at 608.

170. *See* Job *supra* note 11, at 609. *See also* Jeffrey R. Brown, *How Endowment Hoarding Hurts Universities*, CHRON. HIGHER EDUC., (March 17, 2014), http://chronicle.com/article/How-Endowment-Hoarding-Hurts/145343/. "During the recent recession . . . the average endowment [lost] a quarter of its value. . . [Following] years of heady growth that led endowments to grow at a far faster clip than university spending did. As a result, the losses suffered in the market meltdown represented a much larger loss relative to universities' annual operating budgets than did any previous market correction. . . In response, some universities ignored their own spending

the investment decisions of one group of investors has consequences for the whole. With endowments' futures and economic market health hanging in the balance, a new investment standard should be clear, moderate, and nearly all-encompassing. This standard must be situated at the mid-point between the prudent person rule of the common law and the UMIFA's liberalized ordinary prudent investor rule in order to ensure for the future of higher education while generating measured, sustainable growth in the present. The title this article proffers for this rule is the "sensible investor" standard, and as its name suggests, the relatively flexible standard would require universities and their endowment managers to demonstrate the following: (1) fidelity to the university's founding mission and core values; (2) commitment to the direct and indirect stakeholders in the university; (3) dedication to safeguarding the university's integrity in all university operations and expenditures; (4) sensitivity and responsiveness to market factors; and (5) reason and sound judgment in making investment and management decisions to effectuate endowment resiliency, growth, and sustainability.

3. **Sustainability.** The near complete delegation of investment decisions to third-party university managers and the pursuit of endowment growth for its own sake drove the decline of university endowments in the last recession. Realistically, the complexity of modern economic markets dictates that universities cannot fully emancipate themselves from third party endowment managers. Even eliminating an endowment portfolio from one industry (for example, under growing pressure from environmentalists, partaking of institutional activism to divest university endowments of holdings in fossil-fuel and tobacco companies) risks lowering returns and increasing market volatility, both of which may hurt an endowment-dependent university's ability to manage its finances and succeed in carrying out its mission.[171] That said, universities can and must reduce

guidelines. . .and instead chose to actively cut endowment payouts by even more than indicated. In short, they acted to preserve the value of the endowment instead of using the endowment to preserve the value of the university." *Id.* In the above article, and in his paper published in the American Economic Review, Prof. Brown argues that when institutions cut spending during bad times, the effect is most damaging, and "cannot be explained by regulatory or donor constraints against spending the principal." *Id.*

171. For an oil and gas industry-funded empirical study purporting that fossil-fuel divestment results in diminished returns to university endowments, *see* Daniel R. Fischel, *Fossil Fuel Divestment: A Costly and Ineffective Divestment Strategy*, DIVESTMENT FACTS, http://divestmentfacts.com/pdf/Fischel_Report.pdf (2015). However,

systemic reliance on third-party endowment managers and more fully involve themselves in endowment investment strategy in order to reclaim stewardship and ensure compliance with the university's educational mission.[172] By prioritizing consistent, predictable growth, outpacing inflation and other inevitable negative economic externalities, while maintaining an appropriate level of risk, universities can proceed with measured growth without sacrificing the future.[173] By integrat-

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others have reported on similar findings. John Schwartz, *Study Claims Oil Divestiture May Hurt College Endowments*, N.Y. TIMES (Feb. 9, 2015), http://www.nytimes.com/2015/02/10/business/energy-environment/study-claims-oil-divestiture-may-hurt-college-endowments.html?ref=education&_r=3; Rosenberg, *supra* note 102, at A28; Cory Weinberg, *Divestment from 'Moral Evil?'*, INSIDE HIGHER ED. (May 16, 2014), http://www.insidehighered.com/news/2014/05/16/penn-debates-selling-holdings-tobacco-companies#sthash.BKNUCyox.fIxCxdEH.dpbs (discussing University of Pennsylvania's pending decision whether or not to divest its $7.7 billion endowment portfolio of stock in tobacco companies such as Phillip Morris and R.J. Reynolds). *Compare* Michael Wines, *Stanford to Purge $18 Billion Endowment of Coal Stock*, N.Y. TIMES (May 6, 2014), http://www.nytimes.com/2014/05/07/education/stanford-to-purge-18-billion-endowment-of-coal-stock.html?ref=education&_r=2 *and* Zach Schonfeld, *Stanford Pulls Its Coal Investments, But Why Haven't Other Divestment Movements Succeeded?*, NEWSWEEK (May 9, 2014), http://www.newsweek.com/many-ways-college-administrations-have-resisted-fossil-fuel-divestment-movement-250409 *with* Yuki Noguchi, *When Colleges Ditch Coal Investments, It's Barley a Drop in the Bucket*, NPR (May 7, 2014), http://www.npr.org/2014/05/07/310449120/when-colleges-divest-in-coal-its-barely-a-drop-in-the-bucket *and* Stu Johnson, UK Finance Officer Says Coal Divestment Not Likely to Cause Ripples, WEKU (May 11, 2014), http://weku.fm/post/uk-finance-officer-says-stanford-coal-divestment-not-likely-cause-kentucky-ripples; Tyler Kingkade, *Columbia University Will Divest from Private Prison Companies*, HUFFINGTON POST (June 22, 2015), http://www.huffingtonpost.com/2015/06/22/columbia-divest-prison_n_7640888.html.

172. This article is not the only piece of scholarship that sees third party endowment managers as somewhat indispensible in the modern economic context: "with the rise of the Endowment Model of Investing, its diversification into new asset classes beyond domestic public equities, and the increasing use of external investment managers, committees of investor responsibility designed for an earlier era have watched their relevance erode. Given the social costs of the Endowment Model of Investing, which this report only begins to explore, it is high time for colleges and universities not only to reassess risk but also to reclaim this legacy of responsible institutional investment." TELLUS INST., *supra* note 21, at 64. *See also* Rosenberg, *supra* note 100, at A29; Ry Rivard, *Endowment Decisions*, INSIDE HIGHER ED. (March 18, 2014), http://www.insidehighered.com/news/2014/03/18/sewanee-tries-make-its-endowment-spending-more-predictable#sthash.xg4JcLV1.vhT6SJBw.dpbs (discussing the University of the South's decision to use an inflation adjustment to determine a fixed rate for drawing the annual spending distribution of its $350 million endowment).

173. *See* Ry Rivard, *Sustainability, Divestment and Debt: A Survey of Business Officers*, INSIDE HIGHER ED. (July 18, 2014), https://www.insidehighered.com/news/survey/sustainability-divestment-and-debt-survey-business-officers (citing a survey by Gallup and Inside Higher Ed, based on the responses of chief financial officers at 438 universities and universities, finding that just 24 percent of business officers "strongly agree they are confident in the sustainabil-

ing sustainability practices into investment decisions and reclaiming partial ownership of their endowment assets, universities can recover their mantle of enduring, responsible stewardship.

4. **Purpose.** Perhaps better than any other kind of institution in this country, universities effect public change and public benefit on scales small and large. Universities exist for an inherently public purpose; their core values revolve around educating, learning and research. Compliance with the university's mission, then, is determinative of whether students receive a quality education, whether faculty possess the freedom to teach and research, and whether the community is enhanced as a result. Capitalizing on the nonprofit, tax-exempt status, universities must direct that their endowment pursue responsible stewardship above all other investment strategies.[174] The management of a university endowment is not merely an act of ownership; it is an act of trust with past donors as well as present and future generations of students, faculty, staff, and community stakeholders.[175] Universities must not stray from the explicit purpose for which its endowment was created and for which it is expended.[176]

Students, faculty, staff, donors, and community members are all engaged in a common effort to fulfill and benefit from a university's mission. The success of this endeavor depends on its resources not being gambled away. If a focus on the future of university endowments can be pursued with the same fervor with which endowment managers sought total-growth for the last 50 years, universities and their stakeholders can share in the labor and bounty of a fruitful union of mutual interest and reward—whatever the economic climate.[177]

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ity of their business model for the next five years, and only 13 percent strongly agree they are confident in their model over the next 10 years."). While many campus chief financial officers "lack confidence in the sustainability of their universities' business model over the next decade[,] . . . they also seem loath to take cost-saving measures that could ignite campus controversy". *Id.*

174. *See* THE RESPONSIBLE ENDOWMENT PROJECT, *Responsible Returns: A Modern Approach to Ethical Investing for the Yale Endowment*, YALE UNIV., July 22, 2009. *See also* Marc Parry, Kelly Field & Beckie Supiano, *The Gates Effect*, CHRON. HIGHER EDUC., July 19, 2013, at A18-23 (suggesting private foundations can exact this same responsible influence from without academia).

175. *See* Rosenberg, *supra* note 100, at A29.

176. *Id. See also* Henry Doss, *Innovate: Become a Learning Society*, FORBES (Oct. 10, 2013), http://www.forbes.com/sites/henrydoss/2013/10/10/the-economic-value-of-a-learning-society/.

177. *See* Bok, *supra* note 8, at A29. "Presidents and trustees would thus be well

advised to examine their existing policies and try to eliminate practices that seek immediate financial benefit at the cost of compromising important academic values." *Id. See also* Emma Green, *What Makes a University 'Useful'?*, ATLANTIC (Dec. 23, 2013), http://www.theatlantic.com/events/archive/2013/12/what-makes-a-university-useful/281965/ (discussing the University of Washington's creation of the "W Fund to invest $20 million over four years in companies that grow out of the university's research"). "A University can be *both* commercially product *and* a hub for pursuing basic knowledge." *Id.*

APPENDIX

Table 1: Harvard University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$22,143,649,000.00	$25,473,721,000.00	15.04%	$3,330,072,000.00
	Treasury Bond Annual Returns	$22,143,649,000.00	$22,779,171,726.30	2.87%	$635,522,726.30
FY2005-2006	Actual Market Value	$25,473,721,000.00	$28,915,706,000.00	13.51%	$3,441,985,000.00
	Treasury Bond Annual Returns	$22,779,171,726.30	$23,225,643,492.14	1.96%	$446,471,765.84
FY2006-2007	Actual Market Value	$28,915,706,000.00	$34,634,906,000.00	19.78%	$5,719,200,000.00
	Treasury Bond Annual Returns	$23,225,643,492.14	$25,596,981,692.69	10.21%	$2,371,338,200.55
FY2007-2008	Actual Market Value	$34,634,906,000.00	$36,556,284,000.00	5.55%	$1,921,378,000.00
	Treasury Bond Annual Returns	$25,596,981,692.69	$30,741,975,012.92	20.10%	$5,144,993,320.23
FY2008-2009	Actual Market Value	$36,556,284,000.00	$25,662,055,000.00	-29.80%	-$10,894,229,000.00
	Treasury Bond Annual Returns	$30,741,975,012.92	$27,323,467,391.48	-11.12%	-$3,418,507,621.44
FY2009-2010	Actual Market Value	$25,662,055,000.00	$27,557,404,000.00	7.39%	$1,895,349,000.00
	Treasury Bond Annual Returns	$27,323,467,391.48	$29,635,032,732.80	8.46%	$2,311,565,341.32
FY2010-2011	Actual Market Value	$27,557,404,000.00	$31,728,080,000.00	15.13%	$4,170,676,000.00
	Treasury Bond Annual Returns	$29,635,032,732.80	$34,388,491,983.14	16.04%	$4,753,459,250.34
FY2011-2012	Actual Market Value	$31,728,080,000.00	$30,435,375,000.00	-4.07%	-$1,292,705,000.00
	Treasury Bond Annual Returns	$34,388,491,983.14	$35,409,830,195.04	2.97%	$1,021,338,211.90
FY2012-2013	Actual Market Value	$30,435,375,000.00	$32,334,293,000.00	6.24%	$1,898,918,000.00
	Treasury Bond Annual Returns	$35,409,830,195.04	$32,187,535,647.29	-9.10%	-$3,222,294,547.75
FY2013-2014	Actual Market Value	$32,334,293,000.00	$35,883,691,000.00	10.98%	$3,549,398,000.00
	Treasury Bond Annual Returns	$32,187,535,647.29	$35,647,695,729.37	10.75%	$3,460,160,082.08
FY2008-2013 Differential	Actual Market Value	$36,556,284,000.00	$32,334,293,000.00	-11.55%	-$4,221,991,000.00
	Treasury Bond Annual Returns	$30,741,975,012.92	$32,187,535,647.29	4.70%	$1,445,560,634.37
FY2008-2014 Differential	Actual Market Value	$36,556,284,000.00	$35,883,691,000.00	-1.84%	-$672,593,000.00
	Treasury Bond Annual Returns	$30,741,975,012.92	$35,647,695,729.37	15.96%	$4,905,720,716.45
FY2004-2014 Differential	Actual Market Value	$22,143,649,000.00	$35,883,691,000.00	62.05%	$13,740,042,000.00
	Treasury Bond Annual Returns	$22,143,649,000.00	$35,647,695,729.37	60.98%	$13,504,046,729.37

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 2: Yale University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$12,747,150,000.00	$15,224,900,000.00	19.44%	$2,477,750,000.00
	Treasury Bond Annual Returns	$12,747,150,000.00	$13,112,993,205.00	2.87%	$365,843,205.00
FY2005-2006	Actual Market Value	$15,224,900,000.00	$18,030,600,000.00	18.43%	$2,805,700,000.00
	Treasury Bond Annual Returns	$13,112,993,205.00	$13,370,007,871.82	1.96%	$257,014,666.82
FY2006-2007	Actual Market Value	$18,030,600,000.00	$22,530,200,000.00	24.96%	$4,499,600,000.00
	Treasury Bond Annual Returns	$13,370,007,871.82	$14,735,085,675.53	10.21%	$1,365,077,803.71
FY2007-2008	Actual Market Value	$22,530,200,000.00	$22,870,000,000.00	1.51%	$339,800,000.00
	Treasury Bond Annual Returns	$14,735,085,675.53	$17,696,837,896.31	20.10%	$2,961,752,220.78
FY2008-2009	Actual Market Value	$22,870,000,000.00	$16,327,000,000.00	-28.61%	-$6,543,000,000.00
	Treasury Bond Annual Returns	$17,696,837,896.31	$15,728,949,522.24	-11.12%	-$1,967,888,374.07
FY2009-2010	Actual Market Value	$16,327,000,000.00	$16,652,000,000.00	1.99%	$325,000,000.00
	Treasury Bond Annual Returns	$15,728,949,522.24	$17,059,618,651.82	8.46%	$1,330,669,129.58
FY2010-2011	Actual Market Value	$16,652,000,000.00	$19,374,000,000.00	16.35%	$2,722,000,000.00
	Treasury Bond Annual Returns	$17,059,618,651.82	$19,795,981,483.57	16.04%	$2,736,362,831.75
FY2011-2012	Actual Market Value	$19,374,000,000.00	$19,345,000,000.00	-0.15%	-$29,000,000.00
	Treasury Bond Annual Returns	$19,795,981,483.57	$20,383,922,133.63	2.97%	$587,940,650.06
FY2012-2013	Actual Market Value	$19,345,000,000.00	$20,780,000,000.00	7.42%	$1,435,000,000.00
	Treasury Bond Annual Returns	$20,383,922,133.63	$18,528,985,219.47	-9.10%	-$1,854,936,914.16
FY2013-2014	Actual Market Value	$20,780,000,000.00	$23,900,000,000.00	15.01%	$3,120,000,000.00
	Treasury Bond Annual Returns	$18,528,985,219.47	$20,520,851,130.56	10.75%	$1,991,865,911.09
FY2008-2013 Differential	Actual Market Value	$22,870,000,000.00	$20,780,000,000.00	-9.14%	-$2,090,000,000.00
	Treasury Bond Annual Returns	$17,696,837,896.31	$18,258,985,219.47	3.18%	$562,147,323.16
FY2008-2014 Differential	Actual Market Value	$22,870,000,000.00	$23,900,000,000.00	4.50%	$1,030,000,000.00
	Treasury Bond Annual Returns	$17,696,837,896.31	$20,520,851,130.56	15.96%	$2,824,013,234.25
FY2004-2014 Differential	Actual Market Value	$12,747,150,000.00	$23,900,000,000.00	87.49%	$11,152,850,000.00
	Treasury Bond Annual Returns	$12,747,150,000.00	$20,520,851,130.56	60.98%	$7,773,701,130.56

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 3: Emory University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$4,535,587,000.00	$ 4,376,272,000.00	-3.51%	-$159,315,000.00
	Treasury Bond Annual Returns	$4,535,587,000.00	$4,665,758,346.90	2.87%	$130,171,346.90
FY2005-2006	Actual Market Value	$4,376,272,000.00	$4,870,019,000.00	11.28%	$493,747,000.00
	Treasury Bond Annual Returns	$4,665,758,346.90	$4,757,207,210.50	1.96%	$91,448,863.60
FY2006-2007	Actual Market Value	$4,870,019,000.00	$5,561,743,000.00	14.20%	$691,724,000.00
	Treasury Bond Annual Returns	$4,757,207,210.50	$5,242,918,066.69	10.21%	$485,710,856.19
FY2007-2008	Actual Market Value	$5,561,743,000.00	$5,472,528,000.00	-1.60%	-$89,215,000.00
	Treasury Bond Annual Returns	$5,242,918,066.69	$6,296,744,598.09	20.10%	$1,053,826,531.40
FY2008-2009	Actual Market Value	$5,472,528,000.00	$4,328,436,000.00	-20.91%	-$1,144,092,000.00
	Treasury Bond Annual Returns	$6,296,744,598.09	$5,596,546,598.78	-11.12%	-$700,197,999.31
FY2009-2010	Actual Market Value	$4,328,436,000.00	$4,694,260,000.00	8.45%	$365,824,000.00
	Treasury Bond Annual Returns	$5,596,546,598.78	$6,070,014,441.04	8.46%	$473,467,842.26
FY2010-2011	Actual Market Value	$4,694,260,000.00	$5,400,367,000.00	15.04%	$706,107,000.00
	Treasury Bond Annual Returns	$6,070,014,441.04	$7,043,644,757.38	16.04%	$973,630,316.34
FY2011-2012	Actual Market Value	$5,400,367,000.00	$5,461,158,000.00	1.13%	$60,791,000.00
	Treasury Bond Annual Returns	$7,043,644,757.38	$7,252,841,006.67	2.97%	$209,196,249.29
FY2012-2013	Actual Market Value	$5,461,158,000.00	$5,816,046,000.00	6.50%	$354,888,000.00
	Treasury Bond Annual Returns	$7,252,841,006.67	$6,592,832,475.06	-9.10%	-$660,008,531.61
FY2013-2014	Actual Market Value	$5,816,046,000.00	$6,681,479,000.00	14.88%	$865,433,000.00
	Treasury Bond Annual Returns	$6,592,832,475.06	$7,301,561,966.13	10.75%	$708,729,491.07
FY2008-2013 Differential	Actual Market Value	$5,472,528,000.00	$5,816,046,000.00	6.28%	$343,518,000.00
	Treasury Bond Annual Returns	$6,296,744,598.09	$6,592,832,475.06	4.70%	$296,087,876.97
FY2008-2014 Differential	Actual Market Value	$5,472,528,000.00	$6,681,479,000.00	22.09%	$1,208,951,000.00
	Treasury Bond Annual Returns	$6,296,744,598.09	$7,301,561,966.13	15.96%	$1,004,817,368.04
FY2004-2014 Differential	Actual Market Value	$4,535,587,000.00	$6,681,479,000.00	47.31%	$2,145,892,000.00
	Treasury Bond Annual Returns	$4,535,587,000.00	$7,301,561,966.13	60.98%	$2,765,974,966.13

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).
** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 4: Cornell University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$3,238,350,000.00	$3,777,092,000.00	16.64%	$538,742,000.00
	Treasury Bond Annual Returns	$3,238,350,000.00	$3,331,290,645.00	2.87%	$92,940,645.00
FY2005-2006	Actual Market Value	$3,777,092,000.00	$4,321,199,000.00	14.41%	$544,107,000.00
	Treasury Bond Annual Returns	$3,331,290,645.00	$3,396,583,941.64	1.96%	$65,293,296.64
FY2006-2007	Actual Market Value	$4,321,199,000.00	$5,424,733,000.00	25.54%	$1,103,534,000.00
	Treasury Bond Annual Returns	$3,396,583,941.64	$3,743,375,162.08	10.21%	$346,791,220.44
FY2007-2008	Actual Market Value	$5,424,733,000.00	$5,385,482,000.00	-0.72%	-$39,251,000.00
	Treasury Bond Annual Returns	$3,743,375,162.08	$4,495,793,569.66	20.10%	$752,418,407.58
FY2008-2009	Actual Market Value	$5,385,482,000.00	$3,966,041,000.00	-26.36%	-$1,419,441,000.00
	Treasury Bond Annual Returns	$4,495,793,569.66	$3,995,861,324.71	-11.12%	-$499,932,244.95
FY2009-2010	Actual Market Value	$3,966,041,000.00	$4,378,587,000.00	10.40%	$412,546,000.00
	Treasury Bond Annual Returns	$3,995,861,324.71	$4,333,911,192.78	8.46%	$338,049,868.07
FY2010-2011	Actual Market Value	$4,378,587,000.00	$5,059,406,000.00	15.55%	$680,819,000.00
	Treasury Bond Annual Returns	$4,333,911,192.78	$5,029,070,548.10	16.04%	$695,159,355.32
FY2011-2012	Actual Market Value	$5,059,406,000.00	$4,946,954,000.00	-2.22%	-$112,452,000.00
	Treasury Bond Annual Returns	$5,029,070,548.10	$5,178,433,943.38	2.97%	$149,363,395.28
FY2012-2013	Actual Market Value	$4,946,954,000.00	$5,272,228,000.00	6.58%	$325,274,000.00
	Treasury Bond Annual Returns	$5,178,433,943.38	$4,707,196,454.53	-9.10%	-$471,237,488.85
FY2013-2014	Actual Market Value	$5,272,228,000.00	$5,889,948,000.00	11.72%	$617,720,000.00
	Treasury Bond Annual Returns	$4,707,196,454.53	$5,213,220,073.39	10.75%	$506,023,618.86
FY2008-2013 Differential	Actual Market Value	$5,385,482,000.00	$5,272,228,000.00	-2.10%	-$113,254,000.00
	Treasury Bond Annual Returns	$4,495,793,569.66	$4,707,196,454.53	4.70%	$211,402,884.87
FY2008-2014 Differential	Actual Market Value	$5,385,482,000.00	$5,889,948,000.00	9.37%	$504,466,000.00
	Treasury Bond Annual Returns	$4,495,793,569.66	$5,213,220,073.39	15.96%	$717,426,503.73
FY2004-2014 Differential	Actual Market Value	$3,238,350,000.00	$5,889,948,000.00	81.88%	$2,651,598,000.00
	Treasury Bond Annual Returns	$3,238,350,000.00	$5,213,220,073.39	60.98%	$1,974,870,073.39

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 5: Johns Hopkins University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$2,055,542,000.00	$2,176,909,000.00	5.90%	$121,367,000.00
	Treasury Bond Annual Returns	$2,055,542,000.00	$2,114,536,055.40	2.87%	$58,994,055.40
FY2005-2006	Actual Market Value	$2,176,909,000.00	$2,350,749,000.00	7.99%	$173,840,000.00
	Treasury Bond Annual Returns	$2,114,536,055.40	$2,155,980,962.09	1.96%	$41,444,906.69
FY2006-2007	Actual Market Value	$2,350,749,000.00	$2,800,377,000.00	19.13%	$449,628,000.00
	Treasury Bond Annual Returns	$2,155,980,962.09	$2,376,106,618.32	10.21%	$220,125,656.23
FY2007-2008	Actual Market Value	$2,800,377,000.00	$2,524,575,000.00	-9.85%	-$275,802,000.00
	Treasury Bond Annual Returns	$2,376,106,618.32	$2,853,704,048.60	20.10%	$477,597,430.28
FY2008-2009	Actual Market Value	$2,524,575,000.00	$1,976,899,000.00	-21.69%	-$547,676,000.00
	Treasury Bond Annual Returns	$2,853,704,048.60	$2,536,372,158.40	-11.12%	-$317,331,890.20
FY2009-2010	Actual Market Value	$1,976,899,000.00	$2,219,925,000.00	12.29%	$243,026,000.00
	Treasury Bond Annual Returns	$2,536,372,158.40	$2,750,949,243.00	8.46%	$214,577,084.60
FY2010-2011	Actual Market Value	$2,219,925,000.00	$2,598,467,000.00	17.05%	$378,542,000.00
	Treasury Bond Annual Returns	$2,750,949,243.00	$3,192,201,501.58	16.04%	$441,252,258.58
FY2011-2012	Actual Market Value	$2,598,467,000.00	$2,593,316,000.00	-0.20%	-$5,151,000.00
	Treasury Bond Annual Returns	$3,192,201,501.58	$3,287,009,886.18	2.97%	$94,808,384.60
FY2012-2013	Actual Market Value	$2,593,316,000.00	$2,987,298,000.00	15.19%	$393,982,000.00
	Treasury Bond Annual Returns	$3,287,009,886.18	$2,987,891,986.54	-9.10%	-$299,117,899.64
FY2013-2014	Actual Market Value	$2,987,298,000.00	$3,451,947,000.00	15.55%	$464,649,000.00
	Treasury Bond Annual Returns	$2,987,891,986.54	$3,309,090,375.09	10.75%	$321,198,388.55
FY2008-2013 Differential	Actual Market Value	$2,524,575,000.00	$2,987,298,000.00	18.33%	$462,723,000.00
	Treasury Bond Annual Returns	$2,853,704,048.60	$2,987,891,986.54	4.70%	$134,187,937.94
FY2008-2014 Differential	Actual Market Value	$2,524,575,000.00	$3,451,947,000.00	36.73%	$927,372,000.00
	Treasury Bond Annual Returns	$2,853,704,048.60	$3,309,090,375.09	15.96%	$455,386,326.49
FY2004-2014 Differential	Actual Market Value	$2,055,542,000.00	$3,451,947,000.00	67.93%	$1,396,405,000.00
	Treasury Bond Annual Returns	$2,055,542,000.00	$3,309,090,375.09	60.98%	$1,253,548,375.09

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 6: University of Washington Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$1,315,894,000.00	$1,489,924,000.00	13.23%	$174,030,000.00
	Treasury Bond Annual Returns	$1,315,894,000.00	$1,353,660,157.80	2.87%	$37,766,157.80
FY2005-2006	Actual Market Value	$1,489,924,000.00	$1,794,370,000.00	20.43%	$304,446,000.00
	Treasury Bond Annual Returns	$1,353,660,157.80	$1,380,191,896.89	1.96%	$26,531,739.09
FY2006-2007	Actual Market Value	$1,794,370,000.00	$2,184,374,000.00	21.73%	$390,004,000.00
	Treasury Bond Annual Returns	$1,380,191,896.89	$1,521,109,489.56	10.21%	$140,917,592.67
FY2007-2008	Actual Market Value	$2,184,374,000.00	$2,161,438,000.00	-1.05%	-$22,936,000.00
	Treasury Bond Annual Returns	$1,521,109,489.56	$1,826,852,496.96	20.10%	$305,743,007.40
FY2008-2009	Actual Market Value	$2,161,438,000.00	$1,649,159,000.00	-23.70%	-$512,279,000.00
	Treasury Bond Annual Returns	$1,826,852,496.96	$1,623,706,499.30	-11.12%	-$203,145,997.66
FY2009-2010	Actual Market Value	$1,649,159,000.00	$1,904,970,000.00	15.51%	$255,811,000.00
	Treasury Bond Annual Returns	$1,623,706,499.30	$1,761,072,069.14	8.46%	$137,365,569.84
FY2010-2011	Actual Market Value	$1,904,970,000.00	$2,154,494,000.00	13.10%	$249,524,000.00
	Treasury Bond Annual Returns	$1,761,072,069.14	$2,043,548,029.03	16.04%	$282,475,959.89
FY2011-2012	Actual Market Value	$2,154,494,000.00	$2,111,332,000.00	-2.00%	-$43,162,000.00
	Treasury Bond Annual Returns	$2,043,548,029.03	$2,104,241,405.49	2.97%	$60,693,376.46
FY2012-2013	Actual Market Value	$2,111,332,000.00	$2,346,693,000.00	11.15%	$235,361,000.00
	Treasury Bond Annual Returns	$2,104,241,405.49	$1,912,755,437.59	-9.10%	-$191,485,967.90
FY2013-2014	Actual Market Value	$2,346,693,000.00	$2,832,753,000.00	20.71%	$486,060,000.00
	Treasury Bond Annual Returns	$1,912,755,437.59	$2,118,376,647.13	10.75%	$205,621,209.54
FY2008-2013 Differential	Actual Market Value	$2,161,438,000.00	$2,346,693,000.00	8.57%	$185,255,000.00
	Treasury Bond Annual Returns	$1,826,852,496.96	$1,912,755,437.59	4.70%	$85,902,940.63
FY2008-2014 Differential	Actual Market Value	$2,161,438,000.00	$2,832,753,000.00	31.06%	$671,315,000.00
	Treasury Bond Annual Returns	$1,826,852,496.96	$2,118,376,647.13	15.96%	$291,524,150.17
FY2004-2014 Differential	Actual Market Value	$1,315,894,000.00	$2,832,753,000.00	115.27%	$1,516,859,000.00
	Treasury Bond Annual Returns	$1,315,894,000.00	$2,118,376,647.13	60.98%	$802,482,647.13

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 7: Indiana University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$1,012,707,000.00	$1,107,498,000.00	9.36%	$94,791,000.00
	Treasury Bond Annual Returns	$1,012,707,000.00	$1,041,771,690.90	2.87%	$29,064,690.90
FY2005-2006	Actual Market Value	$1,107,498,000.00	$1,276,160,000.00	15.23%	$168,662,000.00
	Treasury Bond Annual Returns	$1,041,771,690.90	$1,062,190,416.04	1.96%	$20,418,725.14
FY2006-2007	Actual Market Value	$1,276,160,000.00	$1,556,853,000.00	22.00%	$280,693,000.00
	Treasury Bond Annual Returns	$1,062,190,416.04	$1,170,640,057.52	10.21%	$108,449,641.48
FY2007-2008	Actual Market Value	$1,556,853,000.00	$1,546,469,000.00	-0.67%	-$10,384,000.00
	Treasury Bond Annual Returns	$1,170,640,057.52	$1,405,938,709.08	20.10%	$235,298,651.56
FY2008-2009	Actual Market Value	$1,546,469,000.00	$1,226,505,000.00	-20.69%	-$319,964,000.00
	Treasury Bond Annual Returns	$1,405,938,709.08	$1,249,598,324.63	-11.12%	-$156,340,384.45
FY2009-2010	Actual Market Value	$1,226,505,000.00	$1,371,025,000.00	11.78%	$144,520,000.00
	Treasury Bond Annual Returns	$1,249,598,324.63	$1,355,314,342.89	8.46%	$105,716,018.26
FY2010-2011	Actual Market Value	$1,371,025,000.00	$1,574,815,000.00	14.86%	$203,790,000.00
	Treasury Bond Annual Returns	$1,355,314,342.89	$1,572,706,763.49	16.04%	$217,392,420.60
FY2011-2012	Actual Market Value	$1,574,815,000.00	$1,576,615,000.00	0.11%	$1,800,000.00
	Treasury Bond Annual Returns	$1,572,706,763.49	$1,619,416,154.37	2.97%	$46,709,390.88
FY2012-2013	Actual Market Value	$1,576,615,000.00	$1,735,086,000.00	10.05%	$158,471,000.00
	Treasury Bond Annual Returns	$1,619,416,154.37	$1,472,049,284.32	-9.10%	-$147,366,870.05
FY2013-2014	Actual Market Value	$1,735,086,000.00	$1,988,336,000.00	14.60%	$253,250,000.00
	Treasury Bond Annual Returns	$1,472,049,284.32	$1,630,294,582.38	10.75%	$158,245,298.06
FY2008-2013 Differential	Actual Market Value	$1,546,469,000.00	$1,735,086,000.00	12.20%	$188,617,000.00
	Treasury Bond Annual Returns	$1,405,938,709.08	$1,472,049,284.32	4.70%	$66,110,575.24
FY2008-2014 Differential	Actual Market Value	$1,546,469,000.00	$1,988,336,000.00	28.57%	$441,867,000.00
	Treasury Bond Annual Returns	$1,405,938,709.08	$1,630,294,582.38	15.96%	$224,355,873.30
FY2004-2014 Differential	Actual Market Value	$1,012,707,000.00	$1,988,336,000.00	96.34%	$975,629,000.00
	Treasury Bond Annual Returns	$1,012,707,000.00	$1,630,294,582.38	60.98%	$617,587,582.38

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 8: University of Cincinnati Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$987,785,000.00	$1,032,124,000.00	4.49%	$44,339,000.00
	Treasury Bond Annual Returns	$987,785,000.00	$1,016,134,429.50	2.87%	$28,349,429.50
FY2005-2006	Actual Market Value	$1,032,124,000.00	$1,101,100,000.00	6.68%	$68,976,000.00
	Treasury Bond Annual Returns	$1,016,134,429.50	$1,036,050,664.32	1.96%	$19,916,234.82
FY2006-2007	Actual Market Value	$1,101,100,000.00	$1,185,400,000.00	7.66%	$84,300,000.00
	Treasury Bond Annual Returns	$1,036,050,664.32	$1,141,831,437.15	10.21%	$105,780,772.83
FY2007-2008	Actual Market Value	$1,185,400,000.00	$1,099,127,000.00	-7.28%	-$86,273,000.00
	Treasury Bond Annual Returns	$1,141,831,437.15	$1,371,339,556.02	20.10%	$229,508,118.87
FY2008-2009	Actual Market Value	$1,099,127,000.00	$832,924,000.00	-24.22%	-$266,203,000.00
	Treasury Bond Annual Returns	$1,371,339,556.02	$1,218,846,597.39	-11.12%	-$152,492,958.63
FY2009-2010	Actual Market Value	$832,924,000.00	$886,262,000.00	6.40%	$53,338,000.00
	Treasury Bond Annual Returns	$1,218,846,597.39	$1,321,961,019.53	8.46%	$103,114,422.14
FY2010-2011	Actual Market Value	$886,262,000.00	$1,004,368,000.00	13.33%	$118,106,000.00
	Treasury Bond Annual Returns	$1,321,961,019.53	$1,534,003,567.06	16.04%	$212,042,547.53
FY2011-2012	Actual Market Value	$1,004,368,000.00	$976,814,000.00	-2.74%	-$27,554,000.00
	Treasury Bond Annual Returns	$1,534,003,567.06	$1,579,563,473.00	2.97%	$45,559,905.94
FY2012-2013	Actual Market Value	$976,814,000.00	$1,045,606,000.00	7.04%	$68,792,000.00
	Treasury Bond Annual Returns	$1,579,563,473.00	$1,435,823,196.96	-9.10%	-$143,740,276.04
FY2013-2014	Actual Market Value	$1,045,606,000.00	$1,183,922,000.00	13.23%	$138,316,000.00
	Treasury Bond Annual Returns	$1,435,823,196.96	$1,590,174,190.63	10.75%	$154,350,993.67
FY2008-2013 Differential	Actual Market Value	$1,099,127,000.00	$1,045,606,000.00	-4.87%	-$53,521,000.00
	Treasury Bond Annual Returns	$1,371,339,556.02	$1,435,823,196.96	4.70%	$64,483,640.94
FY2008-2014 Differential	Actual Market Value	$1,099,127,000.00	$1,183,922,000.00	7.71%	$84,795,000.00
	Treasury Bond Annual Returns	$1,371,339,556.02	$1,590,174,190.63	15.96%	$218,834,634.61
FY2004-2014 Differential	Actual Market Value	$987,785,000.00	$1,183,922,000.00	19.86%	$196,137,000.00
	Treasury Bond Annual Returns	$987,785,000.00	$1,590,174,190.63	60.98%	$602,389,190.63

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 9: Wake Forest University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$812,698,000.00	$906,803,000.00	11.58%	$94,105,000.00
	Treasury Bond Annual Returns	$812,698,000.00	$836,022,432.60	2.87%	$23,324,432.60
FY2005-2006	Actual Market Value	$906,803,000.00	$1,042,558,000.00	14.97%	$135,755,000.00
	Treasury Bond Annual Returns	$836,022,432.60	$852,408,472.28	1.96%	$16,386,039.68
FY2006-2007	Actual Market Value	$1,042,558,000.00	$1,248,695,000.00	19.77%	$206,137,000.00
	Treasury Bond Annual Returns	$852,408,472.28	$939,439,377.30	10.21%	$87,030,905.02
FY2007-2008	Actual Market Value	$1,248,695,000.00	$1,253,673,000.00	0.40%	$4,978,000.00
	Treasury Bond Annual Returns	$939,439,377.30	$1,128,266,692.14	20.10%	$188,827,314.84
FY2008-2009	Actual Market Value	$1,253,673,000.00	$886,761,000.00	-29.27%	-$366,912,000.00
	Treasury Bond Annual Returns	$1,128,266,692.14	$1,002,803,435.97	-11.12%	-$125,463,256.17
FY2009-2010	Actual Market Value	$886,761,000.00	$937,639,000.00	5.74%	$50,878,000.00
	Treasury Bond Annual Returns	$1,002,803,435.97	$1,087,640,606.65	8.46%	$84,837,170.68
FY2010-2011	Actual Market Value	$937,639,000.00	$1,058,250,000.00	12.86%	$120,611,000.00
	Treasury Bond Annual Returns	$1,087,640,606.65	$1,262,098,159.96	16.04%	$174,457,553.31
FY2011-2012	Actual Market Value	$1,058,250,000.00	$1,000,133,000.00	-5.49%	-$58,117,000.00
	Treasury Bond Annual Returns	$1,262,098,158.96	$1,299,582,474.28	2.97%	$37,484,315.32
FY2012-2013	Actual Market Value	$1,000,133,000.00	$1,061,639,000.00	6.15%	$61,506,000.00
	Treasury Bond Annual Returns	$1,299,582,474.28	$1,181,320,469.12	-9.10%	-$118,262,005.16
FY2013-2014	Actual Market Value	$1,061,639,000.00	$1,148,026,000.00	8.14%	$86,387,000.00
	Treasury Bond Annual Returns	$1,181,320,469.12	$1,308,312,419.55	10.75%	$126,991,950.43
FY2008-2013 Differential	Actual Market Value	$1,253,673,000.00	$1,061,639,000.00	-15.32%	-$192,034,000.00
	Treasury Bond Annual Returns	$1,128,266,692.14	$1,181,320,469.12	4.70%	$53,053,776.98
FY2008-2014 Differential	Actual Market Value	$1,253,673,000.00	$1,148,026,000.00	-8.43%	-$105,647,000.00
	Treasury Bond Annual Returns	$1,128,266,692.14	$1,308,312,419.55	15.96%	$180,045,727.41
FY2004-2014 Differential	Actual Market Value	$812,698,000.00	$1,148,026,000.00	41.26%	$335,328,000.00
	Treasury Bond Annual Returns	$812,698,000.00	$1,308,312,419.55	60.98%	$495,614,419.55

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 10: Tulane University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$692,665,000.00	$780,200,000.00	12.64%	$87,535,000.00
	Treasury Bond Annual Returns	$692,665,000.00	$712,544,485.50	2.87%	$19,879,485.50
FY2005-2006	Actual Market Value	$780,200,000.00	$858,323,000.00	10.01%	$78,123,000.00
	Treasury Bond Annual Returns	$712,544,485.50	$726,510,357.42	1.96%	$13,965,871.92
FY2006-2007	Actual Market Value	$858,323,000.00	$1,009,129,000.00	17.57%	$150,806,000.00
	Treasury Bond Annual Returns	$726,510,357.42	$800,687,064.91	10.21%	$74,176,707.49
FY2007-2008	Actual Market Value	$1,009,129,000.00	$1,052,881,000.00	4.34%	$43,752,000.00
	Treasury Bond Annual Returns	$800,687,064.91	$961,625,164.96	20.10%	$160,938,100.05
FY2008-2009	Actual Market Value	$1,052,881,000.00	$807,859,000.00	-23.27%	-$245,022,000.00
	Treasury Bond Annual Returns	$961,625,164.96	$854,692,446.62	-11.12%	-$106,932,718.34
FY2009-2010	Actual Market Value	$807,859,000.00	$888,667,000.00	10.00%	$80,808,000.00
	Treasury Bond Annual Returns	$854,692,446.62	$926,999,427.60	8.46%	$72,306,980.98
FY2010-2011	Actual Market Value	$888,667,000.00	$1,014,985,000.00	14.21%	$126,318,000.00
	Treasury Bond Annual Returns	$926,999,427.60	$1,075,690,135.79	16.04%	$148,690,708.19
FY2011-2012	Actual Market Value	$1,014,985,000.00	$960,972,000.00	-5.32%	-$54,013,000.00
	Treasury Bond Annual Returns	$1,075,690,135.79	$1,107,638,132.82	2.97%	$31,947,997.03
FY2012-2013	Actual Market Value	$960,972,000.00	$1,047,813,000.00	9.04%	$86,841,000.00
	Treasury Bond Annual Returns	$1,107,683,132.82	$1,006,883,967.73	-9.10%	-$100,799,165.09
FY2013-2014	Actual Market Value	$1,047,813,000.00	$1,183,924,000.00	12.99%	$136,111,000.00
	Treasury Bond Annual Returns	$1,006,883,967.73	$1,115,123,994.26	10.75%	$108,240,026.53
FY2008-2013 Differential	Actual Market Value	$1,052,881,000.00	$1,047,813,000.00	-0.48%	-$5,068,000.00
	Treasury Bond Annual Returns	$961,625,164.96	$1,006,883,967.73	4.71%	$45,258,802.77
FY2008-2014 Differential	Actual Market Value	$1,052,881,000.00	$1,183,924,000.00	12.45%	$131,043,000.00
	Treasury Bond Annual Returns	$961,625,164.96	$1,115,123,994.26	15.96%	$153,498,829.30
FY2004-2014 Differential	Actual Market Value	$692,665,000.00	$1,183,924,000.00	70.92%	$491,259,000.00
	Treasury Bond Annual Returns	$692,665,000.00	$1,115,123,994.26	60.99%	$422,458,994.26

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 11: Oberlin College Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$593,742,000.00	$704,329,000.00	18.63%	$110,587,000.00
	Treasury Bond Annual Returns	$593,742,000.00	$610,782,395.40	2.87%	$17,040,395.40
FY2005-2006	Actual Market Value	$704,329,000.00	$697,851,000.00	-0.92%	-$6,478,000.00
	Treasury Bond Annual Returns	$610,782,395.40	$622,753,730.35	1.96%	$11,971,334.95
FY2006-2007	Actual Market Value	$697,851,000.00	$816,135,000.00	16.95%	$118,284,000.00
	Treasury Bond Annual Returns	$622,753,730.35	$686,336,886.22	10.21%	$63,583,155.87
FY2007-2008	Actual Market Value	$816,135,000.00	$760,736,000.00	-6.79%	-$55,399,000.00
	Treasury Bond Annual Returns	$686,336,886.22	$824,290,600.35	20.10%	$137,953,714.13
FY2008-2009	Actual Market Value	$760,736,000.00	$550,263,000.00	-27.67%	-$210,473,000.00
	Treasury Bond Annual Returns	$824,290,600.35	$732,629,485.59	-11.12%	-$91,661,114.76
FY2009-2010	Actual Market Value	$550,263,000.00	$618,104,000.00	12.33%	$67,841,000.00
	Treasury Bond Annual Returns	$732,629,485.59	$794,609,940.07	8.46%	$61,980,454.48
FY2010-2011	Actual Market Value	$618,104,000.00	$699,895,000.00	13.23%	$81,791,000.00
	Treasury Bond Annual Returns	$794,609,940.07	$922,065,374.46	16.04%	$127,455,434.39
FY2011-2012	Actual Market Value	$699,895,000.00	$674,587,000.00	-3.62%	-$25,308,000.00
	Treasury Bond Annual Returns	$922,065,374.46	$949,450,716.08	2.97%	$27,385,341.62
FY2012-2013	Actual Market Value	$674,587,000.00	$727,683,000.00	7.87%	$53,096,000.00
	Treasury Bond Annual Returns	$949,450,716.08	$863,050,700.92	-9.10%	-$86,400,015.16
FY2013-2014	Actual Market Value	$727,683,000.00	$816,107,000.00	12.15%	$88,424,000.00
	Treasury Bond Annual Returns	$863,050,700.92	$955,828,651.27	10.75%	$92,777,950.35
FY2008-2013 Differential	Actual Market Value	$760,736,000.00	$727,683,000.00	-4.34%	-$33,053,000.00
	Treasury Bond Annual Returns	$824,290,600.35	$863,050,700.92	4.70%	$38,760,100.57
FY2008-2014 Differential	Actual Market Value	$760,736,000.00	$816,107,000.00	7.28%	$55,371,000.00
	Treasury Bond Annual Returns	$824,290,600.35	$955,828,651.27	15.96%	$131,538,050.92
FY2004-2014 Differential	Actual Market Value	$593,742,000.00	$816,107,000.00	37.45%	$222,365,000.00
	Treasury Bond Annual Returns	$593,742,000.00	$955,828,651.27	60.98%	$362,086,651.27

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

Table 12: Northeastern University Endowment Fund Actual Market Value* vs. Ten-Year Treasury Bond Annual Returns**

Fiscal Year	Annual Returns	Beginning Value	Ending Value	% Differential	Raw Dollar Differential
FY2004-2005	Actual Market Value	$498,481,000.00	$543,174,000.00	8.97%	$44,693,000.00
	Treasury Bond Annual Returns	$498,481,000.00	$512,787,404.70	2.87%	$14,306,404.70
FY2005-2006	Actual Market Value	$543,174,000.00	$595,859,000.00	9.70%	$52,685,000.00
	Treasury Bond Annual Returns	$512,787,404.70	$522,838,037.83	1.96%	$10,050,633.13
FY2006-2007	Actual Market Value	$595,859,000.00	$679,926,000.00	14.11%	$84,067,000.00
	Treasury Bond Annual Returns	$522,838,037.83	$576,219,801.49	10.21%	$53,381,763.66
FY2007-2008	Actual Market Value	$679,926,000.00	$657,866,000.00	-3.24%	-$22,060,000.00
	Treasury Bond Annual Returns	$576,219,801.49	$692,039,981.59	20.10%	$115,820,180.10
FY2008-2009	Actual Market Value	$657,866,000.00	$486,870,000.00	-25.99%	-$170,996,000.00
	Treasury Bond Annual Returns	$692,039,981.59	$615,085,135.64	-11.12%	-$76,954,845.95
FY2009-2010	Actual Market Value	$486,870,000.00	$508,689,000.00	4.48%	$21,819,000.00
	Treasury Bond Annual Returns	$615,085,135.64	$667,121,338.12	8.46%	$52,036,202.48
FY2010-2011	Actual Market Value	$508,689,000.00	$588,400,000.00	15.67%	$79,711,000.00
	Treasury Bond Annual Returns	$667,121,338.12	$774,127,600.75	16.04%	$107,006,262.63
FY2011-2012	Actual Market Value	$588,400,000.00	$566,767,000.00	-3.68%	-$21,633,000.00
	Treasury Bond Annual Returns	$774,127,600.75	$797,119,190.49	2.97%	$22,991,589.74
FY2012-2013	Actual Market Value	$566,767,000.00	$616,618,000.00	8.80%	$49,851,000.00
	Treasury Bond Annual Returns	$797,119,190.49	$724,581,344.16	-9.10%	-$72,537,846.33
FY2013-2014	Actual Market Value	$616,618,000.00	$713,200,000.00	15.66%	$96,582,000.00
	Treasury Bond Annual Returns	$724,581,344.16	$802,473,838.66	10.75%	$77,892,494.50
FY2008-2013 Differential	Actual Market Value	$657,866,000.00	$616,618,000.00	-6.27%	-$41,248,000.00
	Treasury Bond Annual Returns	$692,039,981.59	$724,581,344.16	4.70%	$32,541,362.57
FY2008-2014 Differential	Actual Market Value	$657,866,000.00	$713,200,000.00	8.41%	$55,334,000.00
	Treasury Bond Annual Returns	$692,039,981.59	$802,473,838.66	15.96%	$110,433,857.07
FY2004-2014 Differential	Actual Market Value	$498,481,000.00	$713,200,000.00	43.07%	$214,719,000.00
	Treasury Bond Annual Returns	$498,481,000.00	$802,473,838.66	60.98%	$303,992,838.66

*Data from the NACUBO-Commonfund Study of Endowments (2004-2014).

** Data from New York University Stern School of Business, *Historical Returns on Stocks, Bonds and Bills*, available at http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html.

REVIEW OF WILLIAM G. BOWEN'S & EUGENE M. TOBIN'S

LOCUS OF AUTHORITY

JONATHAN R. ALGER*

In an era of rapidly changing technology, unprecedented access to information, and increasing global competition, American colleges and universities face questions from many different quarters about the efficiency and effectiveness of higher education in the 21st Century. Although higher education is often jokingly contrasted with "the real world," the reality is that a strong system of higher education is a critical underpinning for a thriving economy and healthy democracy. Institutions face significant resource constraints while coping with relentless calls from all sides for increased accountability, transparency, affordability, and access. Diverse and sometimes competing constituencies, both in and outside the academy, believe that they should have a say in how these institutions are organized and operated. This complex environment of accountability is the backdrop for a new book about higher education governance by two eminent former college presidents: William G. Bowen's and Eugene M. Tobin's *Locus of Authority: The Evolution of Faculty Roles in the Governance of Higher Education*.[1]

The book consists of an unusual combination of history, contemporary observations and advice, and case studies of how governance has (and has not) worked in practice at several different types of institutions. Defining governance as "simply the location and exercise of authority,"[2] Bowen and Tobin focus on the role of faculty and how it has evolved over time in response to changing conditions in higher education and in society more broadly. In order to illustrate this evolution in a concrete way, the book concludes with lengthy case studies from four institutions with very differ-

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1. WILLIAM G. BOWEN & EUGENE M. TOBIN, LOCUS OF AUTHORITY: THE EVOLUTION OF FACULTY ROLES IN THE GOVERNANCE OF HIGHER EDUCATION (2015). Bowen formerly served as president of Princeton University, and Tobin as president of Hamilton College.

2. *Id.* at ix.

ent histories and missions: the University of California, Princeton University, Macalester College, and The City University of New York. While each of the case studies is interesting and nuanced in its own right from a historical point of view, they tend to dwell heavily on personalities, relationships, and individualized circumstances that may be of somewhat limited applicability to other institutions. For many college and university leaders, therefore, the earlier chapters (in which the authors discuss broadly the evolution of our higher education system, and the issues and challenges we need to face now and in the future) are more likely to be helpful from a practical perspective in addressing governance issues at their own institutions.[3]

From the outset, Bowen and Tobin argue that the system of higher education governance in the United States can impede progress on almost every major issue faced by our colleges and universities, and that the system is in need of reform from within. Rather than focusing on the quality of education delivered in an abstract sense (which the authors readily admit is a complex task), they "concentrate instead on three other crucial aspects of educational outcomes—attainment, degree completion, and disparities in outcomes related to socioeconomic status—that are, in at least some respects, more amenable to analysis."[4] These issues are crucial because they go to the heart of the American dream that has served as a point of pride as well as a rallying cry in our national political and social discourse, especially in recent generations. As Bowen and Tobin put it,

> Our country faces the transcendent challenges of raising the overall level of educational attainment and reestablishing the principle that higher education is the pathway to social mobility. This latter principle, which began to be enunciated forcefully only in the postwar years, is much more fragile and impermanent than we care to admit.[5]

If we continue to believe that higher education is the gateway to opportunity in our society for many different types of careers, as well as a key ingredient in many people's lives that fosters civic engagement and personal fulfillment (among many other benefits that are not strictly economic), we need to look at how our institutions can respond nimbly and effectively to our society's rapidly changing needs, circumstances, and demographics. Bowen and Tobin observe that in our century-old system of academic governance, the role of faculty members has not been focused on being proactive in responding to these sorts of challenges that arise from circumstances that transcend any particular academic discipline.[6] Critics from outside the

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3. The authors acknowledge that the case studies will be of specialized interest to various readers and can therefore be read as stand-alone contributions, which is why they overlap with material in the main text. *Id.* at xv.

4. *Id.* at 2.

5. *Id.*

6. Based on their own experiences as well as a need to focus their reflections

academy have frequently expressed frustration with what they perceive as the slow pace of change within colleges and universities, marked often by seemingly endless debate and discussion. Of course, the academy's tradition of thoughtful dialogue based on evidence, analysis, and expression, and consideration of different points of view reflects one of the core (and arguably more timeless) learning outcomes for which higher education is rightly praised: the development of critical thinking skills that enable people to question assumptions, explore alternatives, and ultimately foster progress in many different fields.

So how can this governance model of discussion and critical thinking be reconciled with the demands of the 21st Century, in which institutions must respond to changes in technology and globalization quickly and with finite resources? Bowen and Tobin argue that in order for us to make meaningful changes in academic governance, we must first understand the historical evolution of our current system and the values and assumptions on which it was premised. A significant portion of the book is devoted, therefore, to a historical overview of American higher education both before and after World War II. These chapters remind us that broad historical developments and trends have long been reflected in the academy and in discussions about accountability and governance—including the Industrial Revolution and the rise and role of corporations, concerns with balancing freedom of speech and thought with national security interests at times of war, and providing avenues to prepare future workers for new and different sorts of jobs and careers.

Throughout the period covered by this historical overview (primarily from the early 20th Century onward), Bowen and Tobin describe how the role of faculty members in academic governance has changed in ways that reflect the growth and evolution of American higher education and its role in society. The development of research universities, for example, led to tensions between the respective roles and priorities for research and teaching. The articulation and protection of academic freedom in the Progressive Era was in part driven by the professionalization of academic disciplines, and by faculty leaders who saw themselves as having responsibilities to society that transcended individual institutions. The rise of disciplinary societies and associations created tensions between institutional and disciplinary loyalties, and the increasing importance of technology in society helped lead to tensions between humanists and social scientists on one hand, and hard scientists and engineers on the other (especially after World War II).[7] In more recent decades, economic pressures that have led to an increasing reliance on adjunct and non-tenure-track faculty have

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and recommendations, the authors note that they focus "primarily on faculties of arts and science at four-year colleges and universities." *Id.* at 7.

7. *Id.* at 161.

created tensions between the rights and responsibilities of faculty members with different types of contractual arrangements.[8]

All of these tensions within the academy underscore the fact that the faculty role and voice in governance cannot be understood as a monolithic block. These tensions have magnified over time at many institutions that have become larger and more complex, and that have taken on new functions and responsibilities. Differences among faculty roles within and across institutions (as well as within and across academic units and departments) must be recognized and addressed in order for successful academic governance models to be developed and sustained over time. Bowen and Tobin rightly point out that we need institutional governance structures that reflect and incorporate the reality of these differences in faculty roles and circumstances.[9]

In Chapter 4, the authors review a short list of topics in which the nature and degree of faculty authority has sometimes been the source of controversy within higher education (e.g., the selection and tenure of the president, budgetary and staffing questions related to non-tenure-track faculty, and authority to determine teaching methods in the digital age).[10] They review models from various institutions that address each of these issues and also provide helpful examples. Like the case studies at the end of the book, however, these examples are sometimes heavily dependent on local circumstances that may not translate easily to other institutional contexts (e.g., public and private institutions may have very different external governance structures and pressures that in turn have an impact on internal governance models). Bowen and Tobin do, however, offer basic principles that can serve as useful checklists for institutions in reviewing their governance policies and practices in these areas[11]—even as each institution must account for its own particular history and circumstances.

In general, Bowen and Tobin do not have a comprehensive set of specific suggestions for governance structures that will work for all institutions, which would be an impossible task given the variations in the size, scope, mission, resources, and circumstances of the full panoply of American colleges and universities. Rather than identifying a specific or rigid sort of governance structure, Bowen and Tobin seem to embrace the need to combine formal and informal approaches to governance in order to address different types of challenges, even as they point out the potential shortcomings of less formal or specifically delineated forms of faculty involvement in decision-making (e.g., ambiguity with regard to the necessary or optimal degree of faculty involvement and consultation on general matters of all

8. *Id.* at 132.
9. *Id.*
10. *Id.* at 133.
11. *See, e.g., Id.* at 163-64 (list of propositions regarding faculty appointments).

kinds).[12] They point out, for example, that informal networks can be effective in tackling issues that cut broadly across disciplinary lines—including ad hoc committees and task forces that are commonly used in higher education.[13] As much as faculty members and administrators in higher education like to complain about committees, they may in fact be one of the most important elements of effective governance as a means to gather input, engender thoughtful analysis, and develop potential options and solutions.

Given their backgrounds and experience with technology and online education in particular, it is not surprising that many of the authors' most probing insights about governance relate to this controversial and timely topic. The digital revolution and the development of various forms of online education are the latest battleground for many academic governance issues related to the control of the curriculum, academic freedom, and intellectual property rights. These issues are not really new—advances in technology throughout our history, and especially in the past century (such as the advent of radio and television, even before the Internet) have led to discussions about how we teach and learn, and whether there are efficiencies to be gained with new modes of communication. What has happened recently, however, according to Bowen and Tobin, is that "lines between content, technology, and pedagogy have blurred."[14] They argue that this development necessitates "more horizontal ways of organizing discussion of new approaches to teaching and learning."[15]

Bowen and Tobin describe a series of trade-offs in dealing with this complex topic. On the one hand, they bluntly assert that faculty members must give up "any claim to sole authority over teaching methods of all kinds,"[16] while also being given "an important seat at a bigger table" to promote collaborative decision-making regarding the broader investment in, and use of, online education in the curriculum.[17] While their observations and recommendations in this area are somewhat general, the authors' admonitions to everyone involved in higher education remind us that issues of this magnitude require the involvement of many different parties (just as the successful development and application of this technology for pedagogical purposes relies on the involvement of faculty as well as many different types of staff and support).

Online education is just one area in which Bowen and Tobin claim that a collaborative approach is essential to decision-making in higher education now and in the future. Throughout the book, the authors point to examples

12. *Id.* at 147.
13. *Id.* at 144.
14. *Id.* at 207.
15. *Id.*
16. *Id.* at 173.
17. *Id.*

from the case studies, and to their own extensive experience, in arguing that some of the most successful stories of institutional transformation have occurred as the result of cooperative and collaborative relationships and efforts among administrators and faculty in particular (and also other entities or individuals who have roles to play in governance, such as governing boards).

In other words, old-fashioned personal relationships and interpersonal communication still matter in higher education governance. No amount or type of technology can remove the human element from an enterprise in which we seek to transform the lives of future generations of people through education. Accordingly, Bowen and Tobin remind faculty and administrators alike of the need to treat each other with mutual respect in recognition of their collective commitment to the educational mission:

> Faculty and administrators alike generally believe strongly in the value of what they are doing—otherwise many would have chosen different life paths. In thinking about these roles, it is much better to err in the direction of assuming the best about faculty and administrative colleagues than assuming bad behavior that may, in fact, be brought about only by the assumption that it is likely.[18]

This kind of common-sense civility is often in short supply in our country, and college and university leaders can provide a useful educational service by modeling this sort of behavior for future generations of leaders and decision-makers.

Academic leaders who are looking for easy answers, quick fixes, or canned solutions to governance challenges in higher education will not find them in *Locus of Authority*. The authors succeed more in being descriptive than in being prescriptive. Given the broad array of constituencies who can and should have a stake in higher education and its future, as well as the multi-faceted and human-focused nature of our educational mission, it should perhaps come as no surprise that higher education governance is, and will continue to be, a somewhat messy and complex business. As Bowen and Tobin point out, the very phrase "shared governance" can create ambiguity and uncertainty in the minds of many people, especially those outside the academy who are accustomed to "top-down" corporate models of governance.[19] This concept may not sit well with critics who believe that our model of higher education in this country is broken, that it is not sufficiently nimble and responsive to the current needs of society, and that its governance structures need to be radically overhauled.

Bowen and Tobin strike an overall optimistic if unsentimental tone in responding to such critics, and suggest that the academy is capable of re-

18. *Id.* at 212.
19. *Id.* at 205-12.

forming itself from within—and indeed has demonstrated in the past that it can do so. While they focus their attention on the faculty role in particular, their analysis of governance challenges could benefit from an even further exploration of the increasingly powerful pressures being exerted from forces external to the academy—including political forces at the federal and state level that reflect the voices of skeptics who believe that higher education is too insular and not sufficiently accountable to the taxpayers and the general public.

In spite of all of the crosswinds that buffet institutions of higher education, Bowen and Tobin's focus on the faculty role in particular is a powerful reminder that our faculty members are educators at the front lines of our mission on a daily basis, and that meaningful changes in how and what we teach will be difficult if not impossible without their buy-in. Educational leaders need to appreciate and embrace this reality, and to communicate openly and honestly about it, if they want to create and sustain long-term institutional transformation.

INTERCOLLEGIATE ATHLETICS: AN IMMENSE SCANDAL WITH LEGAL IMPLICATIONS. A REVIEW OF JAY M. SMITH AND MARY WILLINGHAM'S *CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS.*

WILLIAM M. CHACE*

In June of last year, the Southern Association of Colleges and Schools (SACS) levied on the University of North Carolina at Chapel Hill the penalty of "probation" for two decades of academic fraud. Probation is the most severe penalty the Association can levy short of the revocation of accreditation. The Association cited seven standards which, it said, violated the standards of academic integrity and monitoring college sports. "It's a big deal," said Belle Whelan, SACS president, "This issue was bigger than anything with which we've ever dealt, and it went on for longer than anything else. This is the first one I can recall in the 10 years I've been here that we put an institution on probation for academic fraud or [for violations of] academic integrity."[1] The University will remain on probation until such time that it demonstrates its compliance with the principles of the Association.[2]

This book, *Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports*,[3] jointly written by two people—Smith, a professor of French history at UNC, and Willingham, a former employee of the University's Center for Student Success and Academic Counseling—who indirectly played roles in the well-known and much-covered scandal at the University—only now and again touches on issues

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1. Arielle Clay, *Accrediting Organization: Problems at UNC-CH 'a big deal'*, WRAL (June 11, 2015), http://www.wral.com/accrediting-organization-puts-unc-ch-on-12-month-probation/14704731/#eGxzQRmMBTstDImv.99.

2. *Id.*

3. JAY M. SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS (2015).

that properly can be termed "legal." That there were massive and repeated violations of academic integrity over a twenty-year period at Chapel Hill cannot now be in doubt. That hundreds, if not thousands, of students were enrolled in classes that either never met or that required little or no work, that many if not most of those students were basketball or football players, that passing grades were awarded to those students so they could retain their eligibility, as per the rules of the National Collegiate Athletic Association (NCAA), to remain on the teams, and that most of these courses were offered by the Department of African and Afro-American Studies, has been established and is not disputed by the University. One clear legal issue—the indictment for fraud of the chairman of that departmentDr. Julius Nyang'oro[4]—has been resolved with the announcement by Orange County District Attorney Jim Woodall that the charge has been dropped.[5]

Indeed, that the University flagrantly and repeatedly violated not only its own educational principles but also the embedded principles of American higher education is a fact that has been substantiated by an external investigative body hired by the University. Kenneth Wainstein, a former federal prosecutor, and his colleagues, A. Joseph Jay III, and Colleen Depman Kukowski, issued a report, "Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill" on October 16, 2014.[6] That 131-page report, fully delineating the extent of the scandal, was released to the public and has been accepted by the University.[7] In the summer of this year, the University, in response to the Wainstein investigation, reported to the NCAA additional potential violations involving the women's basketball and men's soccer teams. In direct response to these admissions, the NCAA stated that the University "lacked institutional control" over athletics, a finding serious enough that it could lead to postseason bans, the vacating of wins, and scholarship penalties. Such a finding could also bring about the

4. A grand jury indicted Nyang'oro on a felony charge of obtaining property by false pretense. Investigators say he accepted $12,000 for teaching a summer school course in 2011, but no lectures were ever held. Nyang'oro pleaded not guilty to the fraud charge in December and was released on a $30,000 bond.

5. Julia Sims, *Fraud Charge Dropped Against UNC's Nyang'oro*, WRAL (July 3, 2015), http://www.wral.com/unc-prof-nyang-oro-sees-fraud-charge-dropped/13786227/#5rBmxVIEgU7OpzX3.99.

6. The entire report is at: Kenneth L. Wainstein, A. Joseph Jay III, & Colleen Depman Kukowski, *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill* (Oct. 16, 2014), *available at* http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/UNC-FINAL-REPORT.pdf (last visited Nov. 1, 2015).

7. *Id.*

"death penalty," which would shut down, for a certain period of time, specific athletic activities.[8]

What now remains to be said about this egregious (but not unique) instance of institutional malfeasance? More directly, what of legal interest is developed and exposed by Smith and Willingham's study? The answer is not to be found in the bulk of the book. Most of its pages are given over to a detailed, if not tedious, and repetitive recitation of courses that never met but for which passing grades were awarded, instructors assigning no written work, faculty or staff "advisors" shunting athletes into "independent studies" courses for which there was no record of class meetings or formal assignments, and a general—if covert—understanding among certain coaches, members of the faculty, and members of the "Academic Support Program for Student Athletes" that special routes to passing grades had to be kept open to players of basketball and football (the two "profit sports" in American higher education). Those involved knew that such routes were closed to other students. The book is clear that University administrators, including the chancellor, Holden Thorp, did all they could, for as long as they could, to mask the existence of such a system and to ward off any close look at it. Even at the end-stage of the scandal, when the local newspaper, the *Raleigh News and Observer*, was uncovering fact after embarrassing fact, the authors say Thorp, "shared responsibility for the institutional strategy of protecting athletics from further harm, even if it meant that honesty and integrity had to go by the wayside."[9]

Nor does this book shed very much new light on the Chapel Hill story. Despite the fact that Smith and Willingham were working on the campus and were thus afforded an exceptionally close look at the corruption of its academic life, their account does not significantly differ from that given by Paul Barrett writing in *Bloomberg Businessweek*.[10] In fact, Barrett brings in more detailed information about, among other things, the exact numbers of athletes involved, the amount of money generated across the nation by the two "profit sports," the number of grades that were changed at Chapel Hill (more than 500), and the number of Chapel Hill "at-risk" athletes from 2004 to 2012 who were reading at a third-grade level (some ten percent).[11]

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8. Andy Thomason, *Chapel Hill Lacked "Institutional Control" Over Athletics, NCAA Says*, CHRON. HIGHER EDUC. (June 4, 2015), http://chronicle.com/blogs/ticker/chapel-hill-lacked-institutional-control-over-athletics-ncaa-says/100173.

9. SMITH & WILLINGHAM, *supra* note 2, at 111.

10. Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMBERGBUSINESSWEEK (Feb. 27, 2014), http://www.bloomberg.com/bw/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower.

11. *Id.*

As they bring their history of academic dishonesty at Chapel Hill to a close, Smith and Willingham broaden their findings to include similar, and similarly distressing, accounts at Auburn University, the University of Washington, the University of Michigan, and the University of Minnesota: fictitious courses, "ghost-written" essays composed by faculty members friendly to athletes, and equivalent scenarios of cover-up and stalling as whistle-blowers asked uncomfortable questions and local newspapers energetically moved in with investigations. The geography changes but the scandal remains the same.

"Honesty" and "integrity," however, while profoundly important to institutions of higher education, are not terms that carry legal import. Only toward the end of the book do Smith and Willingham introduce certain issues that bring the scandal at Chapel Hill and other schools within the purview of legal interest.

Charging that the schools in question engage in "cartel-like practices," the authors note that initiatives, such as the one sponsored by Congressman Charlie Dent of Pennsylvania and Tony Cardenas of California and the one drawn up by the Drake Group (an association of academic leaders founded in 1999 and devoted to "academic integrity in collegiate sport"), ask hard questions about the legal protections available to athletes, the degree to which their physical well-being was being protected, the terms by which their "grants-in-aid" (scholarships) are granted or removed, and the academic standards to which they should be held accountable. Asking these questions makes it easy to understand why, in 2014, the National Labor Relations Board in Chicago announced that football players at Northwestern University should enjoy the rights and protections afforded to Northwestern employees.[12] To think of those players not as "student-athletes," but as employees, takes the discussion directly into a larger discussion about the athletes' right to bargain and to earn money as a result of their gridiron labors. In August of this year, however, the NLRB headquarters unanimously dismissed the petition of the Northwestern players to unionize, saying that "asserting jurisdiction in this case would not serve to promote stability in labor relations" and would, it implied, upset competitive balance in college sports.[13] The NLRB did not, however, rule on a central question in the case — whether the players are university employees - leaving open the possibility that it could do so in the future.[14]

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12. Northwestern University and C.A.P.A., 2014-15 N.L.R.B. Dec. P 15781 (Mar. 26, 2014).

13. Northwestern University and C.A.P.A., 362 N.L.R.B. No. 167 (2015).

14. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug 17, 2015), http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html.

A collateral legal pursuit discussed by Willingham and Swift issues from a class-action lawsuit brought by two former athletes, Ed O'Bannon and Martin Jenkins, against the National Collegiate Athletic Association. The former players are challenging the organization's use of the images of its former athletes for commercial purposes. O'Bannon and Jenkins argue that a former student athlete should become entitled upon graduation to financial compensation for the commercial use to which his or her image is put. In response, the NCAA maintains that paying its athletes would be a violation of its concept of the "student athlete." In August of 2014, District Judge Claudia Wilken found for O'Bannon and held that the NCAA's rules and bylaws work in unreasonable restraint of trade, and thus in violation of antitrust law.[15] One year later, an appellate court issued a stay to Judge Wilkin's decision, thus granting at least a temporary reprieve for the NCAA.[16]

The ultimate solution to the dismaying crisis in intercollegiate sports could issue from ideas clearly legal in nature that have been proposed by, among others, labor attorney Jeffrey Kessler and *New York Times* columnist Joe Nocera. Kessler filed last year an antitrust suit in a New Jersey federal court on behalf of a group of college basketball and football players, arguing the association unlawfully limits player compensation to the value of an athletic scholarship. Kessler said, "in no other business—and college sports is big business—would it ever be suggested that the people who are providing the essential services work for free. Only in big-time college sports is that line drawn."[17]

For his part, Nocera, in column after column, has noted with anger that while the coaches at some schools make millions of dollars, those who play the "profit sports" make nothing. "The central conundrum is that universities are simply not built to run a multibillion-dollar entertainment industry. The only way they can do it is by looking the other way at certain practices, and making allowances for good athletes who don't care much about college itself. One of the reasons I advocate paying football and men's basketball players is that it would at least ensure that they got something for their efforts."[18] Of course the schools will strongly resist this initiative and, in doing so, will rely on the notion of the "student-athlete," asserting that the education and the "grant-in-aid" provided to the

15. *See* O'Bannon v. NCAA, 7 F.Supp.3d 955, 1009 (N.D. Cal. 2014) ("[T]he Court finds that this restraint does violate antitrust law.").

16. *See* Marc Tracy and Ben Strauss, *Court Grants Stay in O'Bannon Case*, N.Y. TIMES (July 30, 2015), http://www.nytimes.com/2015/08/01/sports/court-grants-stay-in-obannon-case.html.

17. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model.

18. Joe Nocera, *Playing College Moneyball*, N.Y. TIMES (Jan. 12, 2015), http://www.nytimes.com/2015/01/13/opinion/joe-nocera-playing-college-moneyball.html.

players is compensation enough. In all likelihood, both the initiative and the claim will find their way to the courtroom.

Another approach described by Willingham and Swift as they conclude is for the schools to establish rigorous programs for the remediation of students, including athletes, who are simply unprepared to perform at the collegiate level. This would mean, they write, "academics finally placed in a position of supremacy" on the campus, with practice time limited, with shorter seasons and less travel, and with more and better counseling. Again, as worthy or as practicable as these changes might be, they carry with them no legal implications. But what might well carry such implications would be a revision or the revocation of the Family Educational Rights and Privacy Act of 1974. Today, Willingham and Swift argue, the Act works to limit public knowledge of information about the educational records of all students including athletes and workers, in the Chapel Hill case, to shield those athletes from inquiry into their attendance in class, their selection of courses, and, among other things, their record of traffic violations on campus. This too would be opposed by many people, including both athletes and administrators, and would ultimately be destined for judicial treatment.

Other legal issues, not discussed by Willingham and Swift, await their possible day in court. Should content-free and work-free courses such as those liberally granted over the years at Chapel Hill entitle students who took advantage of those courses to a graduation degree? Or should those degrees be revoked? Should there be legal investigation of the possibility of the abuse of Federal monies—Pell grants, SEOG grants—that undergirded such courses?

In sum, this book is clear and detailed in its coverage of an immensely ugly and painful chapter in the history of the University of North Carolina at Chapel Hill. But only in its concluding pages does it direct attention to issues rising to formal legal pertinence.

FOR THE WIN: A STORY OF ACADEMIC FRAUD AND ITS COVER-UP TO KEEP "STUDENT"-ATHLETES ELIGIBLE IN BIG-TIME COLLEGE SPORTS. A REVIEW OF JAY M. SMITH AND MARY WILLINGHAM'S *CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS*

ELSA KIRCHER COLE*

"Cheaters never prosper"

- English Proverb

"I would prefer even to fail with honor than to win by cheating."
- Sophocles

A continuing, now decades-long clamor, is that college athletes in big time sports should be paid. Everyone else, the coaches, athletic directors, schools, conference commissioners, sporting goods manufacturers, broadcasters, it is argued, are making money on the backs of the football and men's basketball players who don't see a dime of that money and who can barely afford a pizza on Saturday night, much less the jerseys with their numbers for sale in the college bookstore.

The National Collegiate Athletic Association (NCAA) has had only one good response to this: Many of the participants in those sports are student-athletes[1] on scholarships who are receiving an education in return for their play. After all, the fundamental purpose of the NCAA as spelled out in its constitution is to "maintain intercollegiate athletics as an integral part of the

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1. "Student-athlete" is the term coined by Walter Byers, the first executive director of the NCAA, to describe the participants in NCAA intercollegiate sports and is the term used in this review. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1997). The authors of *Cheated* disdain using that term as they believe it is a falsehood meant to deceive people into believing players are students equally with being athletes. They use the term "athlete" instead in their book. JAY M. SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME SPORTS (2015).

educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports"[2]

The NCAA's Principle of Amateurism states this clearly: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student-athletes should be protected from exploitation by professional and commercial enterprises."[3] Note that the above principle says nothing about protection from exploitation by their own school administrators and faculty, the folks who should be watching out for them and ensuring they get the education that is the quid pro quo for their athletics participation.[4]

The stunning series of ever more audacious ways that cheated student-athletes at the University of North Carolina-Chapel Hill (UNC) out of a college education to avoid the possibility of their academic ineligibility is the subject of Jay M. Smith and Mary Willingham's new book: *Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports.* It is a story of deception, fraud, and sorry exploitation of many student-athletes for over a decade by those focused only on UNC's athletic success and short-term gain of playing time for the kids and not on preparing them for the world outside of sports.

Although told in the third person, Smith and Willingham were personally involved in the sordid tale that is told. Smith was and is a UNC faculty member in its history department who tried to get answers from college administrators about what was happening as incident after incident came to the attention of the UNC faculty senate. Willingham was an academic counselor in UNC's Student Success and Academic Counseling Center who was so troubled by what she saw going on without any corrective steps by those to whom she complained that she finally felt she needed to share her concerns with an investigative reporter from the local newspaper.

The book is permeated with the sense of betrayal they both experienced as they attempted to find out or address what was really happening at UNC, but that does not appear to bias their reporting of the facts. The obfuscation and avoidance practiced from the highest levels of administrators down to those dealing day-to-day with the student-athletes fills the pages of

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2. NCAA CONST., Art. 1, Bylaw 1.3.1.

3. NCAA CONST., Art. 1, Bylaw 2.9.

4. It is telling that those who are most involved with the NCAA sports model are moving away from labeling it "amateur" athletics and now refer to the "collegiate model of sports." See SMITH & WILLINGHAM, *supra* note 1, at xvi (reference to Mark Emmert, NCAA president, using that term). The reviewer notes the first time she heard that term used was by Jim Delaney, Commissioner of the Big 10, in an NCAA committee meeting in 1998.

this book. There are numerous stories of individual educational travesties as counselors steered players away from their preferred courses of studies to simpler ones with classes that existed only on paper or involved little if any actual learning. The authors are careful to back up their statements with data and documentation obtained from court files or from public records requests in addition to their personal knowledge from one-on-one encounters with administrators and faculty members.

This is not an easy, quick read. There is so much information in the book about academic irregularities that it is almost mind-numbing if one sits down and tries to consume all of it in a few sittings. An example is the statistical unlikelihood of the high grades (one full grade higher than the rest of those on their transcripts) student-athletes achieved in selected independent study courses offered to them by sympathetic faculty in numbers that vastly exceeded departmental norms. Other examples are detailed in stories of ill-prepared UNC athletes from impoverished backgrounds desperately in need of remedial courses instead being shunted through make-believe classes or ones with little or no relevancy to their majors (the number that took "The French Theater in Translation" is staggering, as well as the innovative way counselors found to meet UNC's foreign language requirement through courses in Swahili that never met and never taught a word of Swahili.)

The book outlines the way administrators outfoxed the system that should have highlighted these irregularities by changing course names and numbers as well as getting changes to the ways annual departmental reports were written. They used inside knowledge to bypass the controls in the system that might have alerted others as to what was going on. It is truly staggering to see the manipulations that occurred to prevent others from knowing what was happening as well as disheartening to know that many who knew about it were silent either to protect their own jobs or that of their colleagues.[5]

It is also dismaying, although sadly not unpredictable given the desire to avoid NCAA penalties, that the cover-up that ensued after the facts began to be known tried to downplay the extent of the academic fraud and was dismissive of those who had tried to blow the whistle on it. Certainly campuses that have been faced with scandal often try to "circle the wagons" in fear of reprisals and tough questions from the public, elected officials and alumni as well as the media.

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5. It is completely consistent with the reviewer's experience that a key informant who "blew the whistle" on the UNC fraud was not a UNC employee or faculty member but a fan of its arch-rival, UNC State. Ex-girlfriends are also a typical source for the NCAA of program irregularities. Andy Katz, *Whistleblowing Girlfriends Dish the Dirt*, ESPN.COM (OCT. 7, 2003), http://sports.espn.go.com/espn/print?id=1632563&type=Story&imagesPrint=off.

In *Cheated*, the reader is taken step by step through the way UNC leaders responded as details of the fraud became known. The efforts to conceal and distract were clever and worked well—even the NCAA was misled when it conducted a hearing into one of the frauds. It is unclear if the university's top administrators fully understood the scale and severity of the academic misconduct, but it appears their priority was to minimize the problem rather than to expose and correct it. Because the authors were involved in one-on-one discussions with university leadership and the school's inside and outside lawyers their account of what was said and promised but never followed through on is disturbing and powerful.

Because so many of the student-athletes who were academically victimized were black and because the UNC department that facilitated so much of the fraud was African and Afro-American studies (AFRI/AFAM), the authors early acknowledge that race lies at the center of the UNC story. AFRI/AFAM's struggle for respect from its founding in the civil rights era and the administration's desire to avoid additional student demonstrations over various issues regarding it, the authors claim, led to reduced oversight over its course offerings and wide latitude to its chair. Rather than offering remedial courses to athletically talented but academically ill-prepared student-athletes, AFRI/AFAM's sports-loving chair and his assistant worked the system with sympathetic academic counselors to provide classes that existed only on paper and g.p.a. boosting independent studies at an unheard of rate—291 for student-athletes in 2003-04 by the chair himself when the average rate for a professor in UNC's history department was 0.14 per year!

It is the sheer, systematic magnitude of the cheating that makes what happened at UNC so eye-opening. Certainly, academic fraud has been present in college sports from its earliest days of competition. In 1893, according to University of Chicago Football Coach Amos Alonzo Stagg, Michigan had seven football players who were not enrolled in classes. This use of ringers, according to Stagg, was not unusual. The famous Michigan coach, Fielding Yost, played for West Virginia in 1896, transferred to Lafayette mid-season claiming interest in its engineering program, played one game against that school's traditional rival, and then transferred back to West Virginia the following week after winning the game for Lafayette.[6]

While the NCAA was not created to address these issues, it became a concern when the NCAA began hosting competitions itself. The myriad of rules that determine today who is eligible to compete in NCAA athletics is a result of the attempts by the colleges and universities who are members of the Association to have a consistent set of criteria for all competitors in order to assure a level playing field and fair contests.

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6. JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 37 (2006).

Part of the effort has been to ensure that student-athletes who are initially academically eligible to compete continue to be academically eligible throughout their college athletic seasons. There have been a series of NCAA reforms aimed at achieving this. In 2003, Division I of the NCAA adopted standards that required student-athletes to complete 40% of their graduation requirements by the start of their third year, 60% by the start of their fourth year, and 80% by their fifth year.

Each Division I team was then assigned an Academic Progress Rate (APR) figure based on a complex academic data collection process. Retaining academic eligibility and remaining at the school are key factors in calculating the APR. The formula establishes a cutoff score that equates statistically with a 50% graduation rate. Teams falling below this rate can be subject to penalties if a player who is academically ineligible leaves the team, including making his or her scholarship, if any, unavailable for another student-athlete. Consistent failure to meet the APR leads to scholarship and recruitment restrictions up to postseason competition bans.[7]

Needless to say, these sanctions are taken very seriously by NCAA Division I schools. Upon the announcement of the APR, pundits immediately predicted that rather than promoting academic reform, it would add further inducements to cheating in order to keep student-athletes eligible in lucrative sports, such as football and men's basketball.

These reforms cannot be faulted for the epidemic academic fraud at UNC, however, which the authors claim began in the late 1980's, continued through the 1990's and peaked in the 2000's with increasingly bold moves by the conspirators to make student-athletes academically eligible. The machinations employed to allow players to meet the extremely minimum academic standard described in the book as a 1.5 g.p.a to participate sophomore year, a 1.75 g.p.a. junior year and a 1.9 g.p.a. senior year are detailed in case history after case history by the authors.

While the majority of the book is devoted to describing the systematic ways developed by a sports-obsessed, "friendly" UNC faculty member and his "sympathetic" assistant to keep players academically eligible—dummy courses, grade changes, exemption from class attendance and term paper writing both for regular classes and numerous independent studies—the authors provide evidence that UNC is not alone in perpetuating academic fraud. They give examples of equally poor behavior by friendly faculty and friendlier administrators at Auburn, Michigan, Washington and Minnesota.

Indeed, a double standard for student-athletes' academically in nothing new. It is common for college students to be aware that student-athletes often arrive on campus with grades and board scores below the ones the rest of the student body had to achieve for admission. Students

7. *Id.* at 229.

quickly learn which courses are easiest by the prevalence of student-athletes in a class or word that the professor's grade history is "A for athletes, B for boys and C for co-eds." Paying for others to take tests for them or extolling its past exam or term paper file as an inducement to join a fraternity have been known on college campuses for decades. It is the sheer magnitude and audacity of the academic fraud at UNC over an extended period of time without anyone recognizing it or addressing it that is so shocking.

So while the existence of a double academic standard for student-athletes is not new, what if anything can be done to prevent future academic fraud in a system that places such value on athletic success and awards those programs and coaches with millions of dollars who achieve it? The authors struggle to find anything new to say in this regard.

They write about the need for faculty to get more involved in knowing what is going on in their athletic departments and to put them more in charge of academic counseling and tutoring. But faculty are operating today in departments with limited funds and paltry pay increases. Faculty are focusing their attentions on locating research dollars or other funding sources for their projects. Most would prefer just to do their own scholarship and avoid the possible censure that comes from becoming critics of their school's athletic program. Still, that is really the only way forward—to have faculty pressure university administrators to adopt realistic admission standards and remedial education for those student –athletes who need it.

The authors also take issue with the way that they see colleges and universities are using FERPA[8] to keep from the public information about student-athlete academic performance that might reflect badly on the school. They believe the law should allow the exposure of courses taken, majors pursued and the names of the academic advisors who influenced those decisions, as that might reveal patterns of abuse that prevent student-athletes from obtaining a real education.

The other, more drastic solution of the authors, is to end the myth of the amateur student-athlete and just pay football and men's basketball teams. They suggest the players might be given access to the classroom as part of their financial compensation to play for the school, with no real academic expectations or requirements. There are, of course, significant legal obstacles to this, such as Title IX[9] which would not allow men's teams' compensation without equal compensation for women's teams.

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8. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (a federal law that protects the privacy of student education records).

9. Title IX of the Higher Education Amendments of 1972, 20 U.S.C. § 1681 (1988); 1979 Policy Interpretation on Intercollegiate Athletics, 45 C.F.R. Part 26 (1979).

Looking to the NCAA for a solution, as the authors propose, is not realistic beyond what it has already done to create academic eligibility rules. While the big money in college athletics today increases the already existing temptation to commit academic fraud to keep ill-prepared or ill-performing students on football and men's basketball teams, the members of the NCAA do not have the legal ability to have a rule that addresses this by restricting compensation for coaches or setting revenue limits for the athletic program. That was tried in the 1990's and was ruled a violation of the antitrust laws.[10]

Further, the NCAA cannot police academic fraud more than it already does because it does not have subpoena power. That means it cannot force individuals to testify as to academic wrong-doing, especially if they are no longer with a school and so cannot be threatened by institutional sanctions for failing to cooperate with an investigation. The NCAA instead must rely on those who have left the school to come forward voluntarily and share their stories. However, these individuals will have little incentive to do so and will be concerned about their futures in the sports and academic worlds if they do so.

The other possible ways reform might take place is through pressure from the public, the fans, state legislatures, Congress or the courts. To date, such efforts have had limited or fleeting success in changing the pressures on schools to win games and generate funds to support their athletic programs. To expect a massive sea change in collegiate sports is not realistic. Tinkering around the edges is more likely what is possible, but to abandon that effort even if only minimally successful is anathema to those who still admire and yearn for what the NCAA founders meant to achieve, the Greek model of classical education, that the mind and the body should be entwined.[11] They still want college athletics to instill the characteristics of fairness, generosity, courage, character, self-restraint and high ethical standards.[12]

And, so, in the end, who is cheated if college athletics fails to honor these ideals? The fans, who expect competition to be between student-athletes who have each had to achieve academically the same set of standards to be eligible to play. The public whose taxes support public colleges

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10. Law v. NCAA, 134 F.3d 1025 (10th Cir. 1998).

11. CROWLEY, *supra* note 6, at 42. *See also,* Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004) ("College sports provided an important opportunity for teaching people about character, motivation, endurance, loyalty and the attainment of one's personal best—all qualities of great value in its citizens. In this sense, competitive athletics were viewed as an extracurricular activity, justified by the university as part of its ideal objective of educating the whole person.") (quoting JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 70 (2003) (written by the former president of the University of Michigan) in regard to the relationship of amateur intercollegiate athletics.).

12. CROWLEY, *supra* note 6.

and universities and who expect it to educate those lucky enough to be attending. The college applicants whose academic achievements are not enough to gain them a place set aside for an underachieving student-athlete. The other potential student-athletes whose possible place on a team is taken by the under-achieving player. But most of all, the student-athletes who are never provided with the education they need to be successful in the non-sports world[13] are cheated by those who commit academic fraud in a misguided belief that they are helping the students and the school by their manipulation of the system. A sad tale, indeed.

13. Only a tiny percentage of student-athletes who participate in college sports will go on to be professional athletes, about 1% of college men's basketball players and 2% of college football players. *Estimated Probability of Competing in Professional Athletics*, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last visited Feb. 9, 2016).

HOW NOT TO ARGUE FOR ORIGINALISM: A REVIEW OF MCGINNIS AND RAPPAPORT'S *ORIGINALISM AND THE GOOD CONSTITUTION*

GREGORY BASSHAM*

Conservative legal scholars John O. McGinnis and Michael B. Rappaport have teamed up to write more than a dozen law reviews articles, most of them in defense of originalism (the view that the Constitution should be interpreted according to its original meaning). In *Originalism and the Good Constitution*,[1] McGinnis and Rappaport draw upon these previous articles to argue for a novel brand of originalism, argued for in a novel way. The central thesis of the book is that originalism leads to better consequences than do alternative approaches because the Constitution was enacted by supermajorities, which made it a good constitution, and originalism preserves the benefits of that good constitution. The book is engaging and exceptionally lucid, but thin at crucial points in the argument. In what follows (in Part I), I will lay out the basic argument of the book, and then (in Part II) explain why I find it unconvincing.

I. THE CENTRAL ARGUMENT OF THE BOOK

Two decades ago, originalism was widely considered to be on life support. Now it is making a vigorous comeback, attracting both liberal and conservative defenders. McGinnis and Rappaport begin by briskly reviewing all the major existing justifications for originalism and arguing that none is fully successful. As an alternative, they offer a consequentialist defense of originalism, claiming that originalist readings of the Constitution tend to produce better net consequences for society over the long run. They note briefly that they subscribe to a particular version of consequentialism—welfare rule-consequentialism. So far as I can see, however, only one important part of their argument (noted below) seems to turn on that widely rejected moral theory.[2] Somewhat in the spirit of Rawls, they offer a kind

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1. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

2. In a recent survey, only 23.6% of philosophers indicated that they embraced a consequentialist approach to ethics. David Bourget and David J. Chalmers, *What Do*

of procedural defense of originalism: our Constitution is good, and should be enforced according to its original meaning, because it was enacted by supermajorities.

McGinnis and Rappaport argue that constitutions enacted by supermajorities are very likely be good (though there is no absolute guarantee of this) for two major reasons. First, supermajority rules dampen partisanship and mandate a high level of consensus, which leads to greater stability and citizen buy-in over the long run. Second, supermajority rules lead to better and more deliberate constitutional decision-making, because enactors know that any provision they enact will likely be in place for a long time. This creates a kind of limited "veil of ignorance" that helps to protect minorities, because "citizens cannot easily predict whether they and their families will, as political, economic, and social climates change, be in the majority or minority on various issues."[3] Because of the way it was created, we have a good (though not perfect) Constitution that promotes the welfare of the American people. The benefits of our Constitution flow from its original meaning, because it was that meaning that was ratified through supermajority processes. Originalism is the best theory of constitutional adjudication because it, and it alone, preserves the benefits of our good Constitution. The main alternative to originalism, living constitutionalism, allows for judicial updating of the Constitution in ways that produce bad consequences. Living constitutionalism allows for politically unaccountable judges to change the meaning of constitutional texts, thereby creating uncertainty, undermining the objectivity of law, short-circuiting the amendment process, and compelling judges to be dishonest about what they are actually doing (namely, amending the Constitution).[4] More generally, judicial updatings of the Constitution are often bad because they are made in ways that lack the refining procedural virtues of supermajoritarian processes: such decisions may be partisan, may not reflect wide consensus, and are not made under a beneficent veil of ignorance. For these reasons, originalism is the best theory of constitutional interpretation.

Three other features of McGinnis and Rappaport's central argument should be noted: the particular version of originalism they defend ("original methods originalism") and their responses to two important objections.

McGinnis and Rappaport embrace what they call "original methods originalism." On this view, a constitutional provision's meaning should be interpreted based on the applicable interpretive rules that were generally

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Philosophers Believe? (Nov. 13, 2013), http://philpapers.org/archive/BOUWDP.pdf. The number of welfare consequentialists is smaller, and the number of welfare rule-consequentialists still smaller than that. Defending originalism by invoking a welfare rule-consequentialist theory is thus a bit like defending reincarnation by invoking the teachings of Tibetan Buddhism. One is speaking to a very small audience.

3. MCGINNIS & RAPPAPORT, *supra* note 1, at 42.
4. MCGINNIS & RAPPAPORT, *supra* note 1, at 204.

accepted at the time the provision was enacted. This is different from standard forms of originalism. Most originalists deny that original interpretive methods are binding, partly because such methods would seem to be part of an "unwritten Constitution" (which they reject) and partly because it would open the door to liberal arguments that the enactors often used open-textured language "capable of growth."[5] McGinnis and Rappaport reject such concerns. They argue that originalists must accept original interpretive methods because they are built into the original meaning of constitutional texts. The enactors (most of whom were not lawyers) understood that the Constitution was a legal document and that there were established rules for interpreting such documents. Moreover, they understood that the original meaning (and therefore benefits) of constitutional texts could not be reliably preserved if judges were empowered to apply non-original interpretive methodologies. Therefore the enactors wisely built original interpretive methods into the very meaning of the Constitution's words. What were those methods? McGinnis and Rappaport are surprisingly noncommittal on this issue, saying they believe it was some form of textualism,[6] but conceding that it might have been some version of intentionalism. They seem to think it does not matter a great deal so long as some coherent originalist method was intended.

McGinnis and Rappaport are unfazed by the common liberal retort that the enactors deliberately used elastic language capable of growth. If that were true, then original methods originalists would have to accept that dynamic methods of interpretation should be employed.[7] Though they do not say it, this might force consequentialists like McGinnis and Rappaport to reject original methods originalism.[8] But fortunately, they say, the evidence is solid that the enactors favored originalist methods and were too "risk-averse"[9] to use constitutional language abstractly or open-endedly, so as to effectively delegate questions of application to future interpreters.

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5. JACK M. BALKIN, LIVING ORIGINALISM 26 (2011).

6. MCGINNIS & RAPPAPORT, *supra* note 1, at 135.

7. *Id.* at 134.

8. Curiously, McGinnis and Rappaport admit that the Constitution itself sometimes authorizes departures from its original meaning. They cite precedent as one example. Another is the President's duty to enforce court orders, even when it is clear that the orders are inconsistent with original meaning *(id.* at 172). They say there is "nothing strange" about the Constitution authorizing departures from its original meaning. Maybe not, but there is something strange about an *originalist* who accepts certain kinds of deviations from original meaning. Suppose a constitution includes a provision that specifically requires judges to employ dynamic methods of interpretation rather than originalist ones in the interpretation of certain clauses. This would make originalism self-referentially incoherent. Applying original meaning would require abandoning original meaning.

9. *Id.* at 149.

Original methods originalism has another advantage over other methods of constitutional interpretation, McGinnis and Rappaport claim. It promotes judicial restraint and makes the law clearer and more predictable. Because original methods originalism builds the original interpretive methods into the very meaning of constitutional language, it makes it easier to find determinate "right answers" to constitutional questions. It does this by largely eliminating problems of vagueness and ambiguity from constitutional language. The original interpretive methods include rules that authorize interpreters to resolve issues of vagueness and ambiguity by adopting whatever originalist readings are supported by a preponderance of evidence. Thus, constitutional language is truly vague or ambiguous only in those rare cases of exact equipoise where no reading is more probable than any other.[10] This is an advantage of original methods originalism, because it promotes greater clarity and predictability in constitutional adjudication and reduces judicial activism.

After defending their preferred mode of originalism, McGinnis and Rappaport respond to two important objections. One is that most of the Constitution was enacted without the participation of women and African Americans, and therefore was not enacted by true supermajorities, thereby subverting their consequentialist argument for originalism. The other is that any defensible theory of constitutional interpretation must recognize the importance of precedent, and that originalism is incompatible with precedent.

McGinnis and Rappaport respond to the point about women and African Americans (and other excluded groups, which they strangely ignore) by arguing that the most obvious and worst consequences of excluding these groups have been corrected by later amendments (notably, the Civil War Amendments and the Nineteenth Amendment). They admit that there might be defects in the Constitution that resulted from the exclusion of these groups, but they argue that there is no normatively attractive way to fix those problems now, so judges should still stick with the original meaning, warts and all.[11]

The problem of precedent also raises serious concerns for originalists. Most originalists admit some role for precedent, but as McGinnis and Rappaport note, this is not easy to square with originalist premises. As Gary Lawson has argued, the Supremacy Clause makes the Constitution, federal

10. *Id.* at 142. Note that this is an exceedingly odd way of treating vagueness and ambiguity. Suppose I'm a high school principal and issue a one-sentence dress code: "No inappropriate clothing may be worn in school." It would be bizarre to argue that this rule is not vague because there are interpretive rules that resolve all cases of putative application except in cases of exact ties. The rule is vague because parents and students would have only the foggiest ideas what sorts of clothing I would consider inappropriate, and even if they could assign rough probabilities ("Vampirella t-shirt? I'd say there's a 60-80% chance he'd send you home") it still would be vague.

11. *Id.* at 16.

statutes, and federal treaties the supreme law of the land. There is no mention of federal judicial opinions. Thus, originalism seems to require judges to follow the Constitution, not precedent, whenever the precedent conflicts with original meaning.[12]

McGinnis and Rappaport respond by arguing for a limited role for precedent. They claim that the Constitution incorporates a minimal notion of precedent as an aspect of the "judicial power" that is conferred on federal courts by Article III. They also argue that the principle of *stare decisis* is something judges created and is thus part of the common-law. As common-law, it is subject to regulation by Congress. This raises obvious separation-of-powers concerns, but McGinnis and Rappaport argue that there are constitutional limitations on what Congress can do to try to control court opinions.[13]

Since Congress has the power to legislate rules of precedent, McGinnis and Rappaport take a crack at formulating good rules. They argue for two rules. The first requires non-originalist precedent to be followed whenever a return to original meaning would cause "enormous costs." They cite as examples originalist court rulings striking down paper money, Social Security, or the vast regulatory structures created under expansive New Deal interpretations of the Commerce Clause. The second rule of precedent would require courts to adhere to non-originalist precedents whenever those precedents are "entrenched" in the sense that the judicial decisions enjoy such strong popular support that any court ruling overturning them would likely be quickly reversed by constitutional amendment. They argue that *Griswold v. Connecticut* (recognizing a right of married couples to use contraceptives) falls into this category, as do decisions in the 1970s recognizing that gender discrimination is prohibited by the Equal Protection Clause. Other than these two limited exceptions, however, judges must stick to original meaning come hell or high-water.[14] They call this an "intermediate position"[15] between originalists who have no truck whatever with non-originalist precedent and those who (as they see it) have thrown in the towel to the liberal take-over of constitutional doctrine and are originalists in name only.

In sum, McGinnis and Rappaport argue that courts should (with relatively rare exceptions) stick to the original meaning of the Constitution because doing so would have good consequences for the American people. They concede that originalism is not perfect; all approaches to constitutional interpretation have pros and cons. But as they see it, the downsides of

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12. *See* Gary Lawson, *Mostly Unconstitutional: The Case against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 6 (2007).

13. MCGINNIS & RAPPAPORT, *supra* note 1, at 172.

14. Oddly, they float a four-pronged third possible precedent rule, but say they are "not yet ready to endorse it fully." *Id. at* 187.

15. *Id.* at 192.

living constitutionalism are so severe that originalism comes out the clear winner.

II. WHY THE ARGUMENT FAILS

The argument McGinnis and Rappaport make is bold. They reject all current justifications for originalism and rest their entire case on a single consequentialist argument. Moreover, it is striking that they choose to fight it out with living constitutionalists on consequentialist grounds, because this is widely considered a point on which originalists are vulnerable. A standard objection to originalism is that it has bad consequences for society, because it binds current generations to the "dead hand" of the past. Many living constitutionalists have argued that originalism is too inflexible and would often compel judges to impose outdated and sometimes downright retrograde values on the American people. Living constitutionalist David Strauss offers a typical expression of this argument. He writes:

> Originalists' America—in which states can segregate schools, the federal government can discriminate against anybody, any government can discriminate against women, state legislatures can be malapportioned, states needn't comply with most of the Bill of Rights, and Social Security is unconstitutional—doesn't look much like the country we inhabit. . . . [A]n unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.[16]

McGinnis and Rappaport try to counter these sorts of "parade-of-horribles-type" arguments mostly by claiming that respect for precedent would block the most egregious of the horribles. But as we have seen, they claim that the role of *stare decisis* is quite limited in constitutional law. For the most part, they believe, judges should refrain from any judicial updating and compel the American people to drink whatever brew (however disagreeable) the long-dead enactors concocted. If the American people get fed up enough with this treatment, they can amend the Constitution, as the founders intended. Whatever one thinks of this argumentative strategy, it highlights the risks McGinnis and Rappaport take by eschewing arguments from principle and resting their case entirely on consequentialist grounds.

In thinking about the merits of McGinnis and Rappaport's consequentialist defense of originalism, we should first note the high level of generality at which they frame their argument. In essence they argue: the Constitution as a whole (construed according to its original meaning) is good, therefore each individual provision of the Constitution (construed accord-

16. David A. Strauss, *A Living Constitution*, THE RECORD ONLINE (Fall 2010), http://www.law.uchicago.edu/alumni/magazine/fall10/strauss.

ing to its original meaning) is good. On the face of it, this appears to be an obvious fallacy of division. Why do we have to treat the Constitution as an uncuttable whole tamale? Why cannot we consider it piecemeal, enforcing some provisions in their original meaning, when that appears to make good consequentialist sense, while judicially updating others, when it does not?

This is where McGinnis and Rappaport's rule-consequentialism comes in. According to rule-consequentialism it is a mistake to evaluate acts entirely on their own consequences (as act-consequentialists do). That makes ethics too atomistic and would permit obviously immoral actions (like framing an innocent man to prevent a deadly riot) whenever such acts appear to have optimific consequences. A better approach, rule-consequentialists claim, is to recognize the importance of general rules in the moral life and say that acts are morally right if they accord with a rule whose general observance would maximize good consequences. McGinnis and Rappaport appear to be operating with similar intuitions when they reject any piecemeal examination of the Constitution. It would be too risky to allow judges to decide on their own which parts of the Constitution need updating. We need a general rule, and the best rule, in consequentialist terms, is (roughly): "No judicial updating is permitted."

This is a point at which fruitful debate could be joined. Is rule-consequentialism an acceptable normative theory? More specifically, is it the right theory to apply in constitutional interpretation? If it is, is it true that a more or less rigid rule of "no judicial updating" would produce the best consequences? Might not a more nuanced rule of the form "no judicial updating except in cases X, Y, and Z" produce better consequences? What factors contribute to a "good constitution" other than passage by supermajorities, and to what extent may those factors be considered in constitutional adjudication? These are important questions that McGinnis and Rappaport leave untouched. My own sense is that very few readers will buy McGinnis and Rappaport's argument, either because they disagree with its consequentialist foundations, or because they doubt that a "no judicial updating" rule would have the best consequences, or both. I fall into the "both" camp, and have argued elsewhere at length that a restrained living constitutionalist approach makes sense and has served our nation well.[17]

Another point on which McGinnis and Rappaport might be challenged is their defense of original methods originalism. They claim that present-day judges must use the interpretive rules that were deemed applicable to the Constitution by the enactors. Doing so reduces problems of vagueness and ambiguity, cabins judicial discretion, reflects the risk-averse cautious-

17. *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 91-127 (1992).

ness of the enactors, and ensures that the benefits that flow from a super-majoritarian enactment process are passed on to the future.[18]

This argument is weak for several reasons. First, it far from clear that the enactors would have agreed on the correct way to interpret the Constitution. At the time of the founding, there appears to have been widespread confusion and debate about how legal texts should be interpreted. There were intentionalists, textualists, supporters of traditional "equitable interpretation," and some who apparently favored mix-and-match theories that included elements of various approaches.[19] It is highly unlikely that super-majorities would have agreed on a single preferred approach. Second, the enactors never voted on any proposed method of interpreting the Constitution and the Constitution is silent on the matter. It is unclear, then, why present-day interpreters are bound by the enactors' unexpressed and unratified interpretive intentions or expectations. Third, as Jack Balkin has argued, it is unlikely that the enactors were as risk-averse as McGinnis and Rappaport claim. Contrary to Justice Scalia's oft-quoted claim, it is implausible to suppose that the "whole purpose [of a constitution] is to prevent change."[20] As John Marshall famously stated, constitutions are "intended to endure for ages to come,"[21] and for this reason often include broad principles and abstract guarantees that allow for change and flexibility. Fourth, if the enactors had intended their own preferred interpretive methods to be binding on later generations it seems likely that they would have stated that clearly and provided some reliable way for subsequent generations to discover what those methods were. Finally, it is a *non sequitur* to argue that the consequentialist benefits of constitutional language can be passed on *only if that language is packaged together* with the enactors' preferred interpretive methods. Compare: Would the benefits of Jesus's Sermon on the Mount have been better, worse, or unchanged if the Sermon had been accompanied by an interpretive guide, written by Jesus himself, explaining exactly what he meant? If you think the answer is obvious, I suggest you think again. The point is that the following questions must be kept distinct:

> Q1: "What are the benefits of this enactment?"
>
> Q2: "What would the benefits of this enactment be if it were interpreted according to its original meaning?"

McGinnis and Rappaport clearly assume that the enactors were smart people (way smarter than the folks running around today), that they enacted wise constitutional provisions, and that they attached meanings to those provisions that were wise and far-seeing. We could try to attach better in-

18. MCGINNIS & RAPPAPORT, *supra* note 1, at 150.

19. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1515-22 (1998).

20. *Quoted in* BALKIN, *supra* note 5, at 28.

21. McCulloch v. Maryland, 4 Wheaton 316, 415 (1819).

terpretations to those provisions, but we, being much less sapient than them, would very likely fail. That is why we need to accept not only the majestic words the enactors handed down to us, but also the specific understandings they had of those words. Otherwise we cannot get the extraordinary benefits of their wisdom.

This is a version of what Jack Balkin labels a "narrative of decline."[22] Like all myths, it is at best a half-truth. Its illogic can be exposed by thinking about some of the standard criticisms of originalism that McGinnis and Rappaport sedulously ignore. Consider the Eighth Amendment. Most would agree that the amendment's ban on "cruel and unusual punishments" has produced good effects. Thanks largely to nonoriginalist judges, we no longer flog people, or cut off their noses or ears, or brand them, or execute horse-thieves, the mentally impaired, or children. Would the same benefits (or even greater ones) have flowed from an originalist reading of the Eighth Amendment? It seems highly unlikely. It is well-known that the founding generation saw nothing wrong with whipping criminals or cutting off their noses.[23]

My point, again, is that discussing the comparative benefits of originalist vs. non-originalist interpretive approaches is a good conversation to have. But it is vital that it not be conducted at such a high level of generality that we lose sight of important granular details.

There is one other major point on which McGinnis and Rappaport might be challenged. As Frederic Bloom and Nelson Tebbe have recently noted,[24] there is an inherent structural weakness in McGinnis and Rappaport's argument. McGinnis and Rappaport claim that the Constitution is good because it passed by supermajorities. But was it? Consider the founding. African Americans, women, and Native Americans, of course, were almost totally excluded from the ratification process. Owing to property restrictions, so too were 25-35 percent of adult white males.[25] As a result of voting qualifications and widespread public apathy, only about five percent of the population actually participated in the ratification process.[26] Of those who did participate, it is doubtful that a majority favored ratification. As Gordon Wood notes, "the Federalist victory was actually more of an Anti-federalist default."[27] For these reasons, McGinnis and Rappaport's claim that the original Constitution was approved by supermajorities seems to be

22. BALKIN, *supra* note 5, at 29.

23. *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1031 (1978).

24. Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 820 (2015).

25. Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 335 (1989).

26. ERWIN CHEMERINKSY, INTERPRETING THE CONSTITUTION 19 (1987).

27. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 486 (1969).

more form than substance. On their view, good constitutions are created when lots of people with widely divergent backgrounds and beliefs participate in an enactment process that is constrained by strict supermajoritarian rules. It seems that these conditions were not met with the original Constitution. There was no true supermajority.

As Bloom and Tebbe also note,[28] a similar problem arises with the Civil War Amendments. These were strongly opposed by a majority of Southerners. In late 1865, the Reconstruction Congress refused to seat any representatives from the defeated South. The Fourteenth Amendment would never have been passed by the necessary two-thirds votes in the House and Senate if the Southern representatives had been present. By early 1867, every Southern state that considered the proposed Amendment had rejected it by overwhelming majorities.[29] In 1867, Congress declared that no rebel state could be readmitted to the Union unless it ratified the Fourteenth Amendment. In the South, Union military commanders purged voter rolls and created a new electorate. As a result, African American voters outnumbered white voters in five Southern states.[30] Large numbers of white voters either boycotted elections or were disqualified as former rebels. Under these conditions, constitutional conventions were called in ten Southern states and new state constitutions were written. The reconstructed governments created under these new constitutions duly ratified the Fourteenth Amendment. Despite the fact that Ohio and New Jersey had rescinded their previous ratifications, Secretary of State William Seward declared on July 28, 1868 that the Amendment had been approved by the required three-fourths of the states and the Amendment became part of the supreme law of the land.

Constitutional historians debate whether the process by which the Fourteenth Amendment became part of the Constitution was constitutionally legitimate.[31] My concern is whether the process can be squared with McGinnis and Rappaport's claim that the Constitution was passed by true supermajorities. So far as the Civil War Amendments are concerned, this seems highly dubious.

McGinnis and Rappaport are correct that the Civil War Amendments did much to correct some of the worst flaws of the original Constitution. But this fact does nothing to correct the structural flaws in their defense of originalism. Their argument requires genuine supermajorities, and clearly these did not always exist.

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28. Bloom & Tebbe, *supra* note 24, at 820-21.

29. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 269 (1988).

30. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 717 (1965).

31. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 364-80 (2005) (arguing that it was).